



Judiciary Committee

Thursday, January 11, 2018

8:30 – 10:00 AM

404 HOB

Meeting Packet

Richard Corcoran
Speaker

Chris Sprowls
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Thursday, January 11, 2018 08:30 am
End Date and Time: Thursday, January 11, 2018 10:00 am
Location: Sumner Hall (404 HOB)
Duration: 1.50 hrs

Consideration of the following bill(s):

CS/HB 55 Sale of Firearms by Oversight, Transparency & Administration Subcommittee, White
HB 57 Appointment of Attorneys for Dependent Children with Special Needs by White, Williams
CS/CS/HB 165 Threats to Kill or Do Great Bodily Injury by Justice Appropriations Subcommittee, Criminal Justice Subcommittee, McClain
HB 413 Trusts by Moraitis
HB 491 Theft by Roth
HB 599 Lis Pendens by Altman
HB 623 Out-of-Country Foreign Money Judgments by Byrd
HB 6013 Return of Property by Byrd
HB 6021 Guardian Ad Litem Direct-Support Organization by Stevenson
CS/HB 6515 Relief/Cathleen Smiley/Brevard County by Civil Justice & Claims Subcommittee, Altman
CS/HB 6517 Relief/Robert Allan Smith/Orange County by Civil Justice & Claims Subcommittee, Cortes, B.

Pursuant to rule 7.11, the deadline for amendments to bills on the agenda by non-appointed members shall be 6:00 p.m., Wednesday, January 10, 2018.

By request of the Chair, all committee members are asked to have amendments to bills on the agenda submitted to staff by 6:00 p.m., Wednesday, January 10, 2018.



NOTICE FINALIZED on 01/09/2018 4:11PM by Ellerkamp.Donna

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 55 Sale of Firearms

SPONSOR(S): Oversight, Transparency & Administration Subcommittee; White and others

TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 152

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	10 Y, 0 N, As CS	Moore	Harrington
2) Judiciary Committee		Bruno 	Poche 
3) Government Accountability Committee			

SUMMARY ANALYSIS

The Department of Law Enforcement (DLE) is responsible for regulating the sale and delivery of firearms by licensed firearm dealers to persons who are not licensed. Before a licensed importer, licensed manufacturer, or licensed dealer (licensee) can sell or deliver a firearm to another person who is not a licensee, Florida law requires the licensee to conduct a criminal history check of the potential buyer and collect a \$5 fee for processing the criminal history check. Currently, DLE requires the licensee to transmit the fees using a business or personal check, a money order, or a cashier's check.

CS/HB 55 requires such procedures to allow the processing fees to be paid or transmitted by electronic means, including, but not limited to, debit cards, credit cards, or electronic funds transfers. The bill also authorizes a licensee to request DLE to conduct a criminal history check via electronic means other than a telephone call.

The bill may have an indeterminate negative fiscal impact on the state. See Fiscal Comments section.

The bill provides an effective date of October 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Department of Law Enforcement (DLE) is responsible for regulating the sale and delivery of firearms¹ by licensed firearm dealers to persons who are not licensed. Before a licensed importer, licensed manufacturer, or licensed dealer (licensee) can sell or deliver a firearm to another person who is not a licensee, Florida law requires the licensee to:

- Obtain a completed criminal history check form² from the potential buyer, which is provided by the licensee and must include the name, date of birth, gender, race, and social security number or other identification number of the potential buyer.
- Inspect proper identification that includes a photograph of the potential buyer.
- Collect a fee from the potential buyer for processing the criminal history check of the potential buyer.
- Request, via telephone call, DLE to conduct a check of the information as reported and reflected in the Florida Crime Information Center and National Crime Information Center systems.
- Receive a unique approval number for the inquiry from DLE and record such number and the date on the criminal history check form.³

The fee collected from a potential buyer for processing the criminal history check is established by DLE and may not exceed \$8 per transaction.⁴ Currently, the processing fee is \$5 per transaction.⁵ DLE is required to establish procedures for the fees to be transmitted by the licensee to DLE.⁶ Currently, the procedures established by DLE require a licensee to transmit the fees to DLE each month using a business or personal check, a money order, or a cashier's check.⁷

Effect of the Bill

CS/HB 55 requires the procedures established by DLE for transmitting the criminal history check processing fees to DLE to allow such fees to be paid or transmitted by electronic means, including, but not limited to, debit cards, credit cards, or electronic funds transfers. The bill also authorizes a licensee to request DLE to conduct a criminal history check via electronic means other than a telephone call.

B. SECTION DIRECTORY:

Section 1. Amends s. 790.065, F.S., relating to sale and delivery of firearms.

Section 2. Provides an effective date of October 1, 2018.

¹ The term "firearm" means any weapon (including a starter gun) that will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term does not include an antique firearm unless the antique firearm is used in the commission of a crime. Section 790.001(6), F.S.

² The form is created by the United States Treasury Department's Bureau of Alcohol, Tobacco, and Firearms. Rule 11C-6.009, F.A.C. A copy of the form is available online at <https://www.atf.gov/file/61446/download>.

³ Section 790.065(1)(a), F.S.

⁴ Section 790.065(1)(a)2., F.S.

⁵ Rule 11C-6.009(4), F.A.C.

⁶ Section 790.065(1)(a)2., F.S.

⁷ Rule 11C-6.009(9), F.A.C.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to impact state government revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

According to DLE, the agency will absorb the fiscal impact of the bill by diverting existing staff and resources. However, DLE stated that these existing resources will not be available until the third quarter of 2018 and recommends moving the effective date of the bill to April 1, 2019.⁸

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires DLE to establish procedures for licensees to pay criminal history check fees to the department through electronic means, including debit cards, credit cards, or electronic funds transfers. DLE has sufficient rule-making authority to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

⁸ Department of Law Enforcement, Agency Analysis of 2018 House Bill 55, p. 4 (Sept. 6, 2017) (on file with the Oversight, Transparency & Administration Subcommittee).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 6, 2017, the Oversight, Transparency & Administration Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Authorized a licensee to request DLE to conduct a criminal history check via electronic means other than a telephone call; and
- Changed the effective date of the bill from July 1, 2018, to October 1, 2018.

This analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Administration Subcommittee.

1 A bill to be entitled
 2 An act relating to the sale of firearms; amending s.
 3 790.065, F.S.; requiring Department of Law Enforcement
 4 procedures to allow the payment or transmittal of
 5 processing fees for criminal history checks of
 6 potential firearms buyers by electronic means;
 7 providing that criminal history check requests by
 8 licensed importers, manufacturers, and dealers to the
 9 department may be made by electronic means; providing
 10 an effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Paragraph (a) of subsection (1) of section
 15 790.065, Florida Statutes, is amended to read:

16 790.065 Sale and delivery of firearms.—

17 (1)(a) A licensed importer, licensed manufacturer, or
 18 licensed dealer may not sell or deliver from her or his
 19 inventory at her or his licensed premises any firearm to another
 20 person, other than a licensed importer, licensed manufacturer,
 21 licensed dealer, or licensed collector, until she or he has:

- 22 1. Obtained a completed form from the potential buyer or
 23 transferee, which form shall have been promulgated by the
 24 Department of Law Enforcement and provided by the licensed
 25 importer, licensed manufacturer, or licensed dealer, which shall

26 | include the name, date of birth, gender, race, and social
27 | security number or other identification number of such potential
28 | buyer or transferee and has inspected proper identification
29 | including an identification containing a photograph of the
30 | potential buyer or transferee.

31 | 2. Collected a fee from the potential buyer for processing
32 | the criminal history check of the potential buyer. The fee shall
33 | be established by the Department of Law Enforcement and may not
34 | exceed \$8 per transaction. The Department of Law Enforcement may
35 | reduce, or suspend collection of, the fee to reflect payment
36 | received from the Federal Government applied to the cost of
37 | maintaining the criminal history check system established by
38 | this section as a means of facilitating or supplementing the
39 | National Instant Criminal Background Check System. The
40 | Department of Law Enforcement shall, by rule, establish
41 | procedures for the fees to be transmitted by the licensee to the
42 | Department of Law Enforcement. Such procedures must provide that
43 | fees may be paid or transmitted by electronic means, including,
44 | but not limited to, debit cards, credit cards, or electronic
45 | funds transfers. All such fees shall be deposited into the
46 | Department of Law Enforcement Operating Trust Fund, but shall be
47 | segregated from all other funds deposited into such trust fund
48 | and must be accounted for separately. Such segregated funds must
49 | not be used for any purpose other than the operation of the
50 | criminal history checks required by this section. The Department

51 | of Law Enforcement, each year before ~~prior to~~ February 1, shall
52 | make a full accounting of all receipts and expenditures of such
53 | funds to the President of the Senate, the Speaker of the House
54 | of Representatives, the majority and minority leaders of each
55 | house of the Legislature, and the chairs of the appropriations
56 | committees of each house of the Legislature. In the event that
57 | the cumulative amount of funds collected exceeds the cumulative
58 | amount of expenditures by more than \$2.5 million, excess funds
59 | may be used for the purpose of purchasing soft body armor for
60 | law enforcement officers.



61 | 3. Requested, by means of a toll-free telephone call or
62 | other electronic means, the Department of Law Enforcement to
63 | conduct a check of the information as reported and reflected in
64 | the Florida Crime Information Center and National Crime
65 | Information Center systems as of the date of the request.

66 | 4. Received a unique approval number for that inquiry from
67 | the Department of Law Enforcement, and recorded the date and
68 | such number on the consent form.

69 | Section 2. This act shall take effect October 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 57 Appointment of Attorneys for Dependent Children with Special Needs
SPONSOR(S): White and Williams
TIED BILLS: None **IDEN./SIM. BILLS:** SB 146

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	14 Y, 0 N	Tuszynski	Bond
2) Justice Appropriations Subcommittee	12 Y, 0 N	Smith	Gusky
3) Judiciary Committee		Tuszynski 	Poche 

SUMMARY ANALYSIS

Dependency court is the division of circuit court concerned with the care and custody of abused, abandoned, or neglected children. Most children in dependency court are not represented directly by an attorney, as the Guardian ad Litem program represents the best interest of the child. However, in certain instances, the court is required to appoint an attorney to represent a dependent child with specific special needs. Before appointing an attorney from a registry, the court is required to ask the Guardian ad Litem Program whether a pro bono attorney is willing to be appointed for the child. Current law requires the state to compensate an appointed attorney and provide access to funding for expert witnesses, depositions, and other costs of litigation, however, a pro bono attorney is not reimbursed for costs incurred.

HB 57 requires the Justice Administrative Commission (JAC) to provide a pro bono attorney who represents a dependent child with special needs the same funding for expert witnesses, depositions, and other due process costs of litigation as a paid appointed attorney, subject to appropriations.

It is unknown how many additional attorneys may represent dependent children with special needs on a pro bono basis if reimbursed for case-related due process costs. To the extent that dependent children with special needs are represented by more pro bono attorneys, expenditures to pay contract registry attorneys will decrease and expenditures for due process costs that would have been paid to contract registry attorneys should shift to those pro bono attorneys.

The bill provides that the payment of case-related due process costs are subject to appropriations. The bill would have an indeterminate fiscal impact on the current resources of the JAC.

The effective date of the bill is upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Dependency System and the Statewide Guardian ad Litem Program

Chapter 39, F.S., outlines Florida's child welfare system, known as the dependency system. The Department of Children and Families (DCF) is required to investigate reports of abuse, abandonment, and neglect of children. DCF also provides services to families and children in the dependency system. After DCF investigates a report, if it is determined that a child cannot remain safely in home with services and is removed from his or her home, the court is required to appoint the Guardian ad Litem Program (GAL Program) to represent the best interests of the child.¹ The GAL Program employs program attorneys for this purpose. In dependency cases involving children with special needs, in addition to the GAL Program, the court must appoint an attorney ad litem to represent the child.²

Appointment of an Attorney for a Dependent Child with Certain Special Needs

Current law provides that "dependent children with certain special needs have a particular need for an attorney to represent them in proceedings so that the attorney may address the child's medical and related needs as well as the services and supports necessary for the child to live successfully in the community."³ Section 39.01305, F.S., requires the court to appoint an attorney to represent a dependent child with specific special needs. A child with special needs includes one who:

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing facility;
- Is prescribed psychotropic medication but declines assent to the medication;
- Has a diagnosis of a developmental disability;
- Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- Is a victim of human trafficking.⁴

Before a court may appoint an attorney for the child, the court must request a recommendation from the GAL Program for a volunteer attorney. If such an attorney is available within 15 days after the court's request, the court must appoint that attorney.⁵ However, the court may appoint a compensated attorney within the 15-day period if the GAL Program informs the court it will not be able to recommend a volunteer attorney within the time period.⁶ An attorney appointed to represent the child must provide the complete range of legal services, from the removal from home or from the initial appointment through all appellate proceedings.⁷

Justice Administrative Commission

In 1965, the Legislature created the Justice Administrative Commission (JAC) to provide administrative services, such as budget management, for statewide judicial and justice related offices.⁸ In 2004, the Legislature expanded the duties of the JAC to include the administrative duties related to contracting

¹ S. 39.822(1), F.S.; S. 39.820(1), F.S.

² S. 39.01305, F.S.

³ S. 39.01305(2), F.S.

⁴ S. 39.01305(3), F.S.

⁵ S. 39.01305(4)(a), F.S.

⁶ Id.

⁷ S. 39.01305(4)(b), F.S.

⁸ Ch. 65-328, L.O.F.; s. 43.16, F.S.

with court-appointed attorneys and related service providers.⁹ Court-appointed attorneys are chosen from registries maintained by each judicial circuit.¹⁰ A registry attorney executes a JAC registry contract¹¹ and his or her fees and expenses are submitted to the JAC for payment.¹²

Appointed attorneys are compensated and provided access to funding for expert witnesses, depositions, and other costs of litigation, unless the attorney has agreed to provide pro bono representation.¹³ Payment to an attorney is subject to appropriations and review by the JAC.¹⁴ The JAC must contract with attorneys appointed by the court to represent a dependent child with special needs, but fees may not exceed \$1,000 per child per year.¹⁵ In addition, a compensated attorney is reimbursed for costs.¹⁶

Currently, the JAC does not provide access to funding for expert witnesses, depositions, and other costs of litigation to attorneys who have agreed to provide pro bono representation for a dependent child with special needs.

Effect of the Proposed Language

HB 57 amends s. 39.01305, F.S., to require the JAC to provide a pro bono attorney who agrees to represent dependent children with certain special needs access to the same funding for expert witnesses, depositions, and other due process costs of litigation as an appointed registry attorney. This may increase pro bono participation in dependency cases by allowing an attorney to represent a child with special needs that otherwise may not have done so due to the expense of expert witnesses, depositions, and other due process costs.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1: Creates a short title.

Section 2: Amends s. 39.01305, F.S., relating to appointment of an attorney for a dependent child with certain special needs.

Section 3: Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

It is unknown how many additional attorneys may represent dependent children with special needs on a pro bono basis if reimbursed for case-related due process costs. To the extent that dependent children with special needs are represented by more pro bono attorneys, expenditures to pay

⁹ Ch. 2004-265, L.O.F.; contracted services include services such as investigators, court reporters, and expert witnesses.

¹⁰ Justice Administrative Commission, Court-Appointed Counsel, *Policies & Procedures for Private Court-Appointed Counsel*, available at: https://www.justiceadmin.org/court_app_counsel/P&P.pdf (last accessed January 6, 2018).

¹¹ Justice Administrative Commission, *Instructions for Registry Contract*, available at: https://www.justiceadmin.org/court_app_counsel/agreementscontracts.aspx (last accessed January 6, 2018); Example Contract available at: https://www.justiceadmin.org/court_app_counsel/contracts/2017-2018/Draft.pdf.

¹² Justice Administrative Commission, *Court-Appointed Counsel*, available at: https://www.justiceadmin.org/court_app_counsel/index.aspx (last accessed January 6, 2018).

¹³ S. 39.01305(5), F.S.

¹⁴ Id.

¹⁵ Id.

¹⁶ S. 39.01305, F.S.

contract registry attorneys will decrease and expenditures for due process costs that would have been paid to contract registry attorneys should shift to those pro bono attorneys.

The bill provides that the payment of case related due process costs are subject to appropriations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The direct impact on the private sector is unknown as the number of attorneys who may choose to take a case representing a dependent child with special needs on a pro bono basis is unknown. However, those attorneys will no longer need to spend personal or firm funds for expert witnesses, depositions, or other due process costs associated with litigation.

D. FISCAL COMMENTS:

The JAC reports that from July 1, 2014 through September 8, 2017, it has paid a total of \$3,537,217.52 in attorney fees for registry attorneys representing dependent children with special needs and \$27,007.16 in due process costs.¹⁷

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

¹⁷ Email from Veronica Vasquez, Public Records Coordinator, Justice Administrative Commission, Public Records Request, (Sept. 14, 2017) (On file with Judicial Committee Staff).

1 A bill to be entitled
 2 An act relating to appointment of attorneys for
 3 dependent children with special needs; providing a
 4 short title; amending s. 39.01305, F.S.; requiring the
 5 payment of due process costs of litigation of all pro
 6 bono attorneys appointed to represent dependent
 7 children with certain special needs, subject to
 8 appropriations and review for reasonableness;
 9 providing an effective date.

10
 11 Be It Enacted by the Legislature of the State of Florida:

12
 13 Section 1. This act shall be called the "Pro Bono Matters
 14 Act of 2018."

15 Section 2. Subsection (5) of section 39.01305, Florida
 16 Statutes, is amended to read:

17 39.01305 Appointment of an attorney for a dependent child
 18 with certain special needs.-

19 (5) Unless ~~Except if~~ the attorney has agreed to provide
 20 pro bono services, an appointed attorney or organization must be
 21 adequately compensated. All appointed attorneys and
 22 organizations, including pro bono attorneys, must be provided
 23 with access to funding for expert witnesses, depositions, and
 24 other due process costs of litigation. Payment of attorney fees
 25 and case-related due process costs are ~~to an attorney is~~ subject

26 | to appropriations and ~~subject to~~ review by the Justice
27 | Administrative Commission for reasonableness. The Justice
28 | Administrative Commission shall contract with attorneys
29 | appointed by the court. Attorney fees may not exceed \$1,000 per
30 | child per year.

31 | Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 165 Threats to Kill or Do Great Bodily Injury
SPONSOR(S): Justice Appropriations Subcommittee, Criminal Justice Subcommittee and McClain
TIED BILLS: IDEN./SIM. BILLS: SB 310

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Hall	Sumner
2) Justice Appropriations Subcommittee	12 Y, 0 N, As CS	Smith	Gusky
3) Judiciary Committee		Painter <i>JWP</i>	Poche <i>(M)</i>

SUMMARY ANALYSIS

As the use of social media grows, the potential to use such forms of communication to make threats of violence also increases. In a recent study of online harassment, 10 percent of adult Internet users surveyed reported having been physically threatened online. A separate study found that over one-third of threats made to schools were delivered electronically, with 28 percent of those threats delivered through social media.

Currently, s. 836.10, F.S., makes it a second-degree felony to compose and send certain written threats, including electronic communications, to kill or do bodily injury. To violate this section, a person must:

- Write or compose a threat to kill or do bodily injury; and
- Send, or procure the sending of, the communication to the person threatened or family member of the person threatened.

Recently, the Second District Court of Appeals issued an opinion highlighting the difficulty of applying s. 836.10, F.S., to threats issued and shared publicly on social media, as such threats may not be communicated directly to any specific person. In this case, a juvenile's conviction for violating s. 836.10, F.S., was overturned, although the juvenile had posted multiple threats of school violence on Twitter, because the threats were not directly sent to or received by any of the threatened students or school officials.

CS/CS/HB 165 amends s. 836.10, F.S., to prohibit a person from:

- Making a threat in a writing or other record, including an electronic record, to kill or do great bodily injury to another person; and
- Posting or transmitting the threat in any manner that would allow another person to view the threat.

The bill removes the requirement that the written threat be sent to the person threatened or a member of his or her family. The bill reclassifies the offense as a third degree felony.

The Criminal Justice Impact Conference (CJIC) considered this bill on January 8, 2018, and determined that it has a positive or negative unquantifiable impact on the prison population.

The bill provides an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

According to a recent study, 62 percent of adult Internet users view online harassment as a major problem.¹ The study found that 18 percent of adults surveyed had experienced some form of severe harassment online, such as physical threats, harassment over a sustained period of time, sexual harassment or stalking. Ten percent of those adults had experienced physical threats directed at them online.² In a separate study regarding violent threats to schools,³ researchers found 37 percent of threats made to schools were sent electronically, using social media, text messaging, and other online resources. Of those electronic threats, 28 percent were made through social media.⁴

In 2010, the Legislature amended s. 836.10, F.S., to add "electronic communication" to the types of written threats that are prohibited, but left intact the requirement that the written threat be sent to the person who is the subject of the threat or to a person whose family member is the subject of the threat. The statute currently makes it a second-degree felony⁵ for a person to write or compose and send or procure the sending of any letter, inscribed communication, or electronic communication that contains a threat to kill or do bodily injury to the person threatened or family member of the person threatened.

Criminal defendants have challenged the statute as vague and overbroad, arguing that the statute could criminalize innocent written speech because it does not require proof that the defendant had the specific intent to cause the threatened harm.⁶ Florida courts have held that s. 836.10, F.S., does not require the actual intent to do harm or the apparent ability to carry out the threat.⁷ Additionally, the courts have upheld the statute finding it is definitive enough to give notice of the behavior it proscribes and, thus, not vague. Further, it is limited enough in its objective to target threats to injure persons⁸ and, thus, not overbroad.⁹

In a 2016 decision, a juvenile's disposition under s. 836.10, F.S., for posting written threats to kill or do bodily injury on Twitter¹⁰ was reversed.¹¹ The juvenile made a series of public posts on Twitter over the span of several days threatening to "shoot up" his school.¹² The tweets were discovered by an out-of-

¹ Pew Research Center, *Online Harassment 2017*, (July 11, 2017), available at http://assets.pewresearch.org/wp-content/uploads/sites/14/2017/07/10151519/PI_2017.07.11_Online-Harassment_FINAL.pdf (last visited January 6, 2018).

² *Id.* at 13.

³ The study was conducted by National School Safety and Security Services. It reviewed 812 school threats across the country from August 1 to December 31, 2014. Ken Trump, *Study finds rapid escalation of violent school threats*, <http://www.schoolsecurity.org/2015/02/study-finds-rapid-escalation-violent-school-threats/> (last visited January 6, 2018).

⁴ *Id.*

⁵ A second-degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. SS. 775.082(3)(d) and 775.083(1)(b), F.S.

⁶ *Saidi v. State*, 845 So. 2d 1022, 1026 (Fla. 5th DCA 2003).

⁷ *Id.* at 1027.

⁸ The First Amendment permits a state to ban a "true threat." "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

⁹ *Reilly v. Department of Corrections*, 847 F. Supp. 951, 958 (M.D. Fla. 1994); See also *Smith v. State*, 532 So. 2d 50, 52 (Fla. 2d DCA 1988).

¹⁰ "Twitter allows users to send 'updates' (or 'tweets': text based posts, up to 140 characters long) to [the] Twitter website via short message service (e.g. on a cell phone), instant messaging, from their computer at home or work, or through a third-party application." Gnoted, *What Is Twitter and How Does It Work- Beginner's Guide*, <http://gnoted.com/what-is-twitter-and-how-does-it-work-beginners-guide/> (last visited January 6, 2018).

¹¹ *J.A.W. v. State*, 210 So. 3d 142 (Fla. 2d DCA 2016).

¹² The following tweets were posted: "can't wait to shoot up my school"; "it's time"; "My mom and dad think I'm serious about shooting up my school I'm dying"; "school getting shot up on a Tuesday"; "night f[***]king sucked can't wait to shoot up my school soon"; and "I sincerely apologize to anyone who took me seriously. I love my high school and honestly own no weapons to want to harm anyone in any way." *Id.*

state watchdog group who reported the threats to local police. Local police later contacted school officials informing them of the threats.

On appeal, the Second District Court of Appeals found that because the juvenile publicly posted the tweets, rather than directly sending them to any student or school official, the receipt of the threats by school officials through local police was too far removed to support a conviction under s. 836.10, F.S. The court specifically highlighted the difficulty of applying the current statute to modern forms of social media communication, recognizing that many threats made on social media fall outside the narrow scope of the law, which requires the communication to be sent directly to a specific person.¹³

Effect of the Bill

CS/CS/HB 165 amends s. 836.10, F.S., to prohibit a person from:

- Making a threat in a writing or other record, including an electronic record, to kill or do great bodily injury to another person; and
- Posting or transmitting the threat in any manner that would allow another person to view the threat.

The bill removes the requirement that the written threat be sent to the person threatened or a member of his or her family. Written threats to kill or do great bodily injury to another person that are publicly posted online, even if not specifically sent to or received by the person who is the subject of the threat, are prohibited.

The term "bodily injury", in reference to written threats, is changed to "great bodily injury". The phrase "great bodily injury" is not currently found in statute, however the term was used by the Florida Supreme Court when interpreting s. 784.045, F.S. related to aggravated battery.¹⁴ "Consistent with the language and structure the Legislature used in drafting section 784.045(1)(a) 1, the Supreme Court condensed the terms great bodily harm, permanent disfigurement and permanent disability into the single, logical phrase "great bodily injury" to describe the first crime."¹⁵ As a result, the bill requires threats to include claims to cause great bodily harm, permanent disfigurement, or permanent disability to fall under the prohibitions of s. 836.10, F.S.

The bill reclassifies the offense from a felony of the second-degree to a felony of the third-degree.¹⁶ Additionally, the bill amends s. 921.002(3)(f), F.S., making conforming changes in the Criminal Punishment Code to reflect the amendments made to s. 836.10, F.S.

The bill reenacts ss. 794.056(1), and 938.085, relating to the Rape Crisis Program Trust Fund and the additional cost to fund rape crisis centers, respectively, to incorporate amendments made to s. 836.10, F.S.

The bill provides an effective date of July 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends s. 836.10, F.S., relating to written threats to kill or do bodily injury; punishment.

Section 2: Reenacts s. 794.056(1), F.S. relating to Rape Crisis Program Trust Fund.

Section 3: Amends s. 921.0022(3)(f), F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 4: Reenacts s. 938.085, F.S., relating to additional cost to fund rape crisis centers.

Section 5: Provides an effective date of July 1, 2018.

¹³ Id.

¹⁴ *State v. Warren*, 796 So. 2d 489 (Fla. 2001)

¹⁵ *Calloway v State*, 37 So. 3d 891 (Fla. 1st DCA 2010).

¹⁶ A third-degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. SS. 775.082(3)(e) and 775.083(1)(c), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) considered this bill on January 8, 2018, and determined that it has a positive or negative unquantifiable impact on the prison population.

In FY 16-17, there were 112 offenders sentenced for written threats to kill or do bodily injury, and 43 of these offenders were sentenced to prison. It is not known how many additional offenders would fall under the more expanded definition."¹⁷

Reducing the offense from a second-degree felony to a third-degree felony would likely reduce the number of offenders who would receive a prison sentence.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill appears to be exempt from the requirements of article VII, section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

¹⁷ Criminal Justice Impact Conference, January 8, 2018, available at: <https://thefloridachannel.org/videos/1-8-18-criminal-justice-impact-conference/> (last visited January 8, 2018).

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 25, 2017, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment narrowed the prohibited conduct that qualifies as a second-degree felony to posting or transmitting a written threat to kill or do bodily injury in a manner that would allow another person to view the threat.

On December 6, 2017, the Justice Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment narrowed the scope of the bill and reclassifies the offense from a second-degree felony to a third-degree felony.

The analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.

1 A bill to be entitled
 2 An act relating to threats to kill or do great bodily
 3 injury; amending s. 836.10, F.S.; prohibiting a person
 4 from making a threat to kill or do great bodily injury
 5 in a writing or other record and transmitting that
 6 threat in any manner that would allow another person
 7 to view the threat; deleting requirements that a
 8 threat be sent to a specific recipient to be
 9 prohibited; revising a penalty; amending s. 921.0022,
 10 F.S.; conforming provisions to changes made by the
 11 act; reenacting ss. 794.056(1) and 938.085, F.S.,
 12 relating to the Rape Crisis Program Trust Fund and
 13 additional cost to fund rape crisis centers,
 14 respectively, to incorporate the amendments made by
 15 the act; providing an effective date.

16
 17 Be It Enacted by the Legislature of the State of Florida:
 18

19 Section 1. Section 836.10, Florida Statutes, is amended to
 20 read:

21 836.10 Written threats to kill or do great bodily injury;
 22 punishment.—A ~~Any~~ person who makes a threat in a writing or
 23 other record, including an electronic record, writes or composes
 24 ~~and also sends or procures the sending of any letter, inscribed~~
 25 ~~communication, or electronic communication, whether such letter~~

26 ~~or communication be signed or anonymous, to any person,~~
 27 ~~containing a threat to kill or to do great bodily injury to~~
 28 ~~another the person and posts or transmits the threat in any~~
 29 ~~manner that would allow another person to view the threat ~~to~~~~
 30 ~~whom such letter or communication is sent, or a threat to kill~~
 31 ~~or do bodily injury to any member of the family of the person to~~
 32 ~~whom such letter or communication is sent~~ commits a felony of
 33 the third ~~second~~ degree, punishable as provided in s. 775.082,
 34 s. 775.083, or s. 775.084.

35 Section 2. Paragraph (f) of subsection (3) of section
 36 921.0022, Florida Statutes, is amended to read:

37 921.0022 Criminal Punishment Code; offense severity
 38 ranking chart.—

39 (3) OFFENSE SEVERITY RANKING CHART

40 (f) LEVEL 6

41

Florida Statute	Felony Degree	Description
316.027(2)(b)	2nd	Leaving the scene of a crash involving serious bodily injury.
316.193(2)(b)	3rd	Felony DUI, 4th or subsequent conviction.

43

44	400.9935(4)(c)	2nd	Operating a clinic, or offering services requiring licensure, without a license.
45	499.0051(2)	2nd	Knowing forgery of transaction history, transaction information, or transaction statement.
46	499.0051(3)	2nd	Knowing purchase or receipt of prescription drug from unauthorized person.
47	499.0051(4)	2nd	Knowing sale or transfer of prescription drug to unauthorized person.
48	775.0875(1)	3rd	Taking firearm from law enforcement officer.
49	784.021(1)(a)	3rd	Aggravated assault; deadly weapon without intent to kill.
50	784.021(1)(b)	3rd	Aggravated assault; intent to

			commit felony.
51	784.041	3rd	Felony battery; domestic battery by strangulation.
52	784.048 (3)	3rd	Aggravated stalking; credible threat.
53	784.048 (5)	3rd	Aggravated stalking of person under 16.
54	784.07 (2) (c)	2nd	Aggravated assault on law enforcement officer.
55	784.074 (1) (b)	2nd	Aggravated assault on sexually violent predators facility staff.
56	784.08 (2) (b)	2nd	Aggravated assault on a person 65 years of age or older.
57	784.081 (2)	2nd	Aggravated assault on specified official or employee.
58	784.082 (2)	2nd	Aggravated assault by detained

			person on visitor or other detainee.
59	784.083(2)	2nd	Aggravated assault on code inspector.
60	787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
61	790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
62	790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
63	790.164(1)	2nd	False report concerning bomb, explosive, weapon of mass destruction, act of arson or violence to state property, or use of firearms in violent manner.
64			

65	790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.
66	794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
67	794.05(1)	2nd	Unlawful sexual activity with specified minor.
68	800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years of age; offender less than 18 years.
69	800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.
70	806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
	810.02(3)(c)	2nd	Burglary of occupied structure;

71			unarmed; no assault or battery.
	810.145(8)(b)	2nd	Video voyeurism; certain minor victims; 2nd or subsequent offense.
72			
	812.014(2)(b)1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
73			
	812.014(6)	2nd	Theft; property stolen \$3,000 or more; coordination of others.
74			
	812.015(9)(a)	2nd	Retail theft; property stolen \$300 or more; second or subsequent conviction.
75			
	812.015(9)(b)	2nd	Retail theft; property stolen \$3,000 or more; coordination of others.
76			
	812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
77			

78	817.4821 (5)	2nd	Possess cloning paraphernalia with intent to create cloned cellular telephones.
79	817.505 (4) (b)	2nd	Patient brokering; 10 or more patients.
80	825.102 (1)	3rd	Abuse of an elderly person or disabled adult.
81	825.102 (3) (c)	3rd	Neglect of an elderly person or disabled adult.
82	825.1025 (3)	3rd	Lewd or lascivious molestation of an elderly person or disabled adult.
83	825.103 (3) (c)	3rd	Exploiting an elderly person or disabled adult and property is valued at less than \$10,000.
84	827.03 (2) (c)	3rd	Abuse of a child.
85	827.03 (2) (d)	3rd	Neglect of a child.

86	827.071(2) & (3)	2nd	Use or induce a child in a sexual performance, or promote or direct such performance.
87	836.05	2nd	Threats; extortion.
88	836.10	<u>3rd</u> 2nd	Written threats to kill or do <u>great</u> bodily injury.
89	843.12	3rd	Aids or assists person to escape.
90	847.011	3rd	Distributing, offering to distribute, or possessing with intent to distribute obscene materials depicting minors.
91	847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.
92	847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.

93	914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
94	944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
95	944.40	2nd	Escapes.
96	944.46	3rd	Harboring, concealing, aiding escaped prisoners.
97	944.47(1)(a)5.	2nd	Introduction of contraband (firearm, weapon, or explosive) into correctional facility.
98	951.22(1)	3rd	Intoxicating drug, firearm, or weapon introduced into county facility.
99	Section 3. For the purpose of incorporating the amendment		

100 made by this act to section 836.10, Florida Statutes, in a
 101 reference thereto, subsection (1) of section 794.056, Florida
 102 Statutes, is reenacted to read:

103 794.056 Rape Crisis Program Trust Fund.—

104 (1) The Rape Crisis Program Trust Fund is created within
 105 the Department of Health for the purpose of providing funds for
 106 rape crisis centers in this state. Trust fund moneys shall be
 107 used exclusively for the purpose of providing services for
 108 victims of sexual assault. Funds credited to the trust fund
 109 consist of those funds collected as an additional court
 110 assessment in each case in which a defendant pleads guilty or
 111 nolo contendere to, or is found guilty of, regardless of
 112 adjudication, an offense provided in s. 775.21(6) and (10)(a),
 113 (b), and (g); s. 784.011; s. 784.021; s. 784.03; s. 784.041; s.
 114 784.045; s. 784.048; s. 784.07; s. 784.08; s. 784.081; s.
 115 784.082; s. 784.083; s. 784.085; s. 787.01(3); s. 787.02(3); s.
 116 787.025; s. 787.06; s. 787.07; s. 794.011; s. 794.05; s. 794.08;
 117 former s. 796.03; former s. 796.035; s. 796.04; s. 796.05; s.
 118 796.06; s. 796.07(2)(a)-(d) and (i); s. 800.03; s. 800.04; s.
 119 810.14; s. 810.145; s. 812.135; s. 817.025; s. 825.102; s.
 120 825.1025; s. 827.071; s. 836.10; s. 847.0133; s. 847.0135(2); s.
 121 847.0137; s. 847.0145; s. 943.0435(4)(c), (7), (8), (9)(a),
 122 (13), and (14)(c); or s. 985.701(1). Funds credited to the trust
 123 fund also shall include revenues provided by law, moneys
 124 appropriated by the Legislature, and grants from public or

125 private entities.

126 Section 4. For the purpose of incorporating the amendment
 127 made by this act to section 836.10, Florida Statutes, in a
 128 reference thereto, section 938.085, Florida Statutes, is
 129 reenacted to read:

130 938.085 Additional cost to fund rape crisis centers.—In
 131 addition to any sanction imposed when a person pleads guilty or
 132 nolo contendere to, or is found guilty of, regardless of
 133 adjudication, a violation of s. 775.21(6) and (10)(a), (b), and
 134 (g); s. 784.011; s. 784.021; s. 784.03; s. 784.041; s. 784.045;
 135 s. 784.048; s. 784.07; s. 784.08; s. 784.081; s. 784.082; s.
 136 784.083; s. 784.085; s. 787.01(3); s. 787.02(3); 787.025; s.
 137 787.06; s. 787.07; s. 794.011; s. 794.05; s. 794.08; former s.
 138 796.03; former s. 796.035; s. 796.04; s. 796.05; s. 796.06; s.
 139 796.07(2)(a)–(d) and (i); s. 800.03; s. 800.04; s. 810.14; s.
 140 810.145; s. 812.135; s. 817.025; s. 825.102; s. 825.1025; s.
 141 827.071; s. 836.10; s. 847.0133; s. 847.0135(2); s. 847.0137; s.
 142 847.0145; s. 943.0435(4)(c), (7), (8), (9)(a), (13), and
 143 (14)(c); or s. 985.701(1), the court shall impose a surcharge of
 144 \$151. Payment of the surcharge shall be a condition of
 145 probation, community control, or any other court-ordered
 146 supervision. The sum of \$150 of the surcharge shall be deposited
 147 into the Rape Crisis Program Trust Fund established within the
 148 Department of Health by chapter 2003-140, Laws of Florida. The
 149 clerk of the court shall retain \$1 of each surcharge that the

150 | clerk of the court collects as a service charge of the clerk's
151 | office.

152 | Section 5. This act shall take effect July 1, 2018.



Amendment No.

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Committee/Subcommittee hearing bill: Judiciary Committee
2 Representative McClain offered the following:

Amendment

Remove lines 35-98 and insert:

6 Section 2. Paragraphs (d) and (f) of subsection (3) of section
7 921.0022, Florida Statutes, are amended to read:

8 921.0022 Criminal Punishment Code; offense severity
9 ranking chart.-

- 10 (3) OFFENSE SEVERITY RANKING CHART
- 11 (d) LEVEL 4

12	Florida	Felony	
13	Statute	Degree	Description



Amendment No.

14	316.1935(3)(a)	2nd	Driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights activated.
15	499.0051(1)	3rd	Failure to maintain or deliver transaction history, transaction information, or transaction statements.
16	499.0051(5)	2nd	Knowing sale or delivery, or possession with intent to sell, contraband prescription drugs.
17	517.07(1)	3rd	Failure to register securities.
18	517.12(1)	3rd	Failure of dealer, associated person, or issuer of securities to register.
19	784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, etc.



Amendment No.

20	784.074 (1) (c)	3rd	Battery of sexually violent predators facility staff.
21	784.075	3rd	Battery on detention or commitment facility staff.
22	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
23	784.08 (2) (c)	3rd	Battery on a person 65 years of age or older.
24	784.081 (3)	3rd	Battery on specified official or employee.
25	784.082 (3)	3rd	Battery by detained person on visitor or other detainee.
26	784.083 (3)	3rd	Battery on code inspector.
	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.



Amendment No.

27	787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
28	787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
29	787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
30	787.07	3rd	Human smuggling.
31	790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
32	790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.



Amendment No.

33	790.115(2)(c)	3rd	Possessing firearm on school property.
34	800.04(7)(c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
35	810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
36	810.02(4)(b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
37	810.06	3rd	Burglary; possession of tools.
38	810.08(2)(c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
39	812.014(2)(c)3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/CS/HB 165 (2018)

Amendment No.

40	812.014 (2)(c)4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
41	812.0195(2)	3rd	Dealing in stolen property by use of the Internet; property stolen \$300 or more.
42	817.505(4)(a)	3rd	Patient brokering.
43	817.563(1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
44	817.568(2)(a)	3rd	Fraudulent use of personal identification information.
45	817.625(2)(a)	3rd	Fraudulent use of scanning device, skimming device, or reencoder.
46	817.625(2)(c)	3rd	Possess, sell, or deliver skimming device.

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Amendment No.

47	828.125(1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
48	<u>836.10</u>	<u>3rd</u>	<u>Written threats to kill or do great</u>
49			<u>bodily injury.</u>
50			
	837.02(1)	3rd	Perjury in official proceedings.
51			
	837.021(1)	3rd	Make contradictory statements in official proceedings.
52			
	838.022	3rd	Official misconduct.
53			
	839.13(2)(a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
54			
	839.13(2)(c)	3rd	Falsifying records of the Department of Children and Families.
55			



Amendment No.

56	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
57	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
58	843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).
59	847.0135(5)(c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
60	874.05(1)(a)	3rd	Encouraging or recruiting another to join a criminal gang.
	893.13(2)(a)1.	2nd	Purchase of cocaine (or other s. 893.03(1)(a), (b), or (d), (2)(a), (2)(b), or (2)(c)4. drugs).



Amendment No.

61	914.14(2)	3rd	Witnesses accepting bribes.
62	914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.
63	914.23(2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
64	918.12	3rd	Tampering with jurors.
65	934.215	3rd	Use of two-way communications device to facilitate commission of a crime.
66			
67	(f) LEVEL 6		
68			
	Florida	Felony	
	Statute	Degree	Description
69	316.027(2)(b)	2nd	Leaving the scene of a crash involving serious bodily injury.
70			



Amendment No.

71	316.193(2)(b)	3rd	Felony DUI, 4th or subsequent conviction.
72	400.9935(4)(c)	2nd	Operating a clinic, or offering services requiring licensure, without a license.
73	499.0051(2)	2nd	Knowing forgery of transaction history, transaction information, or transaction statement.
74	499.0051(3)	2nd	Knowing purchase or receipt of prescription drug from unauthorized person.
75	499.0051(4)	2nd	Knowing sale or transfer of prescription drug to unauthorized person.
76	775.0875(1)	3rd	Taking firearm from law enforcement officer.
	784.021(1)(a)	3rd	Aggravated assault; deadly weapon without intent to kill.



Amendment No.

77	784.021(1)(b)	3rd	Aggravated assault; intent to commit felony.
78	784.041	3rd	Felony battery; domestic battery by strangulation.
79	784.048(3)	3rd	Aggravated stalking; credible threat.
80	784.048(5)	3rd	Aggravated stalking of person under 16.
81	784.07(2)(c)	2nd	Aggravated assault on law enforcement officer.
82	784.074(1)(b)	2nd	Aggravated assault on sexually violent predators facility staff.
83	784.08(2)(b)	2nd	Aggravated assault on a person 65 years of age or older.
84	784.081(2)	2nd	Aggravated assault on specified official or employee.



Amendment No.

85	784.082(2)	2nd	Aggravated assault by detained person on visitor or other detainee.
86	784.083(2)	2nd	Aggravated assault on code inspector.
87	787.02(2)	3rd	False imprisonment; restraining with purpose other than those in s. 787.01.
88	790.115(2)(d)	2nd	Discharging firearm or weapon on school property.
89	790.161(2)	2nd	Make, possess, or throw destructive device with intent to do bodily harm or damage property.
90	790.164(1)	2nd	False report concerning bomb, explosive, weapon of mass destruction, act of arson or violence to state property, or



Amendment No.

91			use of firearms in violent manner.
92	790.19	2nd	Shooting or throwing deadly missiles into dwellings, vessels, or vehicles.
93	794.011(8)(a)	3rd	Solicitation of minor to participate in sexual activity by custodial adult.
94	794.05(1)	2nd	Unlawful sexual activity with specified minor.
95	800.04(5)(d)	3rd	Lewd or lascivious molestation; victim 12 years of age or older but less than 16 years of age; offender less than 18 years.
96	800.04(6)(b)	2nd	Lewd or lascivious conduct; offender 18 years of age or older.



Amendment No.

97	806.031(2)	2nd	Arson resulting in great bodily harm to firefighter or any other person.
98	810.02(3)(c)	2nd	Burglary of occupied structure; unarmed; no assault or battery.
99	810.145(8)(b)	2nd	Video voyeurism; certain minor victims; 2nd or subsequent offense.
100	812.014(2)(b)1.	2nd	Property stolen \$20,000 or more, but less than \$100,000, grand theft in 2nd degree.
101	812.014(6)	2nd	Theft; property stolen \$3,000 or more; coordination of others.
102	812.015(9)(a)	2nd	Retail theft; property stolen \$300 or more; second or subsequent conviction.



Amendment No.

103	812.015(9)(b)	2nd	Retail theft; property stolen \$3,000 or more; coordination of others.
104	812.13(2)(c)	2nd	Robbery, no firearm or other weapon (strong-arm robbery).
105	817.4821(5)	2nd	Possess cloning paraphernalia with intent to create cloned cellular telephones.
106	817.505(4)(b)	2nd	Patient brokering; 10 or more patients.
107	825.102(1)	3rd	Abuse of an elderly person or disabled adult.
108	825.102(3)(c)	3rd	Neglect of an elderly person or disabled adult.
109	825.1025(3)	3rd	Lewd or lascivious molestation of an elderly person or disabled adult.



Amendment No.

110	825.103 (3) (c)	3rd	Exploiting an elderly person or disabled adult and property is valued at less than \$10,000.
111	827.03 (2) (c)	3rd	Abuse of a child.
112	827.03 (2) (d)	3rd	Neglect of a child.
113	827.071 (2) & (3)	2nd	Use or induce a child in a sexual performance, or promote or direct such performance.
114	836.05	2nd	Threats; extortion.
115	836.10	2nd	Written threats to kill or do bodily injury.
116	843.12	3rd	Aids or assists person to escape.
117	847.011	3rd	Distributing, offering to distribute, or possessing with intent to distribute obscene materials depicting minors.



Amendment No.

118	847.012	3rd	Knowingly using a minor in the production of materials harmful to minors.
119	847.0135(2)	3rd	Facilitates sexual conduct of or with a minor or the visual depiction of such conduct.
120	914.23	2nd	Retaliation against a witness, victim, or informant, with bodily injury.
121	944.35(3)(a)2.	3rd	Committing malicious battery upon or inflicting cruel or inhuman treatment on an inmate or offender on community supervision, resulting in great bodily harm.
122	944.40	2nd	Escapes.
123	944.46	3rd	Harboring, concealing, aiding escaped prisoners.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/CS/HB 165 (2018)

Amendment No.

124

944.47(1)(a)5. 2nd Introduction of contraband
(firearm, weapon, or explosive)
into correctional facility.

125

951.22(1) 3rd Intoxicating drug, firearm, or
weapon introduced into county
facility.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 413 Trusts
SPONSOR(S): Moraitis, Jr.
TIED BILLS: None **IDEN./SIM. BILLS:** SB 478

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	9 Y, 0 N	MacNamara	Bond
2) Judiciary Committee		MM MacNamara	Poche (M)

SUMMARY ANALYSIS

The Florida Trust Code (Code) governs express trusts and trusts that are required to be administered in the manner of an express trust. An express trust is created by the intent of a settlor (the individual creating the trust), and is generally evidenced by a written instrument that details the terms of the trust. A trust is administered by a trustee, with the terms of a trust providing benefits for individuals known as beneficiaries. Except as otherwise provided, the terms of a trust prevail over any provision of the Code; the Code is used to fill in gaps and provides for the operation of the trust for issues not addressed in the terms of a trust.

Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. HB 413 deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration.

The bill changes portions of the Code related to the trustee and their duties, liabilities, and powers to address which provisions of the Code govern a trustee's duty to provide an accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust. Additionally, the bill limits the application of the portion of the Code relating to posting documents electronically, revises procedural requirements for such postings, and provides consequences for failing to maintain receipts of electronic postings.

The bill also expands the state's decanting statute. Decanting is a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a different trust. The bill expands a trustee's ability to decant trust principal under the terms of the trust, provides support for disabled beneficiaries, and imposes greater notice requirements when a trustee exercises the ability to decant trust principal.

The bill does not appear to have a fiscal impact on state or local governments.

The effective date for the bill is July 1, 2018. The sections related to the period for which beneficiaries may compel trust accounting apply retroactively to all cases pending or commenced on or after July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Overview of the Florida Trust Code

Chapter 736, F.S., contains the Florida Trust Code (Code). The Code applies to express trusts, charitable or noncharitable, and to trusts created pursuant to law, judgment, or decree that requires the trust to be administered in the manner of an express trust. An express trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property.

The "terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.¹ Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.² A "beneficiary" of a trust is a person who has a present or future beneficial interest in the trust.³ A trustee is the person who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee.

The trustee is granted certain powers and is subject to certain duties imposed by the terms of the trust, equity jurisprudence, or by statute. A trustee may have the power or duty to perform various acts of management. To be able to enforce the trustee's duties, the beneficiary must know of the existence of the trust and be informed about its' administration. Accordingly, s. 736.0813, F.S., imposes a duty on a Florida trustee to keep qualified beneficiaries of an irrevocable trust reasonably informed. The duty includes, but is not limited to:

- Notice of the existence of the irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings, and applicability of the fiduciary lawyer-client privilege.
- Notice of the acceptance of the trust, the full name and address of the trustee, and the applicability of the fiduciary lawyer-client privilege.
- Disclosure of a copy of the trust instrument upon reasonable request.
- An annual accounting of the trust to each beneficiary and an accounting on termination of the trust or on change of the trustee. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.
- Disclosure of relevant information about the assets and liabilities of the trust and the particulars relating to administration upon reasonable request.
- Such additional notices and disclosure requirements related to the trust administration as required by the Code.⁴

¹ S. 736.0103(21), F.S.

² S. 736.0103(18), F.S.

³ S. 736.0103(4), F.S.

⁴ See, e.g., S. 736.0108(6), F.S. (notice of a proposed transfer of a trust's principal place of administration); S. 736.04117(4), F.S. (notice of the trustee's exercise of the power to invade the principal of the trust); S. 736.0414(1), F.S. (notice of terminating certain minimally funded trusts); S. 736.0417(1), F.S. (notice prior to combining or dividing trusts); S. 736.0705 (notice of resignation of trustee); S. 736.0802, F.S. (disclose and provide notice of investments in funds owned or controlled by trustee; the identity of the investment instruments, and the identity and relationship to the trustee to any affiliate that owns or controls the investment instruments; and notice to beneficiaries whose share of the trust may be affected by certain legal claims); and S. 736.0902(5), F.S. (notice of the non- application of the prudent investor rule to certain transactions).

A trustee derives his or her rules of conduct, extent and limit of authority, and measure of obligation from the trust instrument. Thus, the extent of a trustee's duties and powers is determined by the trust instrument and by the applicable rules of law, and not by the trustee's own interpretation of the trust instrument or by his or her own belief as to rules of law. Under the Code, a violation by a trustee of a duty owed to a beneficiary is a breach of trust. A breach of trust makes the trustee liable for any loss of the trust estate.

A beneficiary must bring an action for breach of trust as to any matter adequately disclosed within an accounting or any other written report of the trustee, also known as trust disclosure documents, within 6 months of *receiving* the trust disclosure document or a limitation *notice* from the trustee that applies to that trust disclosure document, whichever occurs later.⁵ A limitation notice informs the beneficiary that an action against the trustee for breach of trust based on any matter adequately disclosed in the trust disclosure document may be barred unless the action is commenced within 6 months.

A trustee is required to provide notice to qualified beneficiaries and other individuals when performing various duties while administering a trust.⁶ The Code provides that the only permissible methods of sending notice or a document to such persons are by first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, a properly directed facsimile or other electronic message, or by posting a document to a secure electronic account or website.⁷

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S, which provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.⁸

Effect of Proposed Changes

HB 413 amends portions of the Code related to settlor intent and interest of the beneficiaries, trustee duties and powers, and the method of electronic notice.

Settlor Intent and Interest of the Beneficiaries

To create an express trust, the settlor must intend to create it. This requirement distinguishes an express trust from an implied trust, such as a constructive or resulting trust. In the case of an express trust, the settlor's intent usually is evidenced by a written trust document, such as a will or a trust agreement, that designates a trustee, indicates that the trustee is to hold the trust property in trust, and designates the beneficial interests of the trust.⁹ A written instrument, however, is not required to create a trust; rather, the terms of the trust may be established by clear and convincing evidence.¹⁰ Under current law, however, the settlor's intent may be restricted in the interest of protecting the beneficiaries when interpreting and applying the Code.

Under s. 736.0105(2)(c), F.S., the trust is required to be administered for the benefit of the trust's beneficiaries. The Code also includes limitations on the purpose for which a trust may be created and the affect it would have on the beneficiaries of the trust. A trust must have a lawful purpose that does

⁵ S. 763.1008(2), F.S.

⁶ S. 736.0813, F.S.

⁷ S. 736.0109, F.S.

⁸ S. 736.0105(2)(a-w), F.S.

⁹ The Code defines "interests of the beneficiaries" to mean the beneficial interests provided in the terms of the trust. S. 736.0103(11), F.S.

¹⁰ S. 736.0407, F.S.

not contravene public policy, that is possible to achieve, and its terms must be for the "benefit of its beneficiaries."¹¹

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove current language that a trust and its terms be administered for the benefit of the beneficiaries. The effect is to establish the settlor's intent as the guiding principle with respect to the terms, interests, and purposes of a trust. Specifically:

- The definition of "interests of the beneficiaries" under s. 736.0103(11), F.S. is amended to mean the beneficial interests *intended by the settlor* as provided under the terms of the trust.
- The exception to the general rule that the terms of the trust prevail over provisions of the Code contained in s. 736.0105(2)(c), F.S., is amended to remove the mandatory requirement that the terms of the trust be for the benefit of the beneficiaries.
- Section 736.0404, F.S., is likewise amended to remove the requirement that the trust and its terms be for the benefit of the beneficiaries. As amended, a trust's purpose only needs to be lawful, not contrary to public policy, and possible to achieve.

The Trustee: Duty to Account

A trustee is required to keep beneficiaries reasonably informed and to provide the beneficiaries with a statement of the trust account annually. If the trustee does not keep clear, distinct, and accurate accounts, or if the trustee loses his or her accounts, all presumptions will be made against the trustee and the trustee will bear the costs of any resulting damages. Current law provides standards for the form and content of the accounting.¹² Subsection (3) of s. 736.08135, F.S., provides the standards for the accounting and includes the language:

(3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.

A trustee's liability for failing to perform duties is limited by s. 736.1008, F.S. This section provides the limitations on proceedings against the trustee, with subsection (3) addressing a claim against the trustee for a breach of trust related to the trustee's accounting duties. Any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is an intentional tort, subject to the four-year statute of limitations under s. 95.11(3)(o), F.S. A cause of action for such claims begins to accrue when the beneficiary has actual knowledge of:

- (a) The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or
- (b) The trustee's repudiation of the trust or adverse possession of the trust assets.¹³

In *Corya v. Sanders*,¹⁴ the Fourth District Court of Appeal used ss. 736.08135(3) and 736.1008(3), F.S., in determining a case involving a trustee's liability for failing to prepare trust accounts and inform the beneficiaries of the trust. With respect to s. 736.08135(3), F.S., the court determined that a trustee was not required to prepare an accounting for dates prior to January 1, 2003, saying:

[W]e construe that language as limiting the beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, to be no earlier than January 1, 2003.

In effect, this barred a beneficiary of an express trust from seeking to compel a trust accounting for all periods prior to January 1, 2003.

¹¹ S. 736.0404, F.S.

¹² S. 736.08135(1-2), F.S.

¹³ S. 736.1008(3), F.S.

¹⁴ 155 So.3d 1279 (Fla. 4th DCA 2015).

The court in *Corya* also held that a beneficiary of an express trust who has actual knowledge that he or she is a beneficiary of a trust and has not received a trust accounting is barred by s. 95.11(6), F.S.,¹⁵ from seeking a trust accounting for any period more than 4 years prior to the filing of the action. In other words, the court held that the right of a beneficiary, with knowledge that they have not received a trust accounting, to seek an accounting is subject to a 4 year limitations period that begins to run as soon as a trust accounting is overdue.¹⁶

The bill amends s. 736.08135(3), F.S., to govern the form of content for all trust accountings rendered, including those for accounting periods prior to 2003. The bill amends s. 736.1008, F.S., to provide that a beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for a breach of trust. Moreover, the beneficiary's actual knowledge of that fact does not commence the running of any statute of limitations concerning such claims.

The Trustee: Posting Documents or Notices Electronically

Ch. 2015-176, L.O.F., added posting to a secure electronic account or website to the list of acceptable methods for delivery of notices and documents. This method is only acceptable if the recipient provides written authorization, which must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted.
- Contain specific instructions for accessing the electronic website or account, including any security measures.
- Advise that a separate notice will be sent, and the manner in which it will be sent, when a document is posted.
- Advise that authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting may commence a limitations period as short as 6 months, even if the recipient never accesses the electronic account, website, or document.

The trustee is required to send a notice to a person receiving trust documents by electronic posting, which notice may be made by any permissible method of notice under the Code except electronic posting, at the following intervals:

- Each time a document is posted. The notice must identify each document that has been posted and how the person may access the document.
- Every year (the "annual notice") to advise such persons that posting of a document commences a limitations period as short as 6 months even if the recipient never accesses the website, account, or document. The annual notice must also address the right to amend or revoke a previous authorization to post trust documents on a website or account. The bill provides the suggested form of the annual notice, which is substantially similar to the suggested form of a limitations notice provided in s. 736.1008(4)(c) F.S. The failure of a trustee to provide the annual notice within 380 days of the previous notice will automatically revoke the person's authorization.

The website or account must allow the recipient to download or print the posted document. A document provided solely through electronic posting must be retained on the website or account for at least 4 years after the date it is received.

¹⁵ Related to "Laches."

¹⁶ This holding is in direct conflict with *Taplin v. Taplin*, 88 So.3d 344 (Fla. 3d DCA 2012) and *Nayee v. Nayee*, 705 So.2d 961 (Fla. 5th DCA 1998).

A document delivered by electronic posting is deemed received by the recipient on the earlier of the date that notice of the document's posting is received or the date that the recipient accesses the document on the electronic account or website. The posting is only effective if done in compliance with the requirements of the new provisions, and the trustee has the burden of demonstrating compliance.

The bill provides that the enumerated procedures for electronic posting are solely for the purposes of meeting the notice requirements of s. 736.0109, F.S., and are not intended to restrict or govern courtesy postings in any way. Moreover, the bill provides that the retention requirements only apply if electronic posting is the only method of giving notice.

The bill requires that the initial authorization specifically state whether trust accountings, trust disclosure documents, and limitation notices, each as defined in s. 736.1008(4), F.S., may be posted electronically, but allows a more general description of other types of documents that the sender may provide by posting.

The bill allows a recipient to terminate authorization by following the procedures on the web site instead of giving written notice of such termination.

The bill additionally amends the 4-year document retention requirement:

- If access is terminated by the sender before the end of the 4-year retention period, then the running of the applicable statute of limitations periods contained in s. 736.1008(1) & (2), F.S., are suspended until 45 days after the sender sends a notice by separate means to the recipient that either access has been restored, or access has been terminated and that the recipient may request copies of the posted documents at no cost.
- The applicable statute of limitations is also suspended from the time the recipient asks for copies until 20 days after those documents are provided.
- Documents do not need to be maintained on the website once the recipient's access has been terminated.
- No retention is required, and no statute of limitations is suspended, if access is terminated by the action of, or at the request of the recipient. Revocation of authorization to receive documents via posting is not considered to be a request to terminate access to documents already posted.
- Failure to maintain access does not invalidate the initial notice.

The Trustee: The Decanting Statute

The terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities. One absolute power is to distribute trust property, or "principal," to or for the benefit of one or more beneficiaries. The term "decanting" describes a trustee's distribution of principal from one trust into a different trust (as opposed to distributing principal directly to the beneficiary).¹⁷

Decanting is generally used by trustees to cure or avoid issues with the terms of the first trust without distributing to a beneficiary outright. In this way, decanting can fix issues with a trust while still preserving the settlor's intention. Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend trust funds for judicial involvement.

Under s. 736.04117, F.S., a trustee is allowed to decant principal to a different trust from a first when the trustee has absolute power to make principal distributions.

Although it is not necessary that the trust instrument use the term "absolute," it is necessary that the trustee's invasion power not be limited to a specific or ascertainable purpose. Thus, a power to invade

for a beneficiary's best interests, welfare, comfort, or happiness is an absolute invasion power under the statute, but a power to distribute or invade for a beneficiary's health, education, maintenance, or support is not.¹⁸ Moreover, a trustee may only decant principal to a supplemental needs trust¹⁹ when the terms of the trust provide that the trustee has absolute power to invade the principal for the benefit of a disabled beneficiary.

The trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution. Current law also imposes both procedural and substantive restrictions on a trustee's exercise of decanting power. For instance, s. 736.04117(4), F.S., requires notice, in writing, be made to all beneficiaries of the first trust at least 60 days prior to the date the trustee exercises their power to invade the trust principal.

The bill substantially amends s. 736.04117, F.S., related to the trustee's power to invade principal and expands the ability of the trustee to decant when granted less than absolute power. The bill:

1. Authorizes a trustee to decant principal to a second trust pursuant to a power to distribute that is not absolute. When such power is not absolute, the trustee's decanting authority is restricted so that each beneficiary of the first trust must have a substantially similar interest in the second trust. The bill provides a definition for "substantially similar" to mean, in relevant part, that "there is no material change in a beneficiary's beneficial interest or in the power to make distributions and that the power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to the power under the first trust to make a distribution directly to the beneficiary."²⁰
2. Authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of an absolute discretionary power or discretionary power limited to an ascertainable standard. The bill provides a definition for "supplemental needs trust" to mean a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.²¹
3. Expands the notice requirements under the state's current decanting statute. Specifically, notice is required to be provided to the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust, all trustees of the first trust, and any person with the power to remove the authorized trustee of the first trust. Moreover, the notice must include copies of both the first and second trust instruments.

In addition to these major changes, the bill:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S., including absolute power, authorized trustee, beneficiary with a disability, current beneficiary, government benefits, internal revenue code, power of appointment, presently exercisable general power of appointment, substantially similar, supplemental needs trust, and vested interest.²²
- Provides that, with respect to permissible or impermissible modification of certain trust provisions, the second trust may omit, create or modify a power of appointment.
- Expands the existing prohibition on reducing certain fixed interests to include vested interests.
- Provides that the second trust may extend the term of the first trust, regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard.

¹⁸ S. 736.04117(1)(b), F.S.

¹⁹ The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.

²⁰ HB 413, lines 326-333.

²¹ HB 413, lines 342-345.

²² HB 413, lines 290-357.

- Adds additional tax benefits associated with the first trust that must be maintained in the second trust to include the gift tax annual exclusion, and any and all other tax benefits for income, gift, estate or generation-skipping transfer for tax purposes.
- Incorporates provisions regarding "grantor" trust status and the trustee's ability to decant from a grantor trust to a non-grantor trust.
- Provides that a second trust may be created under the laws of any jurisdiction and institutes certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision.
- Provides that a trustee may decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others.

B. SECTION DIRECTORY:

Section 1: Amends s. 736.0103, F.S., relating to definitions.

Section 2: Amends s. 736.0105, F.S., relating to default and mandatory rules.

Section 3: Amends s. 736.0109, F.S. relating to methods and waiver of notice.

Section 4: Amends s. 736.0404, F.S., relating to trust purposes.

Section 5: Amends s. 736.04117, F.S., relating to trustee's power to invade principal in trust.

Section 6: Amends s. 736.08135, F.S., relating to trust accountings.

Section 7: Amends s. 736.1008, F.S., relating to limitations on proceedings against trustees.

Section 8: Provides for the effect of ss. 736.08135 and 736.1008, F.S., to all cases pending or commenced on or after July 1, 2018.

Section 9: Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to trusts; amending s. 736.0103, F.S.;
 3 redefining the term "interests of the beneficiaries";
 4 amending s. 736.0105, F.S.; deleting a requirement
 5 that a trust and its terms be for the benefit of the
 6 trust's beneficiaries; amending s. 736.0109, F.S.;
 7 revising provisions relating to notice or sending of
 8 trust documents to include posting on a secure
 9 electronic account or website; providing requirements
 10 for such documents to be deemed sent; requiring a
 11 certain authorization to specify documents subject to
 12 electronic posting; revising requirements for a
 13 recipient to electronically access such documents;
 14 prohibiting the termination of a recipient's
 15 electronic access to such documents from invalidating
 16 certain notice or sending of electronic trust
 17 documents; tolling specified limitations periods under
 18 certain circumstances; providing requirements for
 19 electronic access to such documents to be deemed
 20 terminated by a sender; providing construction;
 21 providing applicability; amending s. 736.0404, F.S.;
 22 deleting a restriction on the purpose for which a
 23 trust is created; amending s. 736.04117, F.S.;
 24 defining and redefining terms; authorizing an
 25 authorized trustee to appoint all or part of the

26 principal of a trust to a second trust under certain
 27 circumstances; providing requirements for the second
 28 trust and its beneficiaries; authorizing the second
 29 trust to retain, omit, or create or modify specified
 30 powers; authorizing the term of the second trust to
 31 extend beyond the term of the first trust; authorizing
 32 the class of permissible appointees to the second
 33 trust to differ from the class identified in the first
 34 trust under certain circumstances; providing
 35 requirements for distributions to a second trust when
 36 the authorized trustee does not have absolute power;
 37 providing requirements for such second trust;
 38 providing requirements for grants of power of
 39 appointment by the second trust; authorizing a second
 40 trust created by an authorized trustee without
 41 absolute power to grant specified powers under certain
 42 circumstances; authorizing an authorized trustee to
 43 appoint the principal of a first trust to a
 44 supplemental needs trust under certain circumstances;
 45 providing requirements for such supplemental needs
 46 trust; prohibiting an authorized trustee from
 47 distributing the principal of a trust in a manner that
 48 would reduce specified tax benefits; prohibiting the
 49 distribution of S corporation stock from a first trust
 50 to a second trust under certain circumstances;

51 prohibiting a settlor from being treated as the owner
 52 of a second trust if he or she was not treated as the
 53 owner of the first trust; prohibiting an authorized
 54 trustee from distributing a trust's interest in
 55 property to a second trust if the interest is subject
 56 to specified rules of the Internal Revenue Code;
 57 authorizing the exercise of power to invade a trust's
 58 principal to apply to a second trust created or
 59 administered under the law of any jurisdiction;
 60 prohibiting the exercise of power to invade a trust's
 61 principal to increase an authorized trustee's
 62 compensation or relieve him or her from certain
 63 liability; specifying who an authorized trustee must
 64 notify when he or she exercises his or her power to
 65 invade the trust's principal; specifying the documents
 66 that the authorized trustee must provide with such
 67 notice; amending s. 736.08135, F.S.; revising
 68 applicability; amending s. 736.1008, F.S.; clarifying
 69 that certain knowledge by a beneficiary does not cause
 70 a claim to accrue for breach of trust or commence the
 71 running of a period of limitations or laches;
 72 providing legislative intent; providing retroactive
 73 application; providing effective dates.

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 75 Be It Enacted by the Legislature of the State of Florida:

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Section 1. Subsection (11) of section 736.0103, Florida Statutes, is amended to read:

736.0103 Definitions.—Unless the context otherwise requires, in this code:

(11) "Interests of the beneficiaries" means the beneficial interests intended by the settlor as provided in the terms of a ~~the~~ trust.

Section 2. Paragraph (c) of subsection (2) of section 736.0105, Florida Statutes, is amended to read:

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this code except:

(c) The requirement that a trust ~~and its terms be for the benefit of the trust's beneficiaries, and that the trust~~ have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Section 3. Subsections (1) and (3) of section 736.0109, Florida Statutes, are amended to read:

736.0109 Methods and waiver of notice.—

(1) Notice to a person under this code or the sending of a document to a person under this code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail,

101 personal delivery, delivery to the person's last known place of
102 residence or place of business, ~~or~~ a properly directed facsimile
103 or other electronic message, or posting on a secure electronic
104 account or website in accordance with subsection (3).

105 (3) A document that is sent solely by posting on an
106 electronic account or website is not deemed sent for purposes of
107 this section unless the sender complies with this subsection.
108 The sender has the burden of proving compliance with this
109 subsection ~~In addition to the methods listed in subsection (1)~~
110 ~~for sending a document, a sender may post a document to a secure~~
111 ~~electronic account or website where the document can be~~
112 ~~accessed.~~

113 (a) ~~Before a document may be posted to an electronic~~
114 ~~account or website,~~ The recipient must sign a separate written
115 authorization solely for the purpose of authorizing the sender
116 to post documents on an electronic account or website before
117 such posting. The written authorization must:

118 1. Specifically indicate whether a trust accounting, trust
119 disclosure document, or limitation notice, as those terms are
120 defined in s. 736.1008(4), will be posted in this manner, and
121 generally enumerate the other types of documents that may be
122 posted in this manner.

123 2. Contain specific instructions for accessing the
124 electronic account or website, including the security procedures
125 required to access the electronic account or website, such as a

126 | username and password.

127 | 3. Advise the recipient that a separate notice will be
 128 | sent when a document is posted on ~~to~~ the electronic account or
 129 | website and the manner in which the separate notice will be
 130 | sent.

131 | 4. Advise the recipient that the authorization to receive
 132 | documents by electronic posting may be amended or revoked at any
 133 | time and include specific instructions for revoking or amending
 134 | the authorization, including the address designated for the
 135 | purpose of receiving notice of the revocation or amendment.

136 | 5. Advise the recipient that posting a document on the
 137 | electronic account or website may commence a limitations period
 138 | as short as 6 months even if the recipient never actually
 139 | accesses the electronic account, electronic website, or ~~the~~
 140 | document.

141 | (b) Once the recipient signs the written authorization,
 142 | the sender must provide a separate notice to the recipient when
 143 | a document is posted on ~~to~~ the electronic account or website. As
 144 | used in this subsection, the term "separate notice" means a
 145 | notice sent to the recipient by means other than electronic
 146 | posting, which identifies each document posted to the electronic
 147 | account or website and provides instructions for accessing the
 148 | ~~posted~~ document. The separate notice requirement is deemed
 149 | satisfied if the recipient accesses the document on the
 150 | electronic account or website.

151 (c) A document sent by electronic posting is deemed
 152 received by the recipient on the earlier of the date on which
 153 ~~that~~ the separate notice is received or the date on which ~~that~~
 154 the recipient accesses the document on the electronic account or
 155 website.

156 (d) At least annually after a recipient signs a written
 157 authorization, a sender shall send a notice advising recipients
 158 who have authorized one or more documents to be posted on ~~to~~ an
 159 electronic account or website that such posting may commence a
 160 limitations period as short as 6 months even if the recipient
 161 never accesses the electronic account or website or the document
 162 and that authority to receive documents by electronic posting
 163 may be amended or revoked at any time. This notice must be given
 164 by means other than electronic posting and may not be
 165 accompanied by any other written communication. Failure to
 166 provide such notice within 380 days after the last notice is
 167 deemed to automatically revoke the authorization to receive
 168 documents in the manner permitted under this subsection 380 days
 169 after the last notice is sent.

170 (e) The notice required in paragraph (d) may be in
 171 substantially the following form: "You have authorized the
 172 receipt of documents through posting on ~~to~~ an electronic account
 173 or website on which ~~where~~ the documents can be accessed. This
 174 notice is being sent to advise you that a limitations period,
 175 which may be as short as 6 months, may be running as to matters

176 disclosed in a trust accounting or other written report of a
 177 trustee posted to the electronic account or website even if you
 178 never actually access the electronic account or website or the
 179 documents. You may amend or revoke the authorization to receive
 180 documents by electronic posting at any time. If you have any
 181 questions, please consult your attorney."

182 (f) A sender may rely on the recipient's authorization
 183 until the recipient amends or revokes the authorization by
 184 sending a notice to the address designated for that purpose in
 185 the authorization or in the manner specified on the electronic
 186 account or website. The recipient, at any time, may amend or
 187 revoke an authorization to have documents posted on the
 188 electronic account or website.

189 (g) If a document is provided to a recipient solely
 190 through electronic posting pursuant to this subsection, the
 191 recipient must be able to access and print or download the
 192 document until the earlier of ~~remain accessible to the recipient~~
 193 ~~on the electronic account or website for at least 4 years after~~
 194 the date that the document is deemed received by the recipient
 195 or the date upon which the recipient's access to the electronic
 196 account or website is terminated for any reason.

197 1. If the recipient's access to the electronic account or
 198 website is terminated for any reason, such termination does not
 199 invalidate the notice or sending of any document previously
 200 posted on the electronic account or website in accordance with

201 this subsection, but may toll the applicable limitations period
202 as provided in subparagraph 2.

203 2. If the recipient's access to the electronic account or
204 website is terminated by the sender sooner than 4 years after
205 the date on which the document was received by the recipient,
206 any applicable limitations period set forth in s. 736.1008(1) or
207 (2) which is still running is tolled for any information
208 adequately disclosed in a document sent solely by electronic
209 posting, from the date on which the recipient's access to the
210 electronic account or website was terminated by the sender until
211 45 days after the date on which the sender provides one of the
212 following to the recipient by means other than electronic
213 posting:

214 a. Notice of such termination and notification to the
215 recipient that he or she may request that any documents sent
216 during the prior 4 years solely through electronic posting be
217 provided to him or her by other means at no cost; or

218 b. Notice of such termination and notification to the
219 recipient that his or her access to the electronic account or
220 website has been restored.

221
222 Any applicable limitations period is further tolled from the
223 date on which any request is made pursuant to sub-subparagraph
224 2.a. until 20 days after the date on which the requested
225 documents are provided to the recipient by means other than

226 electronic posting ~~The electronic account or website must allow~~
 227 ~~the recipient to download or print the document. This subsection~~
 228 ~~does not affect or alter the duties of a trustee to keep clear,~~
 229 ~~distinct, and accurate records pursuant to s. 736.0810 or affect~~
 230 ~~or alter the time periods for which the trustee must maintain~~
 231 ~~those records.~~

232 (h) For purposes of this subsection, access to an
 233 electronic account or website is terminated by the sender when
 234 the sender unilaterally terminates the recipient's ability to
 235 access the electronic website or account or to download or print
 236 any document posted on such website or account. Access is not
 237 terminated by the sender when access is terminated by an action
 238 of the recipient or by an action of the sender in response to
 239 the recipient's request to terminate access. The recipient's
 240 revocation of authorization pursuant to paragraph (f) is not
 241 considered a request to terminate access ~~To be effective, the~~
 242 ~~posting of a document to an electronic account or website must~~
 243 ~~be done in accordance with this subsection. The sender has the~~
 244 ~~burden of establishing compliance with this subsection.~~

245 (i) This subsection does not affect or alter the duties of
 246 a trustee to keep clear, distinct, and accurate records pursuant
 247 to s. 736.0810 or affect or alter the time periods for which the
 248 trustee must maintain such records ~~preclude the sending of a~~
 249 ~~document by other means.~~

250 (j) This subsection governs the posting of a document

251 solely for the purpose of giving notice under this code or the
 252 sending of a document to a person under this code and does not
 253 prohibit or otherwise apply to the posting of a document on an
 254 electronic account or website for any other purpose or preclude
 255 the sending of a document by any other means.

256 Section 4. Section 736.0404, Florida Statutes, is amended
 257 to read:

258 736.0404 Trust purposes.—A trust may be created only to
 259 the extent the purposes of the trust are lawful, not contrary to
 260 public policy, and possible to achieve. ~~A trust and its terms~~
 261 ~~must be for the benefit of its beneficiaries.~~

262 Section 5. Effective upon becoming a law, section
 263 736.04117, Florida Statutes, is amended to read:

264 736.04117 Trustee's power to invade principal in trust.—

265 (1)(a) DEFINITIONS.—As used in this section, the term:
 266 ~~Unless the trust instrument expressly provides otherwise, a~~
 267 ~~trustee who has absolute power under the terms of a trust to~~
 268 ~~invade the principal of the trust, referred to in this section~~
 269 ~~as the "first trust," to make distributions to or for the~~
 270 ~~benefit of one or more persons may instead exercise the power by~~
 271 ~~appointing all or part of the principal of the trust subject to~~
 272 ~~the power in favor of a trustee of another trust, referred to in~~
 273 ~~this section as the "second trust," for the current benefit of~~
 274 ~~one or more of such persons under the same trust instrument or~~
 275 ~~under a different trust instrument; provided:~~

276 ~~1. The beneficiaries of the second trust may include only~~
 277 ~~beneficiaries of the first trust;~~

278 ~~2. The second trust may not reduce any fixed income,~~
 279 ~~annuity, or unitrust interest in the assets of the first trust;~~
 280 ~~and~~

281 ~~3. If any contribution to the first trust qualified for a~~
 282 ~~marital or charitable deduction for federal income, gift, or~~
 283 ~~estate tax purposes under the Internal Revenue Code of 1986, as~~
 284 ~~amended, the second trust shall not contain any provision which,~~
 285 ~~if included in the first trust, would have prevented the first~~
 286 ~~trust from qualifying for such a deduction or would have reduced~~
 287 ~~the amount of such deduction.~~

288 ~~(b) For purposes of this subsection, an absolute power to~~
 289 ~~invade principal shall include~~

290 (a) "Absolute power" means a power to invade principal
 291 that is not limited to specific or ascertainable purposes, such
 292 as health, education, maintenance, and support, regardless of
 293 whether ~~or not~~ the term "absolute" is used. A power to invade
 294 principal for purposes such as best interests, welfare, comfort,
 295 or happiness constitutes ~~shall constitute~~ an absolute power not
 296 limited to specific or ascertainable purposes.

297 (b) "Authorized trustee" means a trustee, other than the
 298 settlor or a beneficiary, who has the power to invade the
 299 principal of a trust.

300 (c) "Beneficiary with a disability" means a beneficiary of

301 the first trust who the authorized trustee believes may qualify
 302 for government benefits based on disability, regardless of
 303 whether the beneficiary currently receives those benefits or has
 304 been adjudicated incapacitated.

305 (d) "Current beneficiary" means a beneficiary who, on the
 306 date his or her qualification is determined, is a distributee or
 307 permissible distributee of trust income or principal. The term
 308 includes the holder of a presently exercisable general power of
 309 appointment but does not include a person who is a beneficiary
 310 only because he or she holds another power of appointment.

311 (e) "Government benefits" means financial aid or services
 312 from any state, federal, or other public agency.

313 (f) "Internal Revenue Code" means the Internal Revenue
 314 Code of 1986, as amended.

315 (g) "Power of appointment" has the same meaning as
 316 provided in s. 731.201.

317 (h) "Presently exercisable general power of appointment"
 318 means a power of appointment exercisable by the power holder at
 319 the relevant time. The term:

320 1. Includes a power of appointment that is exercisable
 321 only after the occurrence of a specified event or that is
 322 subject to a specified restriction, but only after the event has
 323 occurred or the restriction has been satisfied.

324 2. Does not include a power of appointment that is
 325 exercisable only upon the death of the power holder.

326 (i) "Substantially similar" means that there is no
327 material change in a beneficiary's beneficial interests or in
328 the power to make distributions and that the power to make a
329 distribution under a second trust for the benefit of a
330 beneficiary who is an individual is substantially similar to the
331 power under the first trust to make a distribution directly to
332 the beneficiary. A distribution is deemed to be for the benefit
333 of a beneficiary if:

334 1. The distribution is applied for the benefit of a
335 beneficiary;

336 2. The beneficiary is under a legal disability or the
337 trustee reasonably believes the beneficiary is incapacitated,
338 and the distribution is made as permitted under this code; or

339 3. The distribution is made as permitted under the terms
340 of the first trust instrument and the second trust instrument
341 for the benefit of the beneficiary.

342 (j) "Supplemental needs trust" means a trust that the
343 authorized trustee believes would not be considered a resource
344 for purposes of determining whether the beneficiary who has a
345 disability is eligible for government benefits.

346 (k) "Vested interest" means a current unconditional right
347 to receive a mandatory distribution of income, a specified
348 dollar amount, or a percentage of value of a trust, or a current
349 unconditional right to withdraw income, a specified dollar
350 amount, or a percentage of value of a trust, which right is not

351 subject to the occurrence of a specified event, the passage of a
 352 specified time, or the exercise of discretion.

353 1. The term includes a presently exercisable general power
 354 of appointment.

355 2. The term does not include a beneficiary's interest in a
 356 trust if the trustee has discretion to make a distribution of
 357 trust property to a person other than such beneficiary.

358 (2) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN
 359 AUTHORIZED TRUSTEE HAS ABSOLUTE POWER TO INVADE.-

360 (a) Unless a trust instrument expressly provides
 361 otherwise, an authorized trustee who has absolute power under
 362 the terms of the trust to invade its principal, referred to in
 363 this section as the "first trust," to make current distributions
 364 to or for the benefit of one or more beneficiaries may instead
 365 exercise such power by appointing all or part of the principal
 366 of the trust subject to such power in favor of a trustee of one
 367 or more other trusts, whether created under the same trust
 368 instrument as the first trust or a different trust instrument,
 369 including a trust instrument created for the purposes of
 370 exercising the power granted by this section, each referred to
 371 in this section as the "second trust," for the current benefit
 372 of one or more of such beneficiaries only if:

373 1. The beneficiaries of the second trust include only
 374 beneficiaries of the first trust; and

375 2. The second trust does not reduce any vested interest.

376 (b) In an exercise of absolute power, the second trust
 377 may:
 378 1. Retain a power of appointment granted in the first
 379 trust;
 380 2. Omit a power of appointment granted in the first trust,
 381 other than a presently exercisable general power of appointment;
 382 3. Create or modify a power of appointment if the power
 383 holder is a current beneficiary of the first trust;
 384 4. Create or modify a power of appointment if the power
 385 holder is a beneficiary of the first trust who is not a current
 386 beneficiary, but the exercise of the power of appointment may
 387 take effect only after the power holder becomes, or would have
 388 become if then living, a current beneficiary of the first trust;
 389 and
 390 5. Extend the term of the second trust beyond the term of
 391 the first trust.
 392 (c) The class of permissible appointees in favor of which
 393 a created or modified power of appointment may be exercised may
 394 differ from the class identified in the first trust.
 395 (3) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN
 396 AUTHORIZED TRUSTEE DOES NOT HAVE ABSOLUTE POWER TO INVADE.-
 397 Unless the trust instrument expressly provides otherwise, an
 398 authorized trustee who has a power, other than an absolute
 399 power, under the terms of a first trust to invade principal to
 400 make current distributions to or for the benefit of one or more

401 beneficiaries may instead exercise such power by appointing all
 402 or part of the principal of the first trust subject to such
 403 power in favor of a trustee of one or more second trusts. If the
 404 authorized trustee exercises such power:

405 (a) The second trusts, in the aggregate, shall grant each
 406 beneficiary of the first trust beneficial interests in the
 407 second trusts which are substantially similar to the beneficial
 408 interests of the beneficiary in the first trust.

409 (b) If the first trust grants a power of appointment to a
 410 beneficiary of the first trust, the second trust shall grant
 411 such power of appointment in the second trust to such
 412 beneficiary, and the class of permissible appointees shall be
 413 the same as in the first trust.

414 (c) If the first trust does not grant a power of
 415 appointment to a beneficiary of the first trust, the second
 416 trust may not grant a power of appointment in the second trust
 417 to such beneficiary.

418 (d) Notwithstanding paragraphs (a), (b), and (c), the term
 419 of the second trust may extend beyond the term of the first
 420 trust, and, for any period after the first trust would have
 421 otherwise terminated, in whole or in part, under the provisions
 422 of the first trust, the trust instrument of the second trust
 423 may, with respect to property subject to such extended term:

424 1. Include language providing the trustee with the
 425 absolute power to invade the principal of the second trust

426 during such extended term; and

427 2. Create a power of appointment, if the power holder is a
 428 current beneficiary of the first trust, or expand the class of
 429 permissible appointees in favor of which a power of appointment
 430 may be exercised.

431 (4) DISTRIBUTION FROM FIRST TRUST TO SUPPLEMENTAL NEEDS
 432 TRUST.—

433 (a) Notwithstanding subsections (2) and (3), unless the
 434 trust instrument expressly provides otherwise, an authorized
 435 trustee who has the power under the terms of a first trust to
 436 invade the principal of the first trust to make current
 437 distributions to or for the benefit of a beneficiary with a
 438 disability may instead exercise such power by appointing all or
 439 part of the principal of the first trust in favor of a trustee
 440 of a second trust that is a supplemental needs trust if:

441 1. The supplemental needs trust benefits the beneficiary
 442 with a disability;

443 2. The beneficiaries of the second trust include only
 444 beneficiaries of the first trust; and

445 3. The authorized trustee determines that the exercise of
 446 such power will further the purposes of the first trust.

447 (b) Except as affected by any change to the interests of
 448 the beneficiary with a disability, the second trusts, in the
 449 aggregate, shall grant each other beneficiary of the first trust
 450 beneficial interests in the second trusts which are

451 substantially similar to such other beneficiary's beneficial
 452 interests in the first trust.

453 (5) PROHIBITED DISTRIBUTIONS.—

454 (a) An authorized trustee may not distribute the principal
 455 of a trust under this section in a manner that would prevent a
 456 contribution to that trust from qualifying for, or that would
 457 reduce a federal tax benefit, including a federal tax exclusion
 458 or deduction, which was originally claimed or could have been
 459 claimed for that contribution, including:

460 1. An exclusion under s. 2503(b) or s. 2503(c) of the
 461 Internal Revenue Code;

462 2. A marital deduction under s. 2056, s. 2056A, or s. 2523
 463 of the Internal Revenue Code;

464 3. A charitable deduction under s. 170(a), s. 642(c), s.
 465 2055(a), or s. 2522(a) of the Internal Revenue Code;

466 4. Direct skip treatment under s. 2642(c) of the Internal
 467 Revenue Code; or

468 5. Any other tax benefit for income, gift, estate, or
 469 generation-skipping transfer tax purposes under the Internal
 470 Revenue Code.

471 (b) If S corporation stock is held in the first trust, an
 472 authorized trustee may not distribute all or part of that stock
 473 to a second trust that is not a permitted shareholder under s.
 474 1361(c)(2) of the Internal Revenue Code. If the first trust
 475 holds stock in an S corporation and is, or but for provisions of

476 paragraphs (a), (c), and (d) would be, a qualified subchapter S
 477 trust within the meaning of s. 1361(d) of the Internal Revenue
 478 Code, the second trust instrument may not include or omit a term
 479 that prevents it from qualifying as a qualified subchapter S
 480 trust.

481 (c) Except as provided in paragraphs (a), (b), and (d), an
 482 authorized trustee may distribute the principal of a first trust
 483 to a second trust regardless of whether the settlor is treated
 484 as the owner of either trust under ss. 671-679 of the Internal
 485 Revenue Code; however, if the settlor is not treated as the
 486 owner of the first trust, he or she may not be treated as the
 487 owner of the second trust unless he or she at all times has the
 488 power to cause the second trust to cease being treated as if it
 489 were owned by the settlor.

490 (d) If an interest in property which is subject to the
 491 minimum distribution rules of s. 401(a)(9) of the Internal
 492 Revenue Code is held in trust, an authorized trustee may not
 493 distribute such an interest to a second trust under subsection
 494 (2), subsection (3), or subsection (4) if the distribution would
 495 shorten the otherwise applicable maximum distribution period.

496 (6) EXERCISE BY WRITING.—The exercise of a power to invade
 497 principal under subsection (2), subsection (3), or subsection
 498 (4) must ~~The exercise of a power to invade principal under~~
 499 ~~subsection (1) shall be by a written an instrument in writing,~~
 500 signed and acknowledged by the authorized trustee, and filed

501 with the records of the first trust.

502 (7)~~(3)~~ RESTRICTIONS ON EXERCISE OF POWER.—The exercise of
 503 a power to invade principal under subsection (2), subsection
 504 (3), or subsection (4):

505 (a) Is ~~(1) shall be~~ considered the exercise of a power of
 506 appointment, excluding ~~other than~~ a power to appoint to the
 507 authorized trustee, the authorized trustee's creditors, the
 508 authorized trustee's estate, or the creditors of the authorized
 509 trustee's estate.

510 (b) Is, ~~and shall be~~ subject to the provisions of s.
 511 689.225 covering the time at which the permissible period of the
 512 rule against perpetuities begins and the law that determines the
 513 permissible period of the rule against perpetuities of the first
 514 trust.

515 (c) May apply to a second trust created or administered
 516 under the law of any jurisdiction.

517 (d) May not:

518 1. Increase the authorized trustee's compensation beyond
 519 the compensation specified in the first trust instrument; or

520 2. Relieve the authorized trustee from liability for
 521 breach of trust or provide for indemnification of the authorized
 522 trustee for any liability or claim to a greater extent than the
 523 first trust instrument; however, the exercise of the power may
 524 divide and reallocate fiduciary powers among fiduciaries and
 525 relieve a fiduciary from liability for an act or failure to act

526 of another fiduciary as otherwise allowed under law or common
 527 law.

528 (8) NOTICE.—

529 (a) ~~(4)~~ The authorized trustee shall provide written
 530 notification of the manner in which he or she intends to
 531 exercise his or her power to invade principal to ~~notify~~ all
 532 ~~qualified beneficiaries~~ of the following parties ~~first trust, in~~
 533 ~~writing,~~ at least 60 days ~~before~~ ~~prior to~~ the effective date of
 534 the authorized trustee's exercise of such power ~~the trustee's~~
 535 ~~power to invade principal~~ pursuant to subsection (2), subsection
 536 (3), or subsection (4): ~~(1), of the manner in which the trustee~~
 537 ~~intends to exercise the power.~~

538 1. All qualified beneficiaries of the first trust.

539 2. If paragraph (5)(c) applies, the settlor of the first
 540 trust.

541 3. All trustees of the first trust.

542 4. Any person who has the power to remove or replace the
 543 authorized trustee of the first trust.

544 (b) The authorized ~~A copy of the proposed instrument~~
 545 ~~exercising the power shall satisfy the trustee's notice~~
 546 ~~obligation to provide notice~~ under this subsection is satisfied
 547 when he or she provides copies of the proposed instrument
 548 exercising the power, the trust instrument of the first trust,
 549 and the proposed trust instrument of the second trust.

550 (c) If all of those required to be notified ~~qualified~~

551 ~~beneficiaries~~ waive the notice period by signed written
 552 instrument delivered to the authorized trustee, the authorized
 553 trustee's power to invade principal shall be exercisable
 554 immediately.

555 (d) The authorized trustee's notice under this subsection
 556 does ~~shall~~ not limit the right of any beneficiary to object to
 557 the exercise of the authorized trustee's power to invade
 558 principal except as otherwise provided in other applicable
 559 provisions of this code.

560 (9)(5) INAPPLICABILITY OF SPENDTHRIFT CLAUSE OR OTHER
 561 PROHIBITION.—The exercise of the power to invade principal under
 562 subsection (2), subsection (3), or subsection (4) ~~(1)~~ is not
 563 prohibited by a spendthrift clause or by a provision in the
 564 trust instrument that prohibits amendment or revocation of the
 565 trust.

566 (10)(6) NO DUTY TO EXERCISE.—Nothing in this section is
 567 intended to create or imply a duty to exercise a power to invade
 568 principal, and no inference of impropriety may ~~shall~~ be made as
 569 a result of an authorized trustee's failure to exercise a
 570 ~~trustee not exercising~~ the power to invade principal conferred
 571 under subsections (2), (3), and (4) ~~subsection (1)~~.

572 (11)(7) NO ABRIDGEMENT OF COMMON LAW RIGHTS.—~~The~~
 573 ~~provisions of~~ This section may ~~shall~~ not be construed to abridge
 574 the right of any trustee who has a power of invasion to appoint
 575 property in further trust that arises under the terms of the

576 first trust or under any other section of this code or under
 577 another provision of law or under common law.

578 Section 6. Subsection (3) of section 736.08135, Florida
 579 Statutes, is amended to read:

580 736.08135 Trust accountings.—

581 (3) Subsections (1) and (2) govern the form and content of
 582 ~~This section applies to~~ all trust accountings rendered for any
 583 accounting periods beginning on or after January 1, 2003, and
 584 all trust accountings rendered on or after July 1, 2018. This
 585 subsection does not affect the beginning period from which a
 586 trustee is required to render a trust accounting.

587 Section 7. Subsection (3) of section 736.1008, Florida
 588 Statutes, is amended to read:

589 736.1008 Limitations on proceedings against trustees.—

590 (3) When a trustee has not issued a final trust accounting
 591 or has not given written notice to the beneficiary of the
 592 availability of the trust records for examination and that
 593 claims with respect to matters not adequately disclosed may be
 594 barred, a claim against the trustee for breach of trust based on
 595 a matter not adequately disclosed in a trust disclosure document
 596 is barred as provided in chapter 95 and accrues when the
 597 beneficiary has actual knowledge of:

598 (a) The facts upon which the claim is based, if such
 599 actual knowledge is established by clear and convincing
 600 evidence; or

601 (b) The trustee's repudiation of the trust or adverse
 602 possession of trust assets.

603
 604 Paragraph (a) applies to claims based upon acts or omissions
 605 occurring on or after July 1, 2008. A beneficiary's actual
 606 knowledge that he or she has not received a trust accounting
 607 does not cause a claim to accrue against the trustee for breach
 608 of trust based upon the failure to provide a trust accounting
 609 required by s. 736.0813 or former s. 737.303 and does not
 610 commence the running of any period of limitations or laches for
 611 such a claim, and paragraph (a) and chapter 95 do not bar any
 612 such claim.

613 Section 8. The changes to ss. 736.08135 and 736.1008,
 614 Florida Statutes, made by this act are intended to clarify
 615 existing law, are remedial in nature, and apply retroactively to
 616 all cases pending or commenced on or after July 1, 2018.

617 Section 9. Except as otherwise provided in this act and
 618 except for this section, which shall take effect upon becoming a
 619 law, this act shall take effect July 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 491 Theft
SPONSOR(S): Roth
TIED BILLS: IDEN./SIM. **BILLS:** SB 776

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 0 N	Painter	Sumner
2) Judiciary Committee		Painter <i>AMP</i>	Poche <i>MP</i>

SUMMARY ANALYSIS

Theft of livestock and beehives in Florida has increased over the years. The use of beehives for commercial pollination has risen, resulting in greater theft. Additionally, beef prices have increased since around 2010, contributing to greater rates of cattle theft - also known as rustling.

Section 812.014(2)(c), F.S., makes it grand theft and a third degree felony if the property stolen is a commercially farmed animal, a bee colony of a registered beekeeper, or an aquaculture species raised at a certified aquaculture facility. A third degree felony is punishable by up to five years in prison and up to a \$5,000 fine. If the stolen property is an aquaculture species raised at a certified aquaculture facility, the crime carries a mandatory \$10,000 fine. The mandatory fine does not extend to theft of commercially farmed animals or bee colonies.

HB 491 extends the mandatory \$10,000 fine to theft of commercially farmed animals and bee colonies.

The bill may have an indeterminate, insignificant positive fiscal impact due to the collection of increased fines.

The bill provides an effective date of October 1, 2018.

FULL ANALYSIS I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

In Florida, it is grand theft and a third-degree felony to steal any commercially farmed animal¹, bee colony of a registered beekeeper², or aquaculture species³ raised at a certified aquaculture facility.⁴ The crime is punishable as provided in s. 775.082, F.S.,⁵ and s. 775.083, F.S.⁶ In addition, if the property stolen is an aquaculture species raised at a certified aquaculture facility, then a \$10,000 fine is mandatory.⁷ This same provision does not apply if the property stolen is a commercially farmed animal or a bee colony.

Beehive Theft in Florida

In recent years, Florida has seen a dramatic increase in theft of beehives, partly due to the increasing use of bees for commercial pollination.⁸ An established hive can be worth up to \$300.⁹ During the summer of 2016, Florida lost an estimated 1,200 beehives to theft.¹⁰ Wonderful Bees operates in Lee and Charlotte counties and is one of the larger bee providers in the nation. In June of 2016, the company reported over 700 stolen hives, resulting in losses of more than \$150,000.¹¹ Wonderful Bees even offered a \$10,000 reward for anyone with knowledge of the thefts.¹² The increase in theft has resulted in many small beehive businesses struggling to remain open or to consider leaving the industry altogether.¹³ Larger companies, who may have the means to protect themselves, have started using embed chips with tracking devices to track the beehives.¹⁴

Cattle Theft

Since 2010, the nation has seen an increase in cattle theft, also referred to as rustling, as a result of the rise in beef prices.¹⁵ Stolen cows are commonly sold in private sales or at local livestock auctions.¹⁶ Yearling cows weighing 600 to 700 pounds that once sold for around \$600 are now worth \$1,000 to \$1,200.¹⁷

¹ Pursuant to S. 814.014(2)(c), F.S., this includes any animal of the equine, bovine, or swine class or other grazing animal.

² S. 586.045, F.S., requires beekeepers to register with the Department of Agriculture and Consumer Services (DACs), and renew such registration annually.

³ S. 597.0015(1), F.S., defines "aquaculture" to mean the cultivation of aquatic organisms; see also S. 597.004, F.S., requiring any person engaging in aquaculture to be certified by DACs.

⁴ S. 812.014(2)(c), F.S.

⁵ S. 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not exceeding 5 years.

⁶ S. 775.083, F.S., provides that fines for a felony of the third degree may not exceed \$5,000.

⁷ S. 812.014(2)(c), F.S.

⁸ Brett Murphy, *Sticky Fingers: the rise of the bee thieves*, The Guardian (May 17, 2016), available at:

<https://www.theguardian.com/environment/2016/may/17/sticky-fingers-rise-of-the-bee-thieves>.

⁹ Michael Braun, *Theft of hives hits southwest Florida bee farmers*, Orlando Sentinel (August 28, 2016), available at:

<http://www.orlandosentinel.com/business/os-ap-theft-bee-hive-florida-20160828-story.html>.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Associated Press, *Beehive theft cases on the rise in SWFL*, NBC2 (August 17, 2016), available at: <http://www.nbc-2.com/story/32779137/10000-reward-offered-for-convictions-in-bee-theft-cases>.

¹⁵ Henry Pierson Curtis, *Former Osceola deputy in jail after being charged with stealing cattle*, Orlando Sentinel (November 11, 2015), available at: <http://www.orlandosentinel.com/news/breaking-news/os-keith-collins-cattle-rustling-osceola-20151106-story.html>.

¹⁶ Id.

¹⁷ Id.

There are several recent instances of cattle theft in Florida. In 2013, Martin County sheriff's deputies arrested an Okeechobee man on grand theft charges in the county's largest cattle rustling scheme in history.¹⁸ The man stole over 175 cows and sold them for a total of \$102,000.¹⁹ The farmer from whom the cows were stolen was forced to discontinue his business as a result of the theft.²⁰ In 2015, a former Osceola County Sheriff's deputy was charged and convicted of stealing cows in Osceola and Volusia counties.²¹ In summer 2017, six men were arrested and charged with stealing four cows and four calves from a Lakeland pasture in Polk county in April 2017.²²

Other States' Efforts

Several states have sought tougher penalties for theft of commercially farmed animals. In Texas, stealing cattle or horses is a third-degree felony, punishable by two to ten years in prison and a \$10,000 maximum fine.²³ The Iowa Farm Bureau Federation has lobbied, unsuccessfully, for mandatory minimum prison sentences for cattle theft.²⁴ In 2016, Oklahoma passed a law assessing fines at three times the value of the animal or equipment stolen and set a prison sentence of three to fifteen years.²⁵ The law also provides that prosecutors in Oklahoma can charge a felony count for each animal stolen.²⁶

Effect of Proposed Changes

HB 491 amends s. 812.014(2)(c), F.S., to extend a mandatory \$10,000 fine to theft of commercially farmed animals and bee colonies of registered beekeepers. The crime remains punishable by up to five years in prison.

The bill also reenacts s. 932.701, F.S., concerning the Florida Contraband Forfeiture Act, to incorporate amendments made by the bill.

The bill provides an effective date of October 1, 2018.

B. SECTION DIRECTORY:

Section 1: Amends 812.014, F.S., relating to theft.

Section 2: Reenacts 932.701 F.S., relating to short title; definitions.

Section 3: Provides an effective date of October 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

¹⁸ Terri Parker, *Sheriff calls cattle theft largest in Martin County's history*, WPBF News (October 29, 2013), available at: <http://www.wpbf.com/article/sheriff-calls-cattle-theft-largest-in-martin-county-s-history/1319401>.

¹⁹ Id.

²⁰ Id.

²¹ Henry Pierson Curtis, *Former Osceola deputy in jail after being charged with stealing cattle*, Orlando Sentinel (November 11, 2015), available at: <http://www.orlandosentinel.com/news/breaking-news/os-keith-collins-cattle-rustling-osceola-20151106-story.html>.

²² Associated Press, *6 Arrested in Separate Florida Cattle Thefts; 8 Cows Missing*, US News (June 18, 2017), available at: <https://www.usnews.com/news/best-states/florida/articles/2017-06-18/6-arrested-in-separate-florida-cattle-thefts-8-cows-missing>.

²³ Tex. Code Ann. § 31.03; see also Donnelle Eller, *Stiffer penalties to be sought for livestock theft*, Des Moines Register (September 14, 2014), available at: <https://www.desmoinesregister.com/story/money/agriculture/2014/09/15/livestock-theft-stiffer-penalties/15652857/>.

²⁴ Donnelle Eller, *Stiffer penalties to be sought for livestock theft*, Des Moines Register (September 14, 2014), available at: <https://www.desmoinesregister.com/story/money/agriculture/2014/09/15/livestock-theft-stiffer-penalties/15652857/>.

²⁵ OKLA. STAT. tit. 21, § 1716 (2016).

²⁶ M. Scott Carter, *Under Bill, Tougher Penalties for Cattle Rustling than Assault*, Oklahoma Watch (February 25, 2015) available at: <http://oklahomawatch.org/2015/02/25/house-committee-mulls-new-fine-sentence-for-cattle-rustling/>; see also Associated Press, *Cattle rustling penalties to increase in US*, Reuters News Agency (April 14, 2016), available at: <https://www.producer.com/daily/cattle-rustling-penalties-to-increase-in-us/>.

1. Revenues:

The bill may result in an insignificant, indeterminate positive fiscal impact through collecting increased fines for the theft of a commercially farmed animal or bee colony of a registered beekeeper.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill may result in an insignificant, indeterminate positive fiscal impact through collecting increased fines for the theft of a commercially farmed animal or bee colony of a registered beekeeper.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The mandatory fine for theft of beehives and cattle may dissuade persons from committing the offense, and protect the property of businesses engaged in beekeeping and raising cattle.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to theft; amending s. 812.014, F.S.;
 3 increasing the fine for the theft of a commercially
 4 farmed animal or a bee colony of a registered
 5 beekeeper; reenacting s. 932.701(1)(a), F.S., relating
 6 to the definition of the term "contraband article," to
 7 incorporate the amendment made to s. 812.014, F.S., in
 8 a reference thereto; providing an effective date.

9
 10 Be It Enacted by the Legislature of the State of Florida:

11
 12 Section 1. Paragraph (c) of subsection (2) of section
 13 812.014, Florida Statutes, is amended to read:

14 812.014 Theft.—
 15 (2)

16 (c) It is grand theft of the third degree and a felony of
 17 the third degree, punishable as provided in s. 775.082, s.
 18 775.083, or s. 775.084, if the property stolen is:

- 19 1. Valued at \$300 or more, but less than \$5,000.
- 20 2. Valued at \$5,000 or more, but less than \$10,000.
- 21 3. Valued at \$10,000 or more, but less than \$20,000.
- 22 4. A will, codicil, or other testamentary instrument.
- 23 5. A firearm.
- 24 6. A motor vehicle, except as provided in paragraph (a).
- 25 7. Any commercially farmed animal, including any animal of

26 | the equine, bovine, or swine class or other grazing animal; a
 27 | bee colony of a registered beekeeper; and aquaculture species
 28 | raised at a certified aquaculture facility. If the property
 29 | stolen is a commercially farmed animal, including an animal of
 30 | the equine, bovine, or swine class or other grazing animal; a
 31 | bee colony of a registered beekeeper; or an aquaculture species
 32 | raised at a certified aquaculture facility, ~~then~~ a \$10,000 fine
 33 | shall be imposed.

34 | 8. Any fire extinguisher.

35 | 9. Any amount of citrus fruit consisting of 2,000 or more
 36 | individual pieces of fruit.

37 | 10. Taken from a designated construction site identified
 38 | by the posting of a sign as provided for in s. 810.09(2)(d).

39 | 11. Any stop sign.

40 | 12. Anhydrous ammonia.

41 | 13. Any amount of a controlled substance as defined in s.
 42 | 893.02. Notwithstanding any other law, separate judgments and
 43 | sentences for theft of a controlled substance under this
 44 | subparagraph and for any applicable possession of controlled
 45 | substance offense under s. 893.13 or trafficking in controlled
 46 | substance offense under s. 893.135 may be imposed when all such
 47 | offenses involve the same amount or amounts of a controlled
 48 | substance.

49 |

50 | However, if the property is stolen within a county that is

51 | subject to a state of emergency declared by the Governor under
 52 | chapter 252, the property is stolen after the declaration of
 53 | emergency is made, and the perpetration of the theft is
 54 | facilitated by conditions arising from the emergency, the
 55 | offender commits a felony of the second degree, punishable as
 56 | provided in s. 775.082, s. 775.083, or s. 775.084, if the
 57 | property is valued at \$5,000 or more, but less than \$10,000, as
 58 | provided under subparagraph 2., or if the property is valued at
 59 | \$10,000 or more, but less than \$20,000, as provided under
 60 | subparagraph 3. As used in this paragraph, the term "conditions
 61 | arising from the emergency" means civil unrest, power outages,
 62 | curfews, voluntary or mandatory evacuations, or a reduction in
 63 | the presence of or the response time for first responders or
 64 | homeland security personnel. For purposes of sentencing under
 65 | chapter 921, a felony offense that is reclassified under this
 66 | paragraph is ranked one level above the ranking under s.
 67 | 921.0022 or s. 921.0023 of the offense committed.

68 | Section 2. For the purpose of incorporating the amendment
 69 | made by this act to section 812.014, Florida Statutes, in a
 70 | reference thereto, paragraph (a) of subsection (2) of section
 71 | 932.701, Florida Statutes, is reenacted to read:

- 72 | 932.701 Short title; definitions.—
 73 | (2) As used in the Florida Contraband Forfeiture Act:
 74 | (a) "Contraband article" means:
 75 | 1. Any controlled substance as defined in chapter 893 or

76 any substance, device, paraphernalia, or currency or other means
 77 of exchange that was used, was attempted to be used, or was
 78 intended to be used in violation of any provision of chapter
 79 893, if the totality of the facts presented by the state is
 80 clearly sufficient to meet the state's burden of establishing
 81 probable cause to believe that a nexus exists between the
 82 article seized and the narcotics activity, whether or not the
 83 use of the contraband article can be traced to a specific
 84 narcotics transaction.

85 2. Any gambling paraphernalia, lottery tickets, money,
 86 currency, or other means of exchange which was used, was
 87 attempted, or intended to be used in violation of the gambling
 88 laws of the state.

89 3. Any equipment, liquid or solid, which was being used,
 90 is being used, was attempted to be used, or intended to be used
 91 in violation of the beverage or tobacco laws of the state.

92 4. Any motor fuel upon which the motor fuel tax has not
 93 been paid as required by law.

94 5. Any personal property, including, but not limited to,
 95 any vessel, aircraft, item, object, tool, substance, device,
 96 weapon, machine, vehicle of any kind, money, securities, books,
 97 records, research, negotiable instruments, or currency, which
 98 was used or was attempted to be used as an instrumentality in
 99 the commission of, or in aiding or abetting in the commission
 100 of, any felony, whether or not comprising an element of the

101 felony, or which is acquired by proceeds obtained as a result of
 102 a violation of the Florida Contraband Forfeiture Act.

103 6. Any real property, including any right, title,
 104 leasehold, or other interest in the whole of any lot or tract of
 105 land, which was used, is being used, or was attempted to be used
 106 as an instrumentality in the commission of, or in aiding or
 107 abetting in the commission of, any felony, or which is acquired
 108 by proceeds obtained as a result of a violation of the Florida
 109 Contraband Forfeiture Act.

110 7. Any personal property, including, but not limited to,
 111 equipment, money, securities, books, records, research,
 112 negotiable instruments, currency, or any vessel, aircraft, item,
 113 object, tool, substance, device, weapon, machine, or vehicle of
 114 any kind in the possession of or belonging to any person who
 115 takes aquaculture products in violation of s. 812.014(2)(c).

116 8. Any motor vehicle offered for sale in violation of s.
 117 320.28.

118 9. Any motor vehicle used during the course of committing
 119 an offense in violation of s. 322.34(9)(a).

120 10. Any photograph, film, or other recorded image,
 121 including an image recorded on videotape, a compact disc,
 122 digital tape, or fixed disk, that is recorded in violation of s.
 123 810.145 and is possessed for the purpose of amusement,
 124 entertainment, sexual arousal, gratification, or profit, or for
 125 the purpose of degrading or abusing another person.



126 11. Any real property, including any right, title,
 127 leasehold, or other interest in the whole of any lot or tract of
 128 land, which is acquired by proceeds obtained as a result of
 129 Medicaid fraud under s. 409.920 or s. 409.9201; any personal
 130 property, including, but not limited to, equipment, money,
 131 securities, books, records, research, negotiable instruments, or
 132 currency; or any vessel, aircraft, item, object, tool,
 133 substance, device, weapon, machine, or vehicle of any kind in
 134 the possession of or belonging to any person which is acquired
 135 by proceeds obtained as a result of Medicaid fraud under s.
 136 409.920 or s. 409.9201.

137 12. Any personal property, including, but not limited to,
 138 any vehicle, item, object, tool, device, weapon, machine, money,
 139 security, book, or record, that is used or attempted to be used
 140 as an instrumentality in the commission of, or in aiding and
 141 abetting in the commission of, a person's third or subsequent
 142 violation of s. 509.144, whether or not comprising an element of
 143 the offense.

144 Section 3. This act shall take effect October 1, 2018.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 599 Lis Pendens
SPONSOR(S): Altman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 904

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	10 Y, 0 N	Tuszynski	Bond
2) Judiciary Committee		Tuszynski 	Poche 

SUMMARY ANALYSIS

An interest in real property is not effective unless the instrument creating such interest is recorded in the public records. In general, documents are recorded soon after creation to create a clear chain of title to real property. However, where there are multiple documents, the first recorded document takes priority over any filed later. Sometimes, an interest recorded during a lawsuit affecting a real property interest may take priority over the final resolution of title in the court case. A lis pendens resolves this situation.

A notice of lis pendens, meaning "pending lawsuit", may be recorded in any legal action where a court may affect an interest in real property. Where a lis pendens is recorded, the final disposition of the court relates back to the recording of the lis pendens, barring any document filed after the lis pendens from affecting the determination of the court.

In 2016, an appellate court ruled that a lis pendens terminated when the time to appeal the final judgment of foreclosure had expired. The effect of that ruling left a gap between the final judgment and judicial sale where an intervening interest could affect title. The court reversed that ruling on rehearing, holding that a lis pendens is valid through the judicial sale.

HB 599 provides that, in a proceeding involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title. This requirement maintains lis pendens protection against subordinate interests or liens, including those filed after a final order of judicial sale in a foreclosure case but before recording of an instrument transferring title. The bill applies to pending actions at the time of the effective date.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida is considered a "notice" state, meaning interest in real property is legally established through recorded notice, placing interests in order according to when they were recorded. Section 695.01, F.S., requires a person with any interest in real property to record that interest, giving constructive notice to any subsequent purchaser or lienor.

Lis Pendens

The term "lis pendens" literally means "pending lawsuit."¹ A notice of lis pendens is a statutory notice to all persons that certain identified property, real or personal, is the subject matter of pending litigation and the court has jurisdiction and control over the identified property.² This creates an exception to the notice system, barring enforcement of all interests and liens that arise after the filing of a notice of lis pendens, but allowing the holder of an unrecorded interest or lien to intervene in a proceeding within 30 days.³ If that interest holder does not intervene and the proceedings continue to a judicial sale, the property is forever discharged from all such unrecorded interests and liens, preventing impaired title.⁴ This protects the plaintiff from intervening liens that could impair any claimed property rights and protects future purchasers and lienors from becoming involved in disputed title.⁵

While a notice of lis pendens may be used in any legal action where title to real property may be at issue, it is most common in foreclosure actions. A mortgagee is allowed to record a notice of lis pendens as the action is based on a recorded instrument, the mortgage.⁶ The established understanding of lis pendens is that, except as otherwise provided by law, the protection from intervening interests and liens remains in effect through the judicial sale of the property and the subsequent issuance of the instrument transferring title.⁷ This understanding is evidenced by the language of Section 48.23(1)(d), F.S.:

" . . . [T]he recording of such notice of lis pendens . . . , constitutes a bar to the enforcement against the property described in the notice of all interests and liens, . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and **if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.** . . . "

The language of the lis pendens statute is the foundation for the following language found in the "Final Judgement of Foreclosure" - Form 1.996(a) of the Florida Rules of Civil Procedure:⁸

¹ Black's Law Dictionary (10th ed. 2014), lis pendens.

² S. 48.23, F.S.

³ S. 48.23(1)(d), F.S.

⁴ Id.

⁵ *Medical Facilities Development, Inc. v. Little Arch Creek Properties*, 675 So.2d 915, 917 (Fla. 1996); *Fischer v. Fischer*, 873 So.2d 534, 536 (Fla. 4th DCA 20014).

⁶ *Berkley Multi-Units v. Linder*, 464 So.2d 1356, 1357 (Fla. 4th DCA 1985).

⁷ Real Property, Probate & Trust Law Section of the Florida Bar, *White Paper on Proposal to Amend s. 48.23, F.S. (lis pendens)* (on file with Judiciary Committee Staff).

⁸ Available at: <https://www.floridabar.org/wp-content/uploads/2017/08/Civil-Procedure-Rules-Updated-8-4-2017.pdf>, pg. 223

“On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed.”

Ober v. Town of Lauderdale-by-the-Sea

On August 24, 2016, the Fourth District Court of Appeal ruled that a notice of lis pendens terminates when the time for appeal of the final judgment of foreclosure has passed. This ruling meant that code enforcement liens recorded after the final judgment of foreclosure and prior to the judicial sale *were not discharged* by the operation of the notice of lis pendens and remained an encumbrance on the real property.⁹

On January 25, 2017, the Fourth District Court of Appeal granted rehearing and reversed its previous ruling. The court found that liens placed on property between the entry of a final judgment of foreclosure and a judicial sale *are discharged* by s. 48.23(1)(d), F.S.¹⁰ The Court held that under a proper reading of s. 48.23(1)(d), F.S., where the proceeding is prosecuted to a judicial sale, the sale discharges all liens, whether recorded before or after the final judgment.¹¹ This ruling confirms that the notice of lis pendens is a bar to enforcing all interests or liens against the property, recorded or unrecorded, from the time of recording of the notice of lis pendens through the issuance of the certificate of sale. The Court concluded by stating:¹²

“Resolution of the competing interests—of the Town, the lending and title insurance industries, property owners, and buyers at foreclosure sales—is in the province of the legislature.”

On February 7, 2017, Lauderdale-by-the-Sea filed a Motion for Certification of a Question of Great Public Importance to the Florida Supreme Court. On March 22, 2017, the District Court of Appeal granted the motion and certified the following question:

“Whether, pursuant to section 48.23(1)(d), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank’s foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final foreclosure judgment, where the local government’s interest or lien on the property arises after final judgment and did not exist within 30 days after the recording of the notice of lis pendens.”

On September 6, 2017, the Florida Supreme Court issued an order declining to exercise jurisdiction and denying Lauderdale-by-the-Sea’s Petition for Review.¹³

Effect of Proposed Changes

HB 599 amends s. 48.23, F.S. to provide that, in a proceeding involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title. This requirement maintains lis pendens protection against subordinate interests or liens, including those filed after a final order of judicial sale in a foreclosure case but before an instrument transferring title is recorded. In effect, the bill codifies the final appellate resolution of *Ober*.

The bill applies to pending actions.

⁹ *Ober v. Town of Lauderdale-by-the-Sea*, 2016 WL 4468134 (Fla. 4th DCA Aug. 24, 2016), withdrawn; *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952 (Fla. 4th DCA 2017).

¹⁰ *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 954 (Fla. 4th DCA 2017).

¹¹ *Id.* at 954.

¹² *Id.*

¹³ *Town of Lauderdale-by-the-Sea v. Ober*, 2017 WL 3883662 (Fla. 2017).

The bill has an effective date of upon becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 48.23, F.S., relating to lis pendens.

Section 2: Applies the proposed changes to actions pending on the effective date of the bill.

Section 3: Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to lis pendens; amending s. 48.23,
 3 F.S.; providing that a person who acquires for a value
 4 a lien on property during the course of specified
 5 legal actions takes such lien free of claims in
 6 certain circumstances; specifying the effect of a
 7 valid, recorded notice of lis pendens in certain
 8 circumstances involving a judicial sale; providing
 9 applicability; providing an effective date.

10
 11 Be It Enacted by the Legislature of the State of Florida:

12
 13 Section 1. Paragraphs (b) and (d) of subsection (1) of
 14 section 48.23, Florida Statutes, are amended to read:

15 48.23 Lis pendens.—

16 (1)

17 (b)1. An action that is filed for specific performance or
 18 that is not based on a duly recorded instrument has no effect,
 19 except as between the parties to the proceeding, on the title
 20 to, or on any lien upon, the real or personal property unless a
 21 notice of lis pendens has been recorded and has not expired or
 22 been withdrawn or discharged.

23 2. Any person acquiring for value an interest in, or lien
 24 upon, the real or personal property during the pendency of an
 25 action described in subparagraph 1., other than a party to the

26 proceeding or the legal successor by operation of law, or
 27 personal representative, heir, or devisee of a deceased party to
 28 the proceeding, shall take such interest or lien exempt from all
 29 claims against the property that were filed in such action by
 30 the party who failed to record a notice of lis pendens or whose
 31 notice expired or was withdrawn or discharged, and from any
 32 judgment entered in the proceeding, notwithstanding the
 33 provisions of s. 695.01, as if such person had no actual or
 34 constructive notice of the proceeding or of the claims made
 35 therein or the documents forming the causes of action against
 36 the property in the proceeding.

37 (d) Except for the interest of persons in possession or
 38 easements of use, the recording of such notice of lis pendens,
 39 provided that during the pendency of the proceeding it has not
 40 expired pursuant to subsection (2) or been withdrawn or
 41 discharged, constitutes a bar to the enforcement against the
 42 property described in the notice of all interests and liens,
 43 including, but not limited to, federal tax liens and levies,
 44 unrecorded at the time of recording the notice unless the holder
 45 of any such unrecorded interest or lien intervenes in such
 46 proceedings within 30 days after the recording of the notice. If
 47 the holder of any such unrecorded interest or lien does not
 48 intervene in the proceedings and if such proceedings are
 49 prosecuted to a judicial sale of the property described in the
 50 notice, the property shall be forever discharged from all such



51 unrecorded interests and liens. A valid recorded notice of lis
52 pendens of such proceedings prosecuted to a judicial sale
53 remains in effect through the recording of any instrument
54 transferring title to the property pursuant to the final
55 judgment unless it expires, is withdrawn, or it is otherwise
56 discharged. If the notice of lis pendens expires or is withdrawn
57 or discharged, the expiration, withdrawal, or discharge of the
58 notice does not affect the validity of any unrecorded interest
59 or lien.

60 Section 2. This act is intended to clarify existing law
61 and shall apply to actions pending on the effective date of this
62 act.

63 Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 623 Out-of-Country Foreign Money Judgments
SPONSOR(S): Byrd
TIED BILLS: None **IDEN./SIM. BILLS:** SB 760

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	10 Y, 0 N	MacNamara	Bond
2) Judiciary Committee		 MacNamara	Poche 

SUMMARY ANALYSIS

Florida is not required to recognize or enforce an out-of-country foreign judgment. However, to encourage international trade and to encourage other countries to recognize Florida judgments, the state has elected to provide a limited framework for the recognition of foreign judgments. In general, all such judgments are recognized, although there are exceptions. Some exceptions are mandatory, others are discretionary.

HB 623 adds two discretionary exceptions whereby a Florida court is not required to recognize or enforce a foreign judgment. Specifically, a Florida court is not required to recognize or enforce a foreign judgment if:

- The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
- The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A person who holds a civil judgment against another person has certain legal rights related to enforcement and collection of the judgment. The United States Constitution requires Florida courts to give full faith and credit to judgments of other state courts, but is silent as to whether a state must give any faith or credit to judgments from foreign countries. While Congress could regulate whether and how states recognize a judgment from a foreign country under federal treaty powers, there is currently no federal law or treaty that requires Florida to recognize any foreign judgment.

In 1962, the National Conference of Commissioners on Uniform State Laws (NCCUSL)¹ developed the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which recognized the general principles of comity with respect to foreign money judgments. In its prefatory note, the NCCUSL stated:

The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than is required to do by the provisions of the Act. . . . Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.

The Act does not prescribe a uniform enforcement procedure. Instead, the Act provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.²

In order to encourage and regulate trade, and in order to encourage courts of other foreign countries to recognize Florida's judgments, Florida has adopted the Uniform Foreign Money-Judgments Recognition Act, at ss. 55.601-55.607, F.S. Section 55.604, F.S., provides that Florida will generally accept and enforce a judgment rendered in a foreign jurisdiction. Section 55.605, F.S., however, provides a number of grounds on which a Florida court either must or may refuse to recognize a judgment from a foreign country. A Florida court must refuse to recognize a foreign judgment:

- That was rendered under a system which does not provide impartial tribunals or does not provide due process of law;
- If the foreign court did not have personal jurisdiction over the defendant; or
- If foreign court did not have subject matter jurisdiction.³

A Florida court may refuse to recognize an out-of-country foreign judgment if:

- The defendant did not receive adequate notice of the foreign court proceedings;
- The judgment was obtained by fraud;
- The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state;
- The judgment conflicts with another final and conclusive order;

¹ The NCCUSL is a non-profit organization comprised of state commissions on uniform laws from each state and certain U.S. territories.

² Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Foreign Money-Judgments Recognition Act*, 1 (1962), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>, p. 1 (last accessed January 7, 2018).

³ S. 55.605(1)(a-c), F.S.

- The parties had an agreement to litigate the matter in a court other than the one that rendered the judgment;
- The foreign court was a seriously inconvenient forum for the trial of the action;
- The foreign jurisdiction where the judgment was rendered would not give recognition to a similar judgment rendered in this state; or
- The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press as provided by the United States Constitution and the state Constitution.⁴

Effect of Proposed Changes

HB 623 adds two exceptions whereby a Florida court may refuse to recognize or enforce a foreign judgment; one related to the integrity of the rendering court and the other related to due process of law. These exceptions are newly adopted provisions of the UFMJRA.⁵ These new exceptions may be contrasted with s. 55.605(1), F.S., which provides that a Florida court may not enforce a foreign judgment if:

The judgment was rendered under a system which does not provide impartial tribunals or procedures incompatible with the requirements of due process of law.

Integrity of the Rendering Court

The bill allows, but does not require, a Florida court to refuse to enforce a foreign judgment where the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court. In adopting this provision, the NCCUSL provided the following comment:

This provision may be contrasted with [s. 55.605(1), F.S.] which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a *judicial system* that does not provide impartial tribunals...

On the other hand, [the newly created exception] allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness in the *individual proceeding* leading to the foreign country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.⁶

Consequently, the exception would allow a Florida court to refuse to enforce a judgment where the integrity of the specific proceeding is called in to question, despite the fact that the foreign system may generally be impartial.

Due Process of Law

The United States Constitution and the Florida Constitution provide that no person may be deprived of life, liberty, or property without due process of law.⁷ Although there is no precise definition of "due

⁴ S. 55.605(2)(a-h), F.S.

⁵http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_am05_binder.pdf, p. 12-14 (last visited January 7, 2018).

⁶ *Id.* at p. 13, lines 12-19.

⁷ U.S. Const. amend. V., and Art. I, s. 5, Fla. Const., respectively.

process," the term embodies a fundamental conception of fairness.⁸ The federal and state Due Process clauses are intended to protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property.⁹

The bill allows, but does not require, a Florida court to refuse to enforce a foreign judgment where the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law. This is in contrast to s. 55.605(1), F.S., which focuses on the judicial system in its entirety, as opposed to a single proceeding. The NCCUSL provided the following comment on this distinction:

Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign country judgment.¹⁰

Similar to the other exception provided for in the bill, this exception would allow a Florida court to refuse to enforce a judgment where the fundamental fairness of a specific proceeding is called in to question, despite the fact that the foreign system may generally be fair.

B. SECTION DIRECTORY:

Section 1: Amends s. 55.605, F.S., related to grounds for nonrecognition.

Section 2: Provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

⁸ *Scull v. State*, 569 So.2d 1251 (Fla. 1990); see also *School Bd. Of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3d 1220 (Fla. 2009) (Due process calls for such procedural protections as the particular situation demands.).

⁹ *Noel v. State*, 191 So.3d 370 (Fla. 2016) ("This clause protects the individual against the arbitrary and unreasonable exercise of governmental power.") (internal citations omitted).

¹⁰ *Supra*, FN. 5 at p. 13, lines 30-35.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to out-of-country foreign money
 3 judgments; amending s. 55.605, F.S.; providing
 4 additional circumstances in which an out-of-country
 5 foreign judgment need not be recognized; providing an
 6 effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Paragraphs (i) and (j) are added to subsection
 11 (2) of section 55.605, Florida Statutes, to read:

12 55.605 Grounds for nonrecognition.—

13 (2) An out-of-country foreign judgment need not be
 14 recognized if:



15 (i) The judgment was rendered in circumstances that raise
 16 substantial doubt about the integrity of the rendering court
 17 with respect to the judgment.

18 (j) The specific proceeding in the foreign court leading
 19 to the judgment was not compatible with the requirements of due
 20 process of law.

21 Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6013 Return of Property
SPONSOR(S): Byrd
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 3 N	Bruno	Sumner
2) Judiciary Committee		Bruno 	Poche 

SUMMARY ANALYSIS

Section 933.14(3), F.S., requires law enforcement to retain a firearm until a court orders its return when the firearm has been taken either:

- Pursuant to a search warrant, or
- Without a search warrant upon an officer viewing a breach of the peace.

Section 877.03, F.S., establishes the crime of breach of the peace, criminalizing acts of a nature to corrupt the public morals; or outrage the sense of public decency; or affect the peace and quiet of persons who may witness them; or engaging in brawling or fighting; or engaging in such conduct as to constitute a breach of the peace or disorderly conduct. A person who violates s. 877.03 commits a second degree misdemeanor, punishable by up to 60 days in the county jail and a \$500 fine.

Courts have broadly interpreted breach of the peace to include *all* violations of the public peace, order or decorum. While broad, the common law definition does not apply to displays of mental illness that do not result in a criminal investigation or charges, as when law enforcement involuntarily commits an individual under the Baker Act.

HB 6013 repeals s. 933.14(3), F.S., which requires a court order for the return of a firearm that was confiscated either pursuant to a warrant or without a warrant upon law enforcement viewing a breach of the peace. Law enforcement will be able to return a firearm that was seized under those circumstances without a court order but may still retain the firearm if otherwise authorized by law.

The bill does not have a fiscal impact on state or local governments.

The bill provides an effective date upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

In Florida, a law enforcement agency is required to take possession of a firearm found on a person pursuant to an arrest and must retain the firearm until after disposition of the case.¹ If the person is later acquitted or the charges are dismissed, he or she is entitled to the return of the firearm.² If a person has been arrested for committing or attempting to commit a felony offense while carrying, displaying, using, threatening, or attempting to use a firearm³, the firearm is automatically forfeited to the state if that person is later convicted of the offense.⁴

Additionally, s. 933.14(3), F.S., requires law enforcement to retain firearms that are confiscated under specific circumstances. A firearm must be retained by law enforcement until there is a court order for its return when the firearm was taken either:

- Pursuant to a search warrant; or
- Without a search warrant, by an officer upon viewing a breach of the peace.

Section 877.03, F.S., criminalizes "such acts as are of a nature to corrupt the public morals; or outrage the sense of public decency; or affect the peace and quiet of persons who may witness them; or engages in brawling or fighting; or engages in such conduct as to constitute a breach of the peace or disorderly conduct."⁵ A person who violates s. 877.03 commits a second degree misdemeanor.⁶ In interpreting s. 933.14(3), F.S., courts have used a broad common law definition of breach of the peace, which includes "all violations of the public peace, order or decorum."⁷

Law enforcement agencies used s. 933.14(3), F.S., to retain the firearms of persons they encounter related to an involuntary commitment under Florida's Baker Act.⁸ In response to this trend, the Florida Attorney General's Office issued an advisory opinion in 2009 concluding that if law enforcement involuntarily commits a person under the Baker Act but does not arrest or charge that person for a criminal offense of any kind, the law enforcement agency is not authorized to retain a firearm taken from that person.⁹

In 2016, the Fourth District Court of Appeals addressed law enforcement's authority to retain a firearm that was confiscated during a safety check.¹⁰ In that case, the plaintiff was neither arrested nor involuntarily committed pursuant to the Baker Act; however, law enforcement impounded his lawfully-owned firearm. When the plaintiff later requested the return of the firearm, the law enforcement agency declined to do so without a court order, citing to s. 933.14(3), F.S. Relying on the legislative intent of the Baker Act¹¹, as well as the prior Florida Attorney General opinion, the court found that persons do not commit a breach of the peace constituting a violation of the law simply for exhibiting behavior related to mental health issues.¹² Additionally, the court held that s. 933.14(3), F.S., did not require or

¹ "Every officer making an arrest under s. 790.07, or under any other law or municipal ordinance within the state, shall take possession of any weapons, electric weapons or devices, or arms mentioned in s. 790.07 found upon the person arrested and deliver them to the sheriff of the county, or the chief of police of the municipality wherein the arrest is made, who shall retain the same until after the trial of the person arrested." S. 790.08(1), F.S.

² S. 790.08(3), F.S.

³ S. 790.07(2), F.S.

⁴ S. 790.08(2), F.S.

⁵ S. 877.03, F.S.

⁶ A second degree misdemeanor is punishable by up to 60 days in the county jail and a \$500 fine. SS. 775.082, F.S., and 775.083, F.S.

⁷ *Dougan v. Bradshaw*, 198 So.3d 878, 883 (Fla. 4th DCA 2016) (quoting *B.A.A. v. State*, 333 So.2d 552, 554 (Fla. 3d DCA 1976)).

⁸ Also known as "The Florida Mental Health Act," the Baker Act provides for emergency services and temporary detention of an individual for a mental health evaluation when required. S. 394.453(1)(b)(1), F.S.

⁹ 09-04 Fla. Op. Att'y Gen. (2009)

¹⁰ *Supra*, FN 7 at 886.

¹¹ The court relied on portions of the Baker Act directing that procedures, facilities, vehicles, and restraining devices used in connection with those accused of a crime shall not be used in connection with those who have a mental illness, except for the protection of the patient or others. S. 394.459(1), F.S.

¹² *Supra*, FN 7 at 882.

permit law enforcement agencies to retain firearms that were taken "in response to a safety call which did not result in a criminal investigation or charges."¹³

A. EFFECT OF PROPOSED CHANGES:

HB 6013 repeals s. 933.14(3), F.S., requiring a court order prior to the return of a pistol or firearm that was impounded pursuant to a warrant or upon a view by the officer of a breach of the peace. Law enforcement will be able to return a firearm that was seized under those circumstances without a court order, but the agency may hold the firearm if otherwise authorized by law.

The bill provides an effective date upon becoming law.

B. SECTION DIRECTORY:

Section 1: Amends s. 933.14, F.S., relating to return of property taken under search warrant.

Section 2: Provides an effective date upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

¹³ Id.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not impact the holding in *Dougan v. Bradshaw*, 198 So.3d 878 (Fla. 4th DCA 2016), which will remain the law regarding safety checks that do not result in criminal charges or a criminal investigation.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
 2 An act relating to return of property; amending s.
 3 933.14, F.S.; deleting a provision requiring a court
 4 to order the return of a pistol or firearm when the
 5 pistol or firearm is taken by an officer with a search
 6 warrant or without a search warrant upon viewing a
 7 breach of the peace; providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Subsection (3) of section 933.14, Florida
 12 Statutes, is amended to read:



13 933.14 Return of property taken under search warrant.—

14 ~~(3) No pistol or firearm taken by any officer with a~~
 15 ~~search warrant or without a search warrant upon a view by the~~
 16 ~~officer of a breach of the peace shall be returned except~~
 17 ~~pursuant to an order of a trial court judge.~~

18 Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6021 Guardian Ad Litem Direct-Support Organization
SPONSOR(S): Stevenson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 222

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	13 Y, 0 N	Tuszynski	Bond
2) Judiciary Committee		Tuszynski 	Poche 

SUMMARY ANALYSIS

A direct-support organization (DSO) is a non-profit organization authorized by statute to carry out specific tasks in support of a public entity or public cause. In 2014, the Legislature established transparency and reporting requirements for DSOs, including the requirement that DSO authorization is repealed on October 1 of the 5th year after enactment, unless reviewed and reenacted by the Legislature. A number of existing DSOs were scheduled for future repeal.

The Guardian ad Litem (GAL) Program established its DSO, the Florida Guardian ad Litem Foundation, in 2007, with a mission to provide additional resources for the GAL Program, its volunteers, and its affiliated circuit nonprofit organizations to promote GAL representation for abused, neglected and abandoned children in Florida's dependency system. The GAL Foundation achieves this by soliciting grants, enhancing volunteer recruitment and retention opportunities, and offering supplemental training to staff and volunteers. The Guardian ad Litem Foundation's authorization is set to repeal on October 1, 2018.

HB 6021 removes the scheduled repeal date for the Guardian ad Litem Foundation, the DSO for the Statewide Guardian ad Litem Office.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Direct-Support Organizations

A direct-support organization (DSO) is a non-profit organization authorized by statute to carry out specific tasks in support of a public entity or public cause. The function and purpose of a DSO is detailed in its enacting statute and the contract with the agency the DSO was created to support.¹

DSO Transparency and Reporting Requirements

In 2014, the Legislature created s. 20.058, F.S., establishing transparency and reporting requirements for DSOs.² Specifically, the law requires each DSO submit annually the following information to the agency it was created to support by August 1:³

- The name, mailing address, telephone number, and website address of the organization;
- The statutory authority or executive order that created the organization;
- A brief description of the mission of, and results obtained by, the organization;
- A brief description of the organization's plans for the next three fiscal years;
- A copy of the organization's code of ethics; and
- A copy of the organization's most recent Internal Revenue Service (IRS) Form 990.⁴

Additionally, the information submitted annually by a DSO must be available on the agency's website and include a link to the DSO's website, if one exists.⁵ A contract between an agency and a DSO must be contingent upon the DSO submitting the required information to the agency and posting the information on the agency's website.⁶ The contract must include a provision for ending operations and returning state-issued funds if the authorizing statute is repealed, the contract is terminated, or the organization is dissolved.⁷ If a DSO fails to submit the required information to the agency for two consecutive years, the agency head must terminate its contract with the DSO.⁸

By August 15 of each year, the agency must report to the Governor, President of the Senate, Speaker of the House of Representatives, and the Office of Program Policy Analysis and Government Accountability the information submitted by each DSO, along with the agency's recommendation and supporting rationale to continue, terminate, or modify the agency's association with the DSO.⁹

Any law creating or authorizing a DSO must provide that the authorization is repealed on October 1 of the 5th year after enactment, unless reviewed and reenacted by the Legislature. A list of DSOs in existence prior to July 1, 2014 and scheduled for repeal in 2018 and 2019 is below:

¹ SS. 14.29(9)(a), 16.616(1), and 258.015(1), F.S. See also Rules of the Florida Auditor General, *Audits of Certain Nonprofit Organizations* (effective June 30, 2017), Rule 10.720(1)(b) and (d), available at: https://flauditor.gov/pages/pdf_files/10_700.pdf (last accessed January 6, 2018).

² S. 3, Ch. 2014-96, L.O.F.

³ S. 20.058(1), F.S.

⁴ The IRS Form 990 is an annual information return required to be filed with the IRS by most organizations exempt from federal income tax under 26 U.S.C. 501. 26 C.F.R. 1.6033-2.

⁵ S. 20.058(2), F.S.

⁶ S. 20.058(4), F.S.

⁷ Ch. 2017-75, L.O.F.

⁸ *Supra*, FN 6.

⁹ S. 20.058(3), F.S.

DSOs Scheduled for Repeal ¹⁰	
October 1, 2018	October 1, 2019
<ul style="list-style-type: none"> • Guardian ad Litem Program Foundation (s. 39.8298(8), F.S.) • Florida Department of Law Enforcement for Florida Missing Children's Day (s. 683.231(8), F.S.) • Department of Corrections (s. 944.802(4), F.S.) • Executive Office of the Governor to assist victims of adult and juvenile crime. (s. 960.002(6), F.S.) • Department of Juvenile Justice (s. 985.672(7), F.S.) 	<ul style="list-style-type: none"> • Department of Environmental Protection (s. 20.2551(6), F.S.) • Division of Library and Information Services (s. 257.43(4), F.S.) • Division of Recreation and Parks (s. 258.015(4), F.S.) • Babcock Ranch Preserve (s. 259.10521(4), F.S.) • Division of Cultural Affairs (s. 265.703(4), F.S.) • Division of Historical Resources (s. 267.17(4), F.S.) • Florida Tourism Industry Marketing Corporation (ss. 288.1226(9) and 288.923(6), F.S.) • Florida Intergovernmental Relations Foundation (s. 288.809(5), F.S.) • Fish and Wildlife Conservation Commission (s. 379.223(4), F.S.) • Department of Agriculture and Consumer Services (s. 570.691(10), F.S.) • Florida Beef Council (s. 570.83(14), F.S.)

Current law requires all DSOs in existence prior to July 1, 2014 to be reviewed by the Legislature by July 1, 2019.¹¹

DSO Audit Requirements

Section 215.981, F.S., requires each DSO with annual expenditures in excess of \$100,000 to conduct an annual financial audit of its accounts and records.¹² The audit must be conducted by an independent certified public accountant in accordance with rules adopted by the Auditor General and the state agency that created, approved, or administers the DSO. The audit report must be submitted within nine months after the end of the fiscal year to the Auditor General and to the state agency the DSO supports. Additionally, the Auditor General may, pursuant to his or her own authority, or at the direction

¹⁰ Supra, FN 2.

¹¹ S. 20.058(5), F.S.

¹² The independent audit requirement does not apply to a DSO for a university, district board of trustees of a community college, or district school board. Additionally, the expenditure threshold for an independent audit is \$300,000 for a DSO for the Department of Environmental Protection and the Department of Agriculture and Consumer Services.

of the Legislative Auditing Committee, conduct audits or other engagements of DSO accounts and records.¹³

The Guardian ad Litem Program

Florida's Guardian ad Litem Program (GAL Program) advocates for the best interests of children alleged to be abused, neglected, or abandoned and who are involved in dependency proceedings.¹⁴ The GAL Program uses a collaborative approach to represent children in the dependency system involving GAL volunteers, Child Advocacy Managers and GAL Program attorneys.¹⁵ Currently the GAL Program advocates for more than 10,000 children in the dependency system. Over the last 35 years the GAL Program has had over 30,000 volunteers who have represented more than 250,000 children.¹⁶

Current law requires that a guardian ad litem (GAL) be appointed at the earliest possible time in an abuse or neglect proceeding.¹⁷ The GAL is required to review all disposition recommendations and changes in placement, and must be present at all critical stages of the dependency proceeding or submit a written report of recommendations to the court.¹⁸

The Guardian ad Litem Foundation

The GAL Program established the Florida Guardian ad Litem Foundation (Foundation) as its DSO in 2007. The executive director of the Statewide GAL Office appoints the members of the board of directors. The board of directors serves at the pleasure of the executive director in carrying out the mission of the DSO, which is to provide additional resources for the GAL Program, its volunteers, and its affiliated circuit nonprofit organizations¹⁹ in order to promote GAL representation for abused, neglected and abandoned children in Florida's dependency system.²⁰ The DSO is scheduled for repeal on October 1, 2018, unless reviewed and saved from repeal by the Legislature.²¹

According to the Statewide GAL Program, the Foundation continues to provide support to the GAL Program and serves the critical function of soliciting and receiving grants and resources from private and philanthropic organizations. In addition, the Foundation conducts the following activities that further the GAL Program's mission:²²

- Developing statewide partnerships;
- Publicizing the GAL Program's mission to represent the best interests of children;
- Coordinating with and serving as a resource to the twenty non-profit organizations affiliated with local GAL Programs;
- Enhancing opportunities for recruitment and retention of volunteers; and
- Offering supplemental training opportunities for volunteers.

For the tax period beginning July 1, 2016 and ending June 30, 2017, the Foundation reported total revenue of \$178,092 and total expenditures of \$153,467.²³

¹³ S. 11.45(3), F.S.

¹⁴ S. 39.8201(1), F.S.

¹⁵ Florida Guardian ad Litem Program, Annual Report, 2016, *A Voice Heard: Visualizing a Hopeful Future*, available at: <http://guardianadlitem.org/wp-content/uploads/2014/08/GAL-Annual-Report-for-Print4.pdf>. (last accessed January 6, 2018).

¹⁶ Id.

¹⁷ S. 39.822(1), F.S.

¹⁸ S. 39.822(4), F.S.

¹⁹ Many of Florida's judicial circuits have non-profit organizations that raise money and sponsor activities for the local Guardian ad Litem program. Those include, Northwest Guardian ad Litem Foundation, Guardian ad Litem Foundation of Florida's First Coast, Child Advocates II of Tallahassee, and Voices for Children.

²⁰ Guardian ad Litem Foundation, *Bylaws 2016*, available at: <http://flgal.org/about/> (last accessed January 6, 2018).

²¹ S. 39.8298, F.S.

²² Florida Statewide Guardian ad Litem Program, *Annual Report of the Florida Guardian ad Litem Foundation*, August 10, 2017, available at: <http://flgal.org/wp-content/uploads/2017/07/GAL-Program-Report-to-Governor-re-Foundation-FINAL.pdf>. (last accessed January 6, 2018).

²³ Internal Revenue Service, Form 990, Return of Organization Exempt From Income Tax, 2016 (on file with Judiciary Committee staff).

Effect of the Bill

HB 6021 removes the scheduled repeal date for the Guardian ad Litem Foundation, the direct-support organization for the Statewide Guardian ad Litem Office. As a result, the DSO will remain in existence until the executive director of the GAL program terminates the contract with the DSO or the DSO is dissolved by the legislature.²⁴

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 39.8298, F.S., relating to Guardian ad Litem direct-support organization.
Section 2: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
None.
2. Expenditures:
None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The GAL Program has stated that without the Foundation, it would have fewer opportunities to educate, advocate, and support the needs of dependent children.

The Program recommends the continuation of the Foundation as its DSO.²⁵

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

²⁵ Id.

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A bill to be entitled
An act relating to the guardian ad litem direct-
support organization; amending s. 39.8298, F.S.;
abrogating the future repeal of provisions related to
the guardian ad litem direct-support organization;
providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (8) of section 39.8298, Florida
Statutes, is amended, and subsections (1) through (7) of that
section are republished, to read:

39.8298 Guardian ad litem direct-support organization.—

(1) AUTHORITY.—The Statewide Guardian Ad Litem Office
created under s. 39.8296 is authorized to create a direct-
support organization.

(a) The direct-support organization must be a Florida
corporation not for profit, incorporated under the provisions of
chapter 617. The direct-support organization shall be exempt
from paying fees under s. 617.0122.

(b) The direct-support organization shall be organized and
operated to conduct programs and activities; raise funds;
request and receive grants, gifts, and bequests of moneys;
acquire, receive, hold, invest, and administer, in its own name,
securities, funds, objects of value, or other property, real or

26 | personal; and make expenditures to or for the direct or indirect
 27 | benefit of the Statewide Guardian Ad Litem Office.

28 | (c) If the executive director of the Statewide Guardian Ad
 29 | Litem Office determines the direct-support organization is
 30 | operating in a manner that is inconsistent with the goals and
 31 | purposes of the Statewide Guardian Ad Litem Office or not acting
 32 | in the best interest of the state, the executive director may
 33 | terminate the contract and thereafter the organization may not
 34 | use the name of the Statewide Guardian Ad Litem Office.

35 | (2) CONTRACT.—The direct-support organization shall
 36 | operate under a written contract with the Statewide Guardian Ad
 37 | Litem Office. The written contract must, at a minimum, provide
 38 | for:

39 | (a) Approval of the articles of incorporation and bylaws
 40 | of the direct-support organization by the executive director of
 41 | the Statewide Guardian Ad Litem Office.

42 | (b) Submission of an annual budget for the approval by the
 43 | executive director of the Statewide Guardian Ad Litem Office.

44 | (c) The reversion without penalty to the Statewide
 45 | Guardian Ad Litem Office, or to the state if the Statewide
 46 | Guardian Ad Litem Office ceases to exist, of all moneys and
 47 | property held in trust by the direct-support organization for
 48 | the Statewide Guardian Ad Litem Office if the direct-support
 49 | organization ceases to exist or if the contract is terminated.

50 | (d) The fiscal year of the direct-support organization,

51 | which must begin July 1 of each year and end June 30 of the
 52 | following year.

53 | (e) The disclosure of material provisions of the contract
 54 | and the distinction between the Statewide Guardian Ad Litem
 55 | Office and the direct-support organization to donors of gifts,
 56 | contributions, or bequests, as well as on all promotional and
 57 | fundraising publications.

58 | (3) BOARD OF DIRECTORS.—The executive director of the
 59 | Statewide Guardian Ad Litem Office shall appoint a board of
 60 | directors for the direct-support organization. The executive
 61 | director may designate employees of the Statewide Guardian Ad
 62 | Litem Office to serve on the board of directors. Members of the
 63 | board shall serve at the pleasure of the executive director.

64 | (4) USE OF PROPERTY AND SERVICES.—The executive director
 65 | of the Statewide Guardian Ad Litem Office:

66 | (a) May authorize the use of facilities and property other
 67 | than money that are owned by the Statewide Guardian Ad Litem
 68 | Office to be used by the direct-support organization.

69 | (b) May authorize the use of personal services provided by
 70 | employees of the Statewide Guardian Ad Litem Office. For the
 71 | purposes of this section, the term "personal services" includes
 72 | full-time personnel and part-time personnel as well as payroll
 73 | processing.

74 | (c) May prescribe the conditions by which the direct-
 75 | support organization may use property, facilities, or personal

76 services of the office.

77 (d) Shall not authorize the use of property, facilities,
 78 or personal services of the direct-support organization if the
 79 organization does not provide equal employment opportunities to
 80 all persons, regardless of race, color, religion, sex, age, or
 81 national origin.

82 (5) MONEYS.—Moneys of the direct-support organization may
 83 be held in a separate depository account in the name of the
 84 direct-support organization and subject to the provisions of the
 85 contract with the Statewide Guardian Ad Litem Office.

86 (6) ANNUAL AUDIT.—The direct-support organization shall
 87 provide for an annual financial audit in accordance with s.
 88 215.981.

89 (7) LIMITS ON DIRECT-SUPPORT ORGANIZATION.—The direct-
 90 support organization shall not exercise any power under s.
 91 617.0302(12) or (16). No state employee shall receive
 92 compensation from the direct-support organization for service on
 93 the board of directors or for services rendered to the direct-
 94 support organization.

95 ~~(8) REPEAL. This section is repealed October 1, 2018,~~
 96 ~~unless reviewed and saved from repeal by the Legislature.~~

97 Section 2. This act shall take effect upon becoming a law.



STORAGE NAME: h6515a.JDC.DOCX
DATE: 1/9/2018

January 9, 2018

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: CS/HB 6515 - Representative Altman
Relief/Cathleen Smiley/Brevard County

THIS IS AN UNCONTESTED CLAIM FOR \$25,000 AGAINST BREVARD COUNTY FOR INJURIES AND DAMAGES SUFFERED BY CATHLEEN SMILEY WHEN A BREVARD COUNTY BUS CAUSED ANOTHER VEHICLE TO CRASH INTO HER TRUCK ON JUNE 18, 1998.

FINDINGS OF FACT:

Cathleen Smiley ("Claimant"), while driving a two-door, 1994 Ford Ranger pickup truck on June 18, 1998, was the victim of a severe chain reaction accident caused by a bus owned and operated by Brevard County ("the County").

On the day of the accident, Claimant's truck was momentarily stopped on a public roadway while waiting to make a left turn. A van approached Claimant's truck from behind in the same lane and began slowing down. Meanwhile, a County bus rapidly approached the van from behind at about 45 miles per hour. As the bus approached the slowing van, the bus failed to adequately brake and crashed into the van, which in turn crashed into Claimant's truck. The crash resulted in disabling damage to each vehicle. Claimant was wearing her seatbelt at the time of the crash.

When Claimant's truck was hit from behind, her head smashed into the back window, splintering the glass and knocking her unconscious. Claimant received 38 stitches in the back of her head as a result.

After the accident, Claimant required physical therapy and her medical bills accrued, causing substantial strain on her family. Moreover, due to the injuries sustained in the accident, as a certified nursing assistant Claimant was no longer able to fulfill the physically demanding requirements of her work.¹

Dr. Christopher Prusinski, a board-certified neurologist who examined Claimant the month after the car accident, opined that Claimant had suffered a permanent impairment. He stated that Claimant would likely need periodic and lifelong chiropractic care or physical therapy.

After the accident, the County initiated disciplinary proceedings against the bus driver, ultimately terminating his employment for his actions relating to the accident.

LITIGATION HISTORY:

On or about February 29, 2000, Claimant and her husband filed suit against the County. However, they were not the only plaintiffs injured in the accident. Three other plaintiffs resolved their cases with the County first, and the County's payments to those plaintiffs have reached the sovereign immunity limit of \$200,000. As a result, the County has been unable to pay Claimant any recovery except for property damage compensation. Claimant's remaining remedy is the passage of a claim bill.

Claimant entered into a settlement agreement with the County on May 27, 2014, for \$25,000. The Brevard County Board of County Commissioners has approved the settlement.

CLAIMANT'S POSITION:

Claimant argues the County is liable for the injuries she sustained from the accident and seeks the amount agreed upon in the settlement agreement.

RESPONDENT'S POSITION:

The County wholly admits fault for the accident and does not oppose the claim bill.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or a settlement agreement, each claim bill is reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

At the time of the accident, the County bus was operated by a County employee in the scope of his employment. The County owed a duty to Claimant and others upon the roadway to operate its bus in a reasonably safe manner and breached this duty when the bus driver negligently failed to brake and rear-ended a van, causing the accident.

¹ Claimant now works in a less physically demanding job.

Causation

The County's breach of the duty of care caused Claimant's injuries when the County bus crashed into the van, causing it to rear-end Claimant's truck.

Damages

Damages for \$25,000 are wholly reasonable under the circumstances and supported by the evidence. As a result of the accident, Claimant was knocked unconscious and sustained injuries resulting in medical bills over \$22,000. Some of those bills are outstanding, and Claimant continues to suffer pain and discomfort. Moreover, the accident caused Claimant to be unable to work for a time and caused significant stress and financial strain on her family life.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorney has agreed to take 25 percent of the total recovery in fees, and there are no lobbying fees. Outstanding costs are \$2,343.12.

COLLATERAL SOURCES:

Claimant received \$10,000 from Allstate Insurance as a result of a personal injury protection (PIP) insurance plan. That money went towards medical bills as well as supporting Claimant while she was unemployed after the accident. Claimant also received from the County \$8,650 for the property damage to the truck.

RESPONDENT'S ABILITY
TO PAY:

The County states that it is able to pay the full amount of \$25,000 out of its self-insurance fund without affecting county operations.

LEGISLATIVE HISTORY:

This is the first time this claim bill has been presented to the Legislature.²

RECOMMENDATION:

I recommend that House Bill 6515 be reported **FAVORABLY**.

Respectfully submitted,



JORDAN JONES

House Special Master

cc: Representative Altman, House Sponsor
Senator Mayfield, Senate Sponsor
Kellie Cochran, Senate Special Master

² The Legislature has previously paid claim bills arising out of this same accident to two other claimants. House Bills 797 and 799 (2003) were for the relief of the driver and a passenger of the van struck by the County bus.

1 A bill to be entitled
 2 An act for the relief of Cathleen Smiley by Brevard
 3 County; providing for an appropriation to compensate
 4 Cathleen Smiley for personal injuries and damages
 5 sustained in an automobile accident caused by a
 6 Brevard County employee; providing for payment by
 7 Brevard County; providing a limitation on the payment
 8 of fees and costs; providing an effective date.

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 10 WHEREAS, on June 18, 1998, Cathleen Smiley was the driver
 11 of her vehicle when it was struck in the rear section by a van
 12 driven by Howard Evarts which had been struck in the rear
 13 section by a passenger bus owned by the Brevard County Board of
 14 County Commissioners, and

15 WHEREAS, the Brevard County employee operating the bus was
 16 traveling at approximately 45 miles per hour when the bus hit
 17 the vehicle in which Mr. Evarts was traveling, causing Mr.
 18 Evarts' vehicle to hit Ms. Smiley's vehicle, and

19 WHEREAS, the vehicles which Ms. Smiley and Mr. Evarts were
 20 operating were appropriately stopped in their lane of travel
 21 waiting to make a left turn, and

22 WHEREAS, at the time of the accident, Ms. Smiley was
 23 without personal resources for medical insurance, other than
 24 nominal personal injury protection, to adequately care for the
 25 injuries she suffered as a result of the accident, and

26 WHEREAS, Ms. Smiley was knocked unconscious and suffered
 27 permanent injuries to the neck and left shoulder, and

28 WHEREAS, Christopher Prusinski, D.O., a neurologist in
 29 Brevard County, has opined that Ms. Smiley has reached maximum
 30 medical improvement and has an 8 percent whole body impairment
 31 due to the accident, and

32 WHEREAS, Dr. Prusinski also has opined that Ms. Smiley will
 33 require extensive future chiropractic care and treatment, and

34 WHEREAS, since the accident Ms. Smiley has required
 35 continuing care and treatment, and it is anticipated that she
 36 will require ongoing care in the future, including chiropractic
 37 treatment and periodic medical intervention and diagnostic
 38 testing, and

39 WHEREAS, on January 25, 2016, a consent judgment was
 40 entered after Ms. Smiley and Brevard County agreed to a
 41 stipulated judgment in the amount of \$25,000 in case number 05-
 42 2000-CA-004291-XXXX-XX, and

43 WHEREAS, Ms. Smiley is one of five persons who filed
 44 lawsuits related to the accident, and

45 WHEREAS, at the time Ms. Smiley filed her lawsuit, on or
 46 about February 29, 2000, Brevard County had already paid
 47 property damage, medical, and injury claims totaling \$101,410.
 48 Additionally, the county was evaluating two additional related
 49 personal injury lawsuits, and

50 WHEREAS, after these property damage, medical, and injury

51 claims were settled, only \$98,590 remained to resolve the other
 52 claims filed in connection with the accident, and

53 WHEREAS, Howard and Sharon Evarts and Alan Hammer filed
 54 their lawsuits against Brevard County on June 24, 1999, and

55 WHEREAS, consent judgments were entered by the Circuit
 56 Court for the 18th Judicial Circuit in Brevard County on
 57 November 30, 2000, pursuant to an agreement entered into by
 58 plaintiffs Evarts and Hammer and Brevard County for stipulated
 59 judgments in case numbers 05-1999-CA-025509-XXXX-XX (Evarts) and
 60 05-1999-CA025510-XXXX-XX (Hammer), each in the amount \$125,000,
 61 and

62 WHEREAS, Mr. Evarts and Mr. Hammer each received \$49,295
 63 out of the remaining balance of \$98,590 of the county's \$200,000
 64 sovereign immunity limitation and, pursuant to their settlement
 65 agreements with Brevard County, received the balance of their
 66 judgments through the claim bill process as articulated in
 67 chapter 2003-346, Laws of Florida, and chapter 2003-345, Laws of
 68 Florida, respectively, and

69 WHEREAS, Brevard County and Ms. Smiley agreed that she
 70 would pursue payment of the stipulated judgment due her in the
 71 amount of \$25,000 from the county through the claim bill
 72 process, and

73 WHEREAS, Brevard County has agreed that it would not oppose
 74 a claim bill being rendered against the county in this matter
 75 and would support same, NOW, THEREFORE,

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Be It Enacted by the Legislature of the State of Florida:

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. Brevard County is authorized and directed to appropriate from funds of the county not otherwise appropriated and to draw a warrant in the sum of \$25,000 payable to Cathleen Smiley, now known as Cathleen Waller, to compensate her for personal injuries and damages sustained.

Section 3. The amount paid by Brevard County pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in injuries and damages to Cathleen Smiley. Of the amount awarded under this act, the total amount paid for attorney fees may not exceed \$6,250, no amount may be paid for lobbying fees, and the total amount paid for costs and other similar expenses relating to this claim may not exceed \$2,343.12.

Section 4. This act shall take effect upon becoming a law.

IN RE SENATE BILL 52 – RELIEF OF CATHLEEN SMILEY BY BREVARD COUNTY

AND

HOUSE BILL 6515 – RELIEF/CATHLEEN SMILEY/BREVARD COUNTY

ATTORNEY'S FEE AND COST AFFIDAVIT

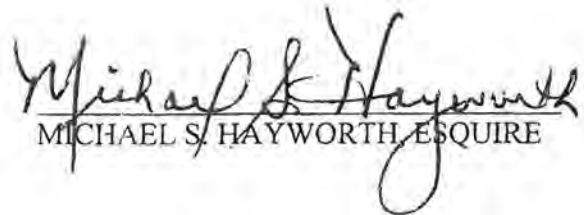
STATE OF FLORIDA

COUNTY OF BREVARD

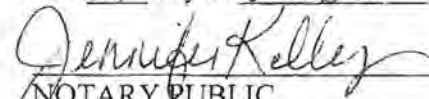
PERSONALLY appeared before me, a Notary Public, MICHAEL S. HAYWORTH, ESQUIRE, who upon being duly sworn, deposes and states:

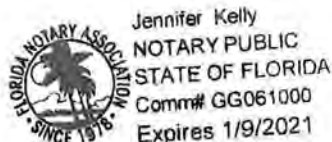
1. I am the attorney of record for the Plaintiff in the above-captioned matter.
2. Pursuant to Section §768.28, Florida Statutes, the attorney's fees in the above-captioned matter are capped at 25% of any judgment or settlement.
3. There are no lobbyist fees or costs associated with these Claims Bills.
4. Other costs incurred to date total \$2,343.12 and are made up of the specific costs as detailed on the attached Itemization of Costs.

Further, Affiant sayeth not.


MICHAEL S. HAYWORTH, ESQUIRE

SWORN TO and subscribed before me
this 31st day of October, 2017.


NOTARY PUBLIC
My Commission Expires: 1/9/2021



IN RE SENATE BILL 52 – RELIEF OF CATHLEEN SMILEY BY BREVARD COUNTY

AND

HOUSE BILL 6515 – RELIEF/CATHLEEN SMILEY/BREVARD COUNTY

ITEMIZATION OF COSTS

Fee for copy of accident report	:	\$1.00
Fee for Defendant owner information	:	\$0.50
Fee for Defendant 7 year driver history	:	\$3.10
Fee for copies of medical records	:	\$51.94
Fee for recorded statement of Dr. Prusinski	:	\$200.00
Fee for transcript of recorded statement	:	\$105.70
Fee for color copies of PD photographs	:	\$19.14
Fee for filing of Complaint and service of process	:	\$378.00
Fee for filing of non-resident cash bond	:	\$5.00
Fee for overnight delivery charges	:	\$149.22
Mileage and toll reimbursement	:	\$413.92
Fee for legal research and person searches	:	\$36.40
Fee for publication of Claims Bill	:	\$21.16
Fee for Court Reporter for Skype attendance	:	\$250.00
Hotel expense for attendance at hearing	:	\$168.38
Long distance telephone expenses	:	\$44.78
Fee for postage, copies and facsimiles	:	<u>\$494.88</u>
Total Costs	:	<u>\$2,343.12</u>



STORAGE NAME: h6517a.JDC.DOCX
DATE: 1/9/2018

January 9, 2018

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: CS/HB 6517 - Representative Cortes
Relief/Robert Allan Smith/Orange County

THIS IS A CONTESTED CLAIM FOR \$750,000¹ AGAINST ORANGE COUNTY FOR INJURIES AND DAMAGES SUFFERED BY ROBERT ALLAN SMITH WHEN HIS MOTORCYCLE WAS STRUCK BY AN ORANGE COUNTY WORK VAN ON SEPTEMBER 7, 2006.

FINDINGS OF FACT:

This matter arises out of a motor vehicle crash that occurred on September 7, 2006, in Orlando, Florida, at the intersection of DePauw Avenue and Orlando Street. DePauw Avenue runs north/south and Orlando Street runs east/west. This intersection is located in a residential neighborhood where the speed limit is 25 miles per hour. It is a four-way intersection with Orlando having stop signs and DePauw having the right-of-way and no stop signs. The accident occurred during daylight hours on a dry day.

On the day of the accident, Robert Allan Smith ("Claimant"), who lived on DePauw Avenue, was repairing his motorcycle, which had recently idled out. He assembled and disassembled several parts and test-drove the motorcycle around the block twice. According to Claimant, the motorcycle would falter when changing gears and not accelerate. The accident occurred on

¹ The bill also seeks to extinguish certain liens for Claimant's treatment and care.

Claimant's third test drive around the block.

Around 1:45 p.m., Lynn Godden, an Orange County employee on duty at the time, was driving a county work van westbound on Orlando Street. Mr. Godden approached the intersection of Orlando Street and DePauw Avenue and stopped at the stop sign controlling Orlando Street. He looked to his left down DePauw Avenue and witnessed Claimant. According to Mr. Godden, he saw Claimant on a motorcycle but believed Claimant was heading in the opposite direction, away from the intersection of Orlando and DePauw. According to Claimant, he made eye contact with Mr. Godden and believed that Mr. Godden was aware of Claimant's presence. Mr. Godden, with parked vehicles partially blocking his view, crept forward a few feet into the intersection. Apparently believing the intersection to be clear, Mr. Godden continued driving west on Orlando Street.

At the same time, Claimant entered the intersection on his motorcycle traveling northbound. Seeing the van, Claimant attempted to steer his motorcycle to the left to avoid a collision, but to no avail. The front of the van struck Claimant, sending Claimant airborne for about 23 feet.

Mr. Godden stopped after clearing the intersection and ran to Claimant's aid. Nelson Dean, a carpenter working at a nearby house, ran to the scene and called 911. Claimant, who apparently never lost consciousness, asked Mr. Godden for his cell phone and called his wife. The ambulance arrived and took Claimant to the hospital. The ambulance logs indicate Claimant stated he was traveling 50 miles per hour. Claimant denies ever stating he was traveling at that speed and Eric Miller, the paramedic attending Claimant, could not be sure who stated the speed. Claimant testified he was traveling 20 to 25 miles per hour and due to his motorcycle's deficiencies, he does not believe it possible that he could have been traveling faster. Mr. Dean, who witnessed Claimant on his motorcycle and Mr. Godden stopped at the stop sign, stated Claimant was traveling 35 or 40 miles per hour.

The front of the county van hit Claimant on his right side, requiring his right leg to be amputated above the knee. Claimant also fractured his left fibula, foot, and pelvis. He incurred over \$551,527.37 in medical bills, many (if not all) of which were apparently paid by third parties, including Medicaid and the U.S. Department of Veteran Affairs. There are outstanding liens (including liens by Veteran Affairs, Medicaid, the State of Florida, and Claimant's ex-wife) against any award Claimant may receive. Claimant has continued to experience the effects of his injuries, including a leg infection.

Claimant went on to complete his college degree but struggled to find employment until recently. He is currently employed at Image Depot Express in Lakeland, Florida, earning twelve

dollars an hour doing graphic design work. Claimant receives social security disability benefits of about \$800 per month, along with Veteran Affairs benefits from past military service.

The record indicates that Mr. Godden, the driver of the county van, has received multiple traffic citations, including failure to obey a stop sign. Mr. Godden is now retired from the county.

LITIGATION HISTORY:

On February 14, 2007, Claimant filed suit, alleging negligence by Mr. Godden and Respondent. Before trial, Claimant and his wife divorced, and she settled her claim against the county for \$85,000. A jury trial was held in November 2011. After the full case had been presented to the jury and after hours of jury deliberation, the judge sent the jury home for the weekend, with deliberations to resume the next Monday. One of the jurors indicated she would not return Monday. Ultimately, a mistrial was declared.

A year later, in November 2012, the case was tried again and resulted in a jury verdict of \$4,814,785.37, with the jury finding Respondent 67% at fault and Claimant 33% at fault. The jury's calculations of damages were as follows:

Past Lost Earnings	\$137,280.00
Past Medical Expenses	551,527.37
Future Medical Expenses	2,376,000.00
Past Pain & Suffering	228,258.00
Future Pain & Suffering	1,521,720.00
Total Damages	<u>\$4,814,785.37</u>

The court reduced the damages, in part for collateral sources of medical expenses and Claimant's portion of fault, and entered a final judgment for \$2,913,536.09. Respondent did not appeal and paid the statutory cap of \$100,000. Claimant's ex-wife has a lien against Claimant for about \$40,000 for half of Claimant's reduced award for past lost wages.

CLAIMANT'S POSITION:

Claimant argues Respondent is liable for the negligence of its employee, Mr. Godden, for failing to yield the right-of-way to Claimant; and that the jury verdict, while too low, should be honored. Claimant asserts he was traveling 25 miles per hour or slower at the time of the accident and that he was in no way negligent. Claimant states that he has not yet received any payout from the \$100,000 because that money is held in trust until the matter is resolved.

RESPONDENT'S POSITION:

Respondent opposes the claim bill, arguing that Claimant was comparatively negligent. Respondent asserts that Claimant was traveling at a speed of up to 50 miles per hour at the time of the accident and that Claimant may have had alcohol in his blood. At the Special Master hearing, Respondent argued that Claimant was up to 75% responsible for the accident, not 33% as the jury found. Respondent objects to the calculation of medical

damages.

CONCLUSIONS OF LAW:

Regardless of whether there is a jury verdict or a settlement agreement, each claim bill is reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

Respondent owed a duty to Claimant to stop and yield the intersection to Claimant. Under Florida law, a driver approaching an intersection with a stop sign must stop, and after stopping, must "yield the right of way to any vehicle" in the intersection or which is approaching so closely as to constitute a hazard.² Respondent's employee, Mr. Godden, as he approached the intersection, owed a duty to Claimant, who had no stop sign and enjoyed the right-of-way. Mr. Godden was acting within the scope of employment with the county, and thus Respondent is liable for Mr. Godden's actions under the doctrine of respondeat superior. Respondent breached its duty to Claimant when its employee proceeded through the intersection without the right-of-way.

Causation

The primary point of contention between the parties is whether, and to what extent, Claimant's own negligence contributed to the accident. Claimant argues that he bears zero fault, while Respondent argues that Claimant bears up to 75% of the responsibility for the accident.³

To support its argument, Respondent makes two main assertions: first, that Claimant was traveling at a speed of up to 50 miles per hour in a residential area when the crash occurred; and second, that Claimant may have been impaired by alcohol.

Claimant's speed at the time of the crash was closely contested at trial and at the Special Master hearing, with Claimant stating he was traveling at 25 miles per hour or less, and Respondent arguing Claimant was traveling at 35 to 50 miles per hour.

Eyewitness Nelson Dean stated that Claimant was traveling at 35 to 40 miles per hour. Additionally, paramedic Eric Miller's medical notes state that Claimant had said he was traveling about 50 miles per hour. Claimant denied at the Special Master hearing that he ever said this to Mr. Miller.

Both parties presented extensive expert testimony as to Claimant's speed. Orion Keifer, a mechanical engineer and Claimant's expert witness, testified that Claimant was traveling 25 miles per hour or less based on where Claimant's body and

² S. 316.123(2)(a), F.S.

³ In Florida, the doctrine of comparative fault provides for apportionment of the loss among those whose fault contributed to the occurrence. *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973). A plaintiff's negligence diminishes the proportionality of the amount awarded but does not bar recovery. S. 768.81(2), F.S.

motorcycle landed after the crash. The distance from impact to the resting place of Claimant's body was between 45 and 50 feet. Mr. Keifer opined that if Claimant had been traveling 50 miles per hour, he would have been thrown 160-180 feet.

Respondent's expert, Dr. James Ipser, opined that Claimant was traveling about 50 miles per hour when the accident occurred. Dr. Ipser opined that Claimant went airborne upon impact with the van and then hit guide wires on a nearby telephone pole, causing Claimant's body to stop traveling as far as it would have otherwise gone. Dr. Ipser also opined that if Claimant had been traveling at 25 miles per hour, he would have had opportunity to avoid the accident.

With regard to the possible presence of alcohol impairment, Respondent cites to Claimant's two prior DUI convictions⁴ as evidence that he may have been drinking and driving the day of the accident. Claimant denies alcohol impairment on the day of the accident, and the two paramedics who stabilized and transported Claimant did not report any signs of alcohol impairment.

I find that the jury's determination that Claimant was 33% responsible and Respondent was 67% responsible is wholly reasonable. The jury evaluated the evidence presented at trial and decided that Claimant's percentage of fault lay at 33%—that is, between the 0% argued by Claimant and the 75% argued by Respondent. No testimony or arguments presented at the Special Master hearing have shown any reason to disturb the jury's apportionment of liability.

Damages

Claimant's damages are severe and life-altering. His right leg was amputated above the knee, and that loss continues to plague him. His left leg was fractured, and his pelvis was broken. The parties presented different estimates for the cost of purchasing and maintaining a prosthetic leg—Claimant's expert estimated the average annual cost at \$55,164, and Respondent's expert estimated the cost at \$44,400.

In the years following the trial, Claimant has had his prosthetic replaced and continues to suffer from complications from the amputation. In December 2016, he was hospitalized for an infection in his right leg. Claimant is overweight and diabetic.

Respondent asserts that many, if not all, of the medical costs have been paid by third parties, including the U.S. Department

⁴ Claimant was convicted of driving under the influence twice, apparently in 2000 and 2001. Additionally, Claimant had not had his license for about six years and received his reinstated license about a week before the accident. While he did not have a motorcycle endorsement, Claimant stated he took the written test and was allowed to ride without passengers until he passed the driving test.

of Veteran Affairs and Medicaid.⁵ Respondent also suggests Claimant needs a new prosthetic every ten years instead of every five years.

Notwithstanding Respondent's arguments, I conclude the jury's award and resulting final judgment of \$2.9 million is an appropriate amount to compensate Claimant for his losses. In the claim bill, Claimant seeks \$750,000, plus the extinguishment of certain medical liens, which is reasonable.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorneys will limit their fees to 25 percent of any amount awarded by the Legislature, of which 5 percent will go to lobbyist fees.

RESPONDENT'S ABILITY
TO PAY:

At the time of the accident, Orange County maintained a self-insured retention fund for \$1,000,000 with an excess insurance policy for \$10 million. According to Respondent, if the claim bill were to pass, \$670,510.74 would be paid from the self-insured retention fund, and the remaining amount would purportedly be paid from the excess policy.

LEGISLATIVE HISTORY:

This is the second session this claim has been presented to the Legislature. CS/HB 6509 (2017)—which sought the full excess jury verdict amount of \$2,813,536.09—passed the House by a vote of 109-4, but died in the Senate Judiciary Committee. HB 6517 seeks \$750,000, plus the extinguishment of certain medical liens.⁶

RECOMMENDATION:

I recommend that House Bill 6517 be reported **FAVORABLY**.

Respectfully submitted,



JORDAN JONES

House Special Master

cc: Representative Robert Cortes, House Sponsor
Senator Torres and Senator Stewart, Senate Sponsors
Ashley Istler, Senate Special Master

⁵ The U.S. Department of Veteran Affairs has a lien for about \$181,000 and Medicaid has a lien for about \$42,000, reduced from \$335,000.

⁶ SB 54 (2018) seeks \$2,813,536.09, but does not include the lien extinguishment provision.

1 A bill to be entitled
 2 An act for the relief of Robert Allan Smith by Orange
 3 County; providing for an appropriation to compensate
 4 Mr. Smith for injuries he sustained as a result of the
 5 negligence of an employee of Orange County; providing
 6 legislative intent regarding lien interests held by
 7 the state; providing a limitation on the payment of
 8 fees and costs; providing an effective date.

9
 10 WHEREAS, at 1:43 p.m. on September 7, 2006, Robert Allan
 11 Smith was driving his motorcycle north on DePauw Avenue, the
 12 quiet residential street he lived on in Orlando, within 300 feet
 13 of his home, within the 25-mile-per-hour posted speed limit, and
 14 with the motorcycle's headlights on in clear, dry weather, and

15 WHEREAS, as Mr. Smith approached the intersection of DePauw
 16 Avenue and Orlando Street, at which stop signs are posted for
 17 vehicles traveling on Orlando Street, Orange County employee
 18 Lynn Lawrence Godden, who was driving an Orange County work van
 19 west on Orlando Street, negligently pulled away from the stop
 20 sign, colliding with Mr. Smith, and

21 WHEREAS, Mr. Smith said he saw the driver of the Orange
 22 County van visibly slow down as he approached the stop sign,
 23 having observed Mr. Smith approaching on his motorcycle, but
 24 that the driver drove through the stop sign and into Mr. Smith's
 25 path and Mr. Smith was unable to avoid a collision, and

26 WHEREAS, the front of the Orange County van struck Mr.
 27 Smith, causing severe and life-threatening injuries and
 28 necessitating surgical procedures, including a traumatic
 29 amputation of his right leg above his knee, and

30 WHEREAS, Mr. Smith also suffered a badly fractured lower
 31 left leg with internal fixation, a broken pelvis and sacrum with
 32 internal fixation, and damage to the rectum and internal organs,
 33 which required a laparotomy, and

34 WHEREAS, the Orange County employee testified that he
 35 observed Mr. Smith's motorcycle as he approached the
 36 intersection, but he erroneously believed that it was heading
 37 away from him, though there was no evidence to support this
 38 claim, and that he was looking to his right, away from Mr.
 39 Smith, when he entered the intersection, and

40 WHEREAS, the Orange County employee was issued a citation
 41 by the Orlando Police Department for failure to yield from a
 42 stop sign, and

43 WHEREAS, after finding for Mr. Smith and against Orange
 44 County in a civil jury trial, the jury in the case determined
 45 that Mr. Smith's future medical expenses totaled \$2,376,000 over
 46 40 years and that his past medical expenses and lost wages
 47 totaled \$688,807.37, and awarded him \$1,749,978 in damages for
 48 past and future pain and suffering, for a total award of
 49 \$4,814,785.37, and

50 WHEREAS, after the total award was reduced by amounts for

51 comparative negligence and Medicaid and Veterans Administration
 52 setoffs, a final judgment was entered against Orange County on
 53 November 27, 2012, in the amount of \$2,913,536.09, and

54 WHEREAS, Orange County has paid Mr. Smith \$100,000 pursuant
 55 to the statutory limits of liability set forth in s. 768.28,
 56 Florida Statutes, which were in effect at the time Mr. Smith's
 57 claim arose, leaving a remaining unpaid balance of
 58 \$2,813,536.09, NOW, THEREFORE,

59
 60 Be It Enacted by the Legislature of the State of Florida:

61
 62 Section 1. The facts stated in the preamble to this act
 63 are found and declared to be true.

64 Section 2. Orange County is authorized and directed to
 65 appropriate from funds not otherwise encumbered and to draw a
 66 warrant in the sum of \$750,000 payable to Robert Allan Smith as
 67 compensation for injuries and damages he sustained as a result
 68 of the negligence of an employee of Orange County.

69 Section 3. It is the intent of the Legislature that the
 70 lien interests relating to the claim of Robert Allan Smith for
 71 the treatment and care of Robert Allan Smith, including Medicaid
 72 liens, are hereby waived or extinguished.

73 Section 4. The amount paid by Orange County pursuant to s.
 74 768.28, Florida Statutes, and the amount awarded under this act
 75 are intended to provide the sole compensation for all present

76 and future claims arising out of the factual situation described
77 in this act which resulted in injuries and damages to Robert
78 Allan Smith. Of the amount awarded under this act, the total
79 amount paid for attorney fees may not exceed \$150,000, the total
80 amount paid for lobbying fees may not exceed \$37,500, and the
81 total amount paid for costs and other similar expenses relating
82 to this claim may not exceed \$71,511.15.

83 Section 5. This act shall take effect upon becoming a law.

**IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

CASE NO: 07-CA-1925

ROBERT ALAN SMITH,

Plaintiff,

vs.

**ORANGE COUNTY BOARD OF
COUNTY COMMISSIONERS,**

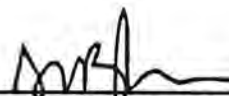
Defendant.

AFFIDAVIT OF DAVID B. MOFFETT AND ALBERT BALIDO

BEFORE ME, the undersigned authority, personally appeared **DAVID B. MOFFETT**, Esq., attorney with Morgan and Morgan, P.A., who, after being duly sworn, deposes and says:

1. The attorney's fees that Mr. Smith has agreed to pay Morgan and Morgan, P.A. for legal services is a flat twenty-five percent (25%) of any amount that may be awarded by the Legislature pursuant to Mr. Smith's claim bill petition.
2. Morgan and Morgan, P.A. agreed to pay its lobbyist, Mr. Albert Balido with Anfield Consulting in Tallahassee, Fl., five percent (5%) of any amount that may be awarded by the Legislature pursuant to Mr. Smith's claim bill petition.
3. The attorney's fees specified in paragraph 1 above include the lobbyist fees specified in paragraph 2 above, thus reducing Morgan and Morgan's fee to an effective fee of twenty percent (20%) of any amount that may be awarded by the Legislature pursuant to Mr. Smith's claim bill petition.

4. The total dollar amount of outstanding law firm costs that will be paid from any amount that may be awarded by the legislature is \$71,511.15 (seventy one thousand, five hundred eleven dollars and three cents), to include Valenzuela and Stern (per lien letter \$2,697.44); Nation Law Firm (\$10,493.68); and Morgan and Morgan (\$58,320.03).
5. I, Albert Balido, agree with the forgoing statement of lobbyists fees.

 10/4/2017

Albert Balido (dated _____)

6. The dollar amount of costs that were paid from the statutory cap payment is zero dollars (\$0). All of the statutory cap payment (\$100,000) is held in trust pending resolution of the claims bill petition.

FURTHER, AFFIANT SAYETH NOT

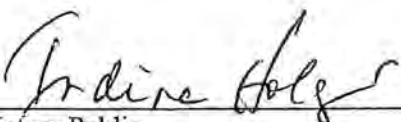


DAVID B. MOFFETT

**STATE OF FLORIDA
COUNTY OF ORANGE**

The foregoing instrument was subscribed and sworn to before me this 4th day of October, 2017 by **DAVID B. MOFFETT**, who is personally known to me and who did take an oath.





Notary Public
My commission expires: