



---

# **Civil Justice & Claims Subcommittee**

**Wednesday, December 6, 2017  
4:00 PM – 6:00 PM  
404 HOB**

**Meeting Packet**

**Richard Corcoran  
Speaker**

**Heather Fitzenhagen  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice & Claims Subcommittee

**Start Date and Time:** Wednesday, December 06, 2017 04:00 pm  
**End Date and Time:** Wednesday, December 06, 2017 06:00 pm  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 2.00 hrs

**Consideration of the following bill(s):**

HB 385 Transient Occupants of Residential Property by Toledo  
HB 413 Trusts by Moraitis  
HB 421 Homestead Waivers by Berman  
HB 599 Lis Pendens by Altman  
HB 617 Covenants and Restrictions by Edwards  
HB 623 Out-of-Country Foreign Money Judgments by Byrd  
HB 6515 Relief/Cathleen Smiley/Brevard County by Altman  
HB 6517 Relief/Robert Allan Smith/Orange County by 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., Tuesday, December, 5, 2017.



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., Tuesday, December, 5, 2017.

**NOTICE FINALIZED on 11/29/2017 4:18PM by Ellerkamp.Donna**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 385 Transient Occupants of Residential Property  
**SPONSOR(S):** Toledo  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 566

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		Tuszynski 	Bond 
2) Agriculture & Property Rights Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

A transient occupant is a person temporarily occupying a residential property as an invited guest. Where landlord-tenant law requires a court order to evict, current law allows a person entitled to possession of a dwelling to ask law enforcement to summarily direct a transient occupant to leave a property. The person entitled to possession must provide an affidavit that shows the other person to be a transient occupant. Where the law enforcement agency does not find the occupant to qualify as a transient occupant, the person may file an expedited lawsuit for removal.

This bill amends laws regarding transient occupants to:

- Alter the criteria establishing whether a person is considered a transient occupant, limiting the lookback period for the address to 12 months and removing consideration of whether the transient has mail delivered to the residence;
- Specify that a transient occupancy ends when the person resides elsewhere, surrenders the key, or agrees to leave;
- Require the person entitled to possession to allow a former transient occupant a reasonable opportunity to recover his or her personal belongings;
- Generally require the former transient to recover the personal property within 5 days; and
- Create a civil cause of action against the person entitled to possession for unreasonably withholding access to the personal belongings of the former transient occupant, with prevailing party attorney fees.

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

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Transient Occupants of Residential Property

Florida residential property owners and tenants commonly allow relatives, friends, or acquaintances to temporarily reside in their home as guests without a formal rental agreement. These occupancies naturally terminate when the guest voluntarily vacates the property at the time agreed or, when the guest is no longer welcome, at the direction of the property owner or rightful resident. A guest who refuses to surrender possession of residential property at the request of the owner or rightful resident, unlawfully detains the property. Historically, the property owner or rightful resident would need to seek to have the unwanted guest criminally sanctioned for trespass<sup>1</sup> or file a civil action against the unwanted guest for unlawful detainer,<sup>2</sup> which takes time and requires payment of significant costs.<sup>3</sup>

In 2015, the Legislature created a remedy for unlawful detention by a transient occupant of residential property.<sup>4</sup> Section 82.045, F.S., allows law enforcement to immediately direct an unwanted guest to surrender possession of the property upon receipt of a sworn affidavit from the owner or rightful resident which establishes that the unwanted guest is a "transient occupant." Current law details eight factors to consider when determining whether a person is a transient occupant. The person:

1. Does not have an ownership interest, financial interest, or leasehold interest in the property entitling him or her to occupancy of the property;
2. Does not have any property utility subscriptions;
3. Does not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections;
4. Does not receive mail at the property;
5. Pays minimal or no rent for his or her stay at the property;
6. Does not have a designated space of his or her own, such as a room, at the property;
7. Has minimal, if any, personal belongings at the property; and
8. Has an apparent permanent residence elsewhere.

Where a transient occupant refuses to leave upon request of a person entitled to possession of the dwelling, the person entitled to possession may file an affidavit setting forth why the occupant is a transient occupant subject to immediate removal. If the law enforcement officer agrees, the officer will direct the transient occupant to immediately leave or face criminal trespass charges. If the law enforcement officer does not agree, the person entitled to possession of the property may file a summary action for unlawful detainer.

##### **Effect of Proposed Changes - Status as a Transient**

The bill modifies the factors that establish whether a person is considered a transient occupant. The factor looking at whether the person has used the property address as an address of record with a

<sup>1</sup> S. 810.08(1), F.S., provides that a person commits the criminal offense of trespass in a structure or conveyance if the person willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so.

<sup>2</sup> S. 82.04(1), F.S.

<sup>3</sup> Filing fees for the civil action - \$180 [s. 34.041(1)(a)7, F.S.]; Service charge for issuance of each summons - \$10 [ss. 28.241(1)(d) and 34.041(1)(d), F.S.]; Service of each summons by the Sheriff - \$40 [s. 30.231(1)(a), F.S.]; Service and execution of the writ of possession by Sheriff - \$90 [s. 30.231, F.S.]; Fees charged by the Sheriff to be present and keep the peace in an action for possession - Varies [s. 30.231(2), F.S.]; Attorney Fees - Varies.

<sup>4</sup> Ch. 2015-89, Laws of Fla.

governmental agency is limited to use within the past 12 months. The bill also deletes the provision related to receiving mail at the property.

### **Effect of Proposed Changes - Termination of Transient Occupancy**

Current law does not define or establish when a transient occupancy is terminated. Termination of the transient occupancy defines the point at which the transient occupant's belongings are at issue. The bill defines termination of a transient occupancy as when the transient occupant:

- Begins to reside elsewhere;
- Surrenders the key to the dwelling; or
- Agrees to leave the dwelling as directed by law enforcement, the party entitled to possession of the dwelling, or a court.

The presence of a transient occupant's personal belongings does not extend a transient occupancy.

### **Effect of Proposed Changes - Recovery of Personal Property**

Upon termination, current law regarding transient occupancy does not say what to do with belongings left behind.

In general, the bill requires the party entitled to possession of the dwelling to allow a former transient occupant to recover his or her personal belongings at a reasonable time and under reasonable conditions. Reasonable time and conditions are to include a convenient time when the party entitled to possession or trusted third party can be present. Additional conditions, such as the presence of a law enforcement officer during recovery, the use of a registered mover, or the use of a trusted third party are not considered unreasonable if the party entitled to possession of a dwelling reasonably believes the former transient occupant has a history of violence, drug or alcohol abuse, or has engaged in misconduct. Misconduct for the purposes of the bill includes, but is not limited to:

- Intentional damage to the dwelling or property of the party entitled to possession of a dwelling or another occupant of the dwelling;
- Physical or verbal abuse directed at the party entitled to possession of a dwelling or another occupant of the dwelling; or
- Theft of property of the party entitled to possession of a dwelling or another occupant of the dwelling.

The bill allows a person entitled to possession of a dwelling to presume personal belongings left at the dwelling are abandoned if the former transient occupant has not recovered them within a reasonable time after surrendering occupancy of the dwelling. The bill defines a reasonable time for recovery to be at least 5 days. However, this may be longer or shorter depending on specific circumstances.

Circumstances that may extend the 5-day period include an agreement to hold the property longer than 5 days or the unavailability of the party entitled to possession of the dwelling to be present.

Circumstances that may shorten the 5-day period include:

- Poor condition or perishable or hazardous nature of the personal belongings;
- Intent of the former transient occupant to abandon or discard the personal belongings; or
- Significant impairment of the use of the dwelling by the storage of the personal belongings.

The bill creates a civil cause of action to allow the former transient occupant to sue the person entitled to possession of the dwelling for unreasonably withholding access to the personal belongings of the former transient occupant. The prevailing party is entitled to an award of attorney fees and costs.

### **Other**

The bill adds that the law on transient occupants must "be construed to recognize that the right to exclude others is one of the most essential property rights."

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

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 82.045, F.S., relating to remedy for unlawful detention by a transient occupant of residential property.

**Section 2:** 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 transient occupants of residential  
 3 property; amending s. 82.045, F.S.; revising criteria  
 4 for determination of whether a person is a transient  
 5 occupant; specifying when a transient occupancy ends;  
 6 providing that a party entitled to possession of a  
 7 dwelling must allow a former transient occupant to  
 8 recover his or her personal belongings at a reasonable  
 9 time under reasonable conditions; specifying that  
 10 additional conditions may be imposed in certain  
 11 circumstances; creating a presumption that personal  
 12 belongings are abandoned in certain circumstances;  
 13 authorizing civil actions for recovery of personal  
 14 property by former transient occupants; providing  
 15 construction; providing an effective date.

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

18  
 19 Section 1. Section 82.045, Florida Statutes, is amended to  
 20 read:

21 82.045 Remedy for unlawful detention by a transient  
 22 occupant of residential property; recovery of transient  
 23 occupant's property.—

24 (1) As used in this section, the term "transient occupant"  
 25 means a person whose residency in a dwelling intended for



26 residential use has occurred for a brief length of time, is not  
 27 pursuant to a lease, and whose occupancy was intended as  
 28 transient in nature.

29 (a) Factors that establish that a person is a transient  
 30 occupant include, but are not limited to:

31 1. The person does not have an ownership interest,  
 32 financial interest, or leasehold interest in the property  
 33 entitling him or her to occupancy of the property.

34 2. The person does not have any property utility  
 35 subscriptions.

36 3. The person does not use the property address as an  
 37 address of record with any governmental agency, including, but  
 38 not limited to, the Department of Highway Safety and Motor  
 39 Vehicles or the supervisor of elections within the past 12  
 40 months.

41 ~~4. The person does not receive mail at the property.~~

42 ~~4.5.~~ The person pays minimal or no rent for his or her  
 43 stay at the property.

44 ~~5.6.~~ The person does not have a designated space of his or  
 45 her own, such as a room, at the property.

46 ~~6.7.~~ The person has minimal, if any, personal belongings  
 47 at the property.

48 ~~7.8.~~ The person has an apparent permanent residence  
 49 elsewhere.

50 (b) Minor contributions made for the purchase of household

51 goods, or minor contributions towards other household expenses,  
 52 do not establish residency.

53 (2) A transient occupant unlawfully detains a residential  
 54 property if the transient occupant remains in occupancy of the  
 55 residential property after the party entitled to possession of  
 56 the property has directed the transient occupant to leave. A  
 57 transient occupancy terminates when a transient occupant begins  
 58 to reside elsewhere, surrenders the key to the dwelling, or  
 59 agrees to leave the dwelling when directed by a law enforcement  
 60 officer, the party entitled to possession, or a court. A  
 61 transient occupancy is not extended by the presence of personal  
 62 belongings of a former transient occupant.

63 (3) Any law enforcement officer may, upon receipt of a  
 64 sworn affidavit of the party entitled to possession that a  
 65 person who is a transient occupant is unlawfully detaining  
 66 residential property, direct a transient occupant to surrender  
 67 possession of residential property. The sworn affidavit must set  
 68 forth the facts, including the applicable factors listed in  
 69 paragraph (1)(a), which establish that a transient occupant is  
 70 unlawfully detaining residential property.

71 (a) A person who fails to comply with the direction of the  
 72 law enforcement officer to surrender possession or occupancy  
 73 violates s. 810.08. In any prosecution of a violation of s.  
 74 810.08 related to this section, whether the defendant was  
 75 properly classified as a transient occupant is not an element of

76 the offense, the state is not required to prove that the  
77 defendant was in fact a transient occupant, and the defendant's  
78 status as a permanent resident is not an affirmative defense.

79 (b) A person wrongfully removed pursuant to this  
80 subsection has a cause of action for wrongful removal against  
81 the person who requested the removal, and may recover injunctive  
82 relief and compensatory damages. However, a wrongfully removed  
83 person does not have a cause of action against the law  
84 enforcement officer or the agency employing the law enforcement  
85 officer absent a showing of bad faith by the law enforcement  
86 officer.

87 (4) A party entitled to possession of a dwelling has a  
88 cause of action for unlawful detainer against a transient  
89 occupant pursuant to s. 82.04. The party entitled to possession  
90 is not required to notify the transient occupant before filing  
91 the action. If the court finds that the defendant is not a  
92 transient occupant but is instead a tenant of residential  
93 property governed by part II of chapter 83, the court may not  
94 dismiss the action without first allowing the plaintiff to give  
95 the transient occupant the notice required by that part and to  
96 thereafter amend the complaint to pursue eviction under that  
97 part.

98 (5) The party entitled to possession of a dwelling must  
99 allow a former transient occupant to recover his or her personal  
100 belongings at a reasonable time and under reasonable conditions.

101 (a) A reasonable time for the recovery of the former  
102 transient occupant's personal belongings includes a convenient  
103 time when the party entitled to possession of the dwelling or a  
104 trusted third party can be present at the dwelling to supervise  
105 the recovery of the belongings.

106 (b) If the party entitled to possession of the dwelling  
107 reasonably believes that the former transient occupant has  
108 engaged in misconduct or has a history of violence or drug or  
109 alcohol abuse, it is not unreasonable for the party entitled to  
110 possession of the dwelling to impose additional conditions on  
111 access to the dwelling or the personal belongings. These  
112 conditions may include, for example, the presence of a law  
113 enforcement officer or the use of a mover that is registered  
114 with the Department of Agriculture and Consumer Services or the  
115 use of a trusted third party to recover the personal belongings.  
116 For purposes of this paragraph, misconduct includes, but is not  
117 limited to:

118 1. Intentional damage to the dwelling, property owned by  
119 the party entitled to possession of the dwelling, or property  
120 owned by another occupant of the dwelling;

121 2. Physical or verbal abuse directed at the party entitled  
122 to possession of the dwelling or directed at another occupant of  
123 the dwelling; or

124 3. Theft of property belonging to the party entitled to  
125 possession of the dwelling or property of another occupant of

126 | the dwelling.

127 |       (c) The person entitled to possession of a dwelling may  
128 | presume that the former transient occupant has abandoned  
129 | personal belongings left at the dwelling if the former transient  
130 | occupant does not seek to recover them within a reasonable time  
131 | after the transient occupant surrenders occupancy of the  
132 | dwelling. A reasonable time to recover personal belongings is  
133 | generally at least 5 days after the termination of the transient  
134 | occupancy, but may be longer or shorter depending on the  
135 | specific circumstances. Circumstances that may extend the time  
136 | period include an agreement to hold the property for longer than  
137 | 5 days or the unavailability of the party entitled to possession  
138 | of the dwelling to supervise the recovery of the personal  
139 | belongings. Circumstances that may shorten the time period  
140 | include, but are not limited to, the poor condition or  
141 | perishable or hazardous nature of the personal belongings, the  
142 | intent of the former transient occupant to abandon or discard  
143 | the belongings, or the significant impairment of the use of the  
144 | dwelling by the storage of the former transient occupant's  
145 | personal belongings.

146 |       (d) If the person entitled to possession of the dwelling  
147 | unreasonably withholds access to a former transient occupant's  
148 | personal belongings, the former transient occupant may bring a  
149 | civil action for damages or the recovery of the property. The  
150 | court shall award the prevailing party reasonable attorney fees

151 and costs.

152       (6) This section shall be construed to recognize that the  
153 right to exclude others is one of the most essential property  
154 rights.

155       Section 2. This act shall take effect July 1, 2018.

Amendment No. 1

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: Civil Justice & Claims  
2 Subcommittee

3 Representative Toledo offered the following:

**Amendment**

6 Remove lines 36-40 and insert:

7 3. The person has ~~does~~ not used ~~use~~ the property address  
8 as an address of record with any governmental agency within the  
9 past 12 months, including, but not limited to, the Department of  
10 Highway Safety and Motor Vehicles or the supervisor of  
11 elections.



Amendment No. 2

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: Civil Justice & Claims  
2 Subcommittee  
3 Representative Toledo offered the following:

4  
5 **Amendment**

6 Remove lines 59-60 and insert:  
7 leaves the dwelling when directed by the party entitled to  
8 possession, a law enforcement officer, or a court. A





## 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		<i>MM</i> MacNamara	Bond <i>NB</i>
2) Judiciary Committee			

### SUMMARY ANALYSIS

The Florida Trust Code governs express trusts, charitable or noncharitable, 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. The 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. This bill 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 provide 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, as opposed to distributing property directly to a beneficiary. 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:

##### Overview of the Florida Trust Code

Chapter 736, F.S., is referred to as the "Florida Trust Code." The Code applies to express trusts, charitable or noncharitable, and 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 defined as 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, which arises as a result of a manifestation of an intention to create it.

The term "terms of a trust" is defined to mean 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.<sup>1</sup> Under the Code, "settlor" is defined as a person who creates or contributes property to a trust.<sup>2</sup> A "beneficiary" of the trust is a person who has a present or future beneficial interest in the trust.<sup>3</sup> A trustee is the person in the trust transaction who holds the legal title to the property of the trust.

A trustee is essential to the creation and validity of a trust; however, occupancy of the position by a designated person is not essential since in the absence of a trustee, whether by failure of appointment, nonacceptance, disqualification, or other cause, a court will ordinarily appoint a trustee in order to administer a trust.

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 in administering the trust estate. To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust. Accordingly, s. 736.0813, F.S., imposes a duty on a Florida trustee to keep the qualified beneficiaries of an irrevocable trust reasonably informed of the trust and its administration. 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 Florida Trust Code.<sup>4</sup>

<sup>1</sup> s. 736.0103(21), F.S.

<sup>2</sup> s. 736.0103(18), F.S.

<sup>3</sup> s. 736.0103(4), F.S.

<sup>4</sup> 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

It is from the trust instrument that a trustee derives his or her rules of conduct, extent and limit of authority, and measure of obligation. 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 the trustee owes a beneficiary is a breach of trust. A breach of trust by a trustee gives rise to liability by the trustee to the beneficiary 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. 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. 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.<sup>5</sup>

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 any beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S. In all, the Code currently provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.<sup>6</sup>

### **Current Florida Trust Code Provisions and Effect of Proposed Amendments**

The bill amends portions of Florida's Trust Code related to the intent of the settlor and interest of the beneficiaries, the duties, and powers of the trustee, and the Code's method of electronic notice.

#### **Settlor Intent and Interest of the Beneficiaries**

In order for a settlor to create an express trust, he or she must indicate an intention to create it. This requirement is what 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 and indicates that the trustee is to hold the trust property in trust and designates the beneficial interests of the trust.<sup>7</sup> 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.<sup>8</sup> 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. In order for a trust to be created, the trust must

---

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).

<sup>5</sup> s. 736.0109, F.S.

<sup>6</sup> See s. 736.0105(2)(a-w), F.S.

<sup>7</sup> 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.

<sup>8</sup> s. 736.0407, F.S.

have a lawful purpose that does not contravene public policy, that is possible to achieve, and the trust and its terms must be for the "benefit of its beneficiaries."<sup>9</sup>

The bill amends ss. 736.0103(11), 736.0105(2)(c), and 736.0404, F.S., to remove the current language in those statutes 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 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

One duty a trustee is required to perform under the Code is a duty to account to trust beneficiaries. The 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. In addition to the Code's requirements to inform and account to beneficiaries, current law provides standards for the form and content of the accounting.<sup>10</sup> 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, such as providing trust accounting, 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. Current law states that any claim against the trustee for a breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in ch. 95, 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.<sup>11</sup>

In *Corya v. Sanders*,<sup>12</sup> the Fourth District Court of Appeal used both 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.

<sup>9</sup> s. 736.0404, F.S.

<sup>10</sup> s. 736.08135(1-2), F.S.

<sup>11</sup> s. 736.1008(3), F.S.

<sup>12</sup> 155 So.3d 1279 (Fla. 4th DCA 2015).

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.

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.,<sup>13</sup> 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.<sup>14</sup>

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. The posting of documents to a secure website or account that is accessible to the recipient is only acceptable if the recipient provides written authorization. The written authorization to provide electronic posting of documents must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted on the electronic website or account.
- 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 to the electronic website or account.
- Advise that the authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting of a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never access 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 and 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 to post trust documents on an electronic website or account.

---

<sup>13</sup> Related to "Laches."

<sup>14</sup> 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).

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.

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 of a document to an electronic account or website is only effective if done in compliance with the requirements of the new provisions. The trustee has the burden of demonstrating compliance with such requirements.

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., They 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 customer 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 to receive documents via posting 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 as follows:

- 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 by a customer 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*

In some instances, the terms of a trust may grant the trustee "absolute power" to perform certain duties and responsibilities for the trust. One absolute power that may be granted to a trustee is the power 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).<sup>15</sup>

Decanting is generally used by trustees who wish 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 of maintaining the assets in trust. 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.<sup>16</sup> Moreover, and for purposes of the analysis, a trustee may only decant principal to a supplemental needs trust<sup>17</sup> 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 (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright 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 under the terms of the trust. The bill's three major effects can be summarized as follows:

1. The bill 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 authorized 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."<sup>18</sup>
2. The bill authorizes a trustee to decant principal to a supplemental needs trust where a beneficiary is disabled. The trustee may take this action regardless of whether the authorized trustee has 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.<sup>19</sup>
3. The bill 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 to 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 amends current law on decanting in the following ways:

- Provides definitions for purposes of interpreting and applying the provisions of s. 736.04117, F.S. Specifically, the bill defines the terms absolute power, authorized trustee, beneficiary with a disability, current beneficiary, government benefits, internal revenue code, power of

---

<sup>16</sup> s. 736.04117(1)(b), F.S.

<sup>17</sup> The assets in a supplemental needs trust are excluded in the determination of entitlements to government benefits.

<sup>18</sup> HB 413, lines 326-333.

<sup>19</sup> HB 413, lines 342-345.



appointment, presently exercisable general power of appointment, substantially similar, supplemental needs trust, and vested interest.

- 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.
- 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 a trustee's power to invade principal in trust.

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

**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.

74  
75 Be It Enacted by the Legislature of the State of Florida:

76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100

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 421 Homestead Waivers  
**SPONSOR(S):** Berman  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 512

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		<i>MM</i> MacNamara	Bond <i>NB</i>
2) Agriculture & Property Rights Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Florida's Constitution provides that homestead property may not be transferred through a will or trust where the owner has a spouse or minor child, except the homestead may be transferred to the spouse where there is no minor child. A spouse, however, may waive this restriction through a written contract or agreement. A spouse's waiver must be knowing and intelligent.

The bill provides "safe harbor language" that may be included in a deed that creates a presumption that the spouse knowingly and intelligently waived his or her right to inherit such homestead property.

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

The effective date of the bill is July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Homestead Property

A homestead is not a property interest but is simply a constitutionally defined status. Article X, s. 4(a)(1) of the Florida Constitution provides protections for homestead property owned by "natural persons." A homestead is protected in three different ways: It provides the homestead with an exemption from some taxes; it protects the homestead from forced sale by creditors; and it places certain restrictions on a homestead owner from alienating or devising the homestead property. Section 731.201(33), F.S., defines "protected homestead" as:

[T]he property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution.

Homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead as the decedent's interest in the homestead property terminates at death.<sup>1</sup> Current law addresses the descent (transfer of property to descendants) of homestead property where no devise is allowed. Specifically, ss. 732.401, F.S., provides:

(1) [T]he homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

When there are no surviving minor children and the surviving spouse has waived his or her homestead rights, there is no constitutional restriction on the devise of the homestead property.<sup>2</sup>

##### Waiver of Homestead Rights by Surviving Spouse

Under s. 732.702, F.S., the rights of a surviving spouse to estate allowances, including a homestead, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses as provided by statute. The statute also requires fair disclosure where the contract, agreement, or waiver is signed after marriage and specifies that no consideration other than execution is required.

In order to find that a surviving spouse has waived or relinquished homestead protection, evidence must demonstrate such spouse's intent to waive the constitutional and statutory claim to homestead property. Stated differently, courts held that waivers of constitutional rights must be made knowingly and intelligently.<sup>3</sup>

<sup>1</sup> s. 732.401(5), F.S.

<sup>2</sup> *City Nat'l Bank of Fla. v. Tescher*, 578 So.2d 701, 703 (Fla. 1991).

<sup>3</sup> *Rutherford v. Gascon*, 679 So. 2d 329 (Fla. 2d DCA 1996); See also *Chames v. DeMayo*, 972 So.2d 850 (Fla. 2007).

Recently, Florida courts have addressed the issue of whether joining in a deed might constitute a waiver of homestead rights. In *Stone v. Stone*<sup>4</sup>, the Fourth District Court of Appeal held that a spouse waived her homestead rights when she joined in the execution of a warranty deed on the property, transferring her interest in the property into a trust set up by her husband, despite her position that she did not intend to waive her constitutional homestead rights. The court relied on s. 732.702(1), F.S., in reaching their decision. Specifically, the court relied on the language in the statute providing that "a waiver of 'all rights,' or equivalent language" in a written contract, agreement, or waiver, is a waiver of all rights in homestead property.<sup>5</sup>

As cases like *Stone* illustrate, Florida courts allow a spouse to waive her rights in homestead property through the execution of a deed conveying the property. Moreover, the case illustrates instances where the language in the deed may be sufficient to establish waiver under s. 732.702, F.S., despite a surviving spouse's contention that their waiver was not knowingly and intelligent at the time he or she executed the deed.

### Effect of Proposed Changes

The bill provides statutory language that may be placed in a deed that creates a presumption that a spouse has intentionally waived his or her rights in a homestead property. Specifically, the bill provides that the following language contained in a deed constitutes an intentional waiver of homestead rights by a spouse:

"By joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me."

The waiver language is not considered a waiver of:

- The protection against the owner's creditors during the owner's lifetime and after death; or
- The restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

### B. SECTION DIRECTORY:

**Section 1:** Creates s. 732.7025, F.S., related to waiver of homestead rights through deed.

**Section 2:** 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.

<sup>4</sup> 157 So.3d 295 (Fla. 4th DCA 2014); See also *Lyons v. Lyons*, 155 So.3d 1179 (Fla. 4th DCA 2014); *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA 2011).

<sup>5</sup> *Stone*, 157 So.3d at 304 (The court found that the language "all tenements, hereditaments, and appurtenances thereto belonging or in otherwise appertaining" in the deed constituted "all rights, or other equivalent language" for purposes of waiving spousal rights pursuant to s. 732.702(1), F.S.).

**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 homestead waivers; creating s.  
 3           732.7025, F.S.; providing language that may be used to  
 4           waive spousal homestead rights concerning devise  
 5           restrictions; providing an effective date.

6  
 7 Be It Enacted by the Legislature of the State of Florida:

8  
 9           Section 1. Section 732.7025, Florida Statutes, is created  
 10 to read:

11           732.7025 Waiver of homestead rights through deed.—  
 12           (1) A spouse is presumed to have waived his or her rights  
 13 as a surviving spouse with respect to the devise restrictions  
 14 under s. 4(c), Art. X of the State Constitution if the following  
 15 or substantially similar language is included in a deed:

16  
 17           "By joining this deed, I intend to waive homestead rights  
 18 that would otherwise prevent my spouse from devising the  
 19 homestead property described in this deed to someone other than  
 20 me."

21  
 22           (2) The waiver language in subsection (1) may not be  
 23 considered a waiver of the protection against the owner's  
 24 creditor claims during the owner's lifetime and after death.  
 25 Such language may not be considered a waiver of the restrictions

HB 421

2018



26 | against alienation by mortgage, sale, gift, or deed without the  
27 | joinder of the owner's spouse.

28 |       Section 2. This act shall take effect July 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		Tuszynski 	Bond 
2) Judiciary Committee			

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 creating, creating a clear chain of title. However, where there are conflicting documents, the first recorded document takes priority over any filed later. Where a lawsuit is filed affecting a real property interest, an interest recorded during the pendency of the lawsuit may take priority over the final resolution of title in the court case. A lis pendens resolves this.

A notice of lis pendens is 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, thereby barring any intervening document from affecting the real property interest determined by 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 was to leave a gap between final judgment and judicial sale where an intervening interest could impact title. The court reversed that ruling on rehearing to provide that the lis pendens is valid though the judicial sale.

The bill 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 an instrument transferring title is recorded.

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 the state employs a system in which 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 of that interest.

##### Lis Pendens

The term "lis pendens" literally means "pending lawsuit."<sup>1</sup> 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 now has jurisdiction and control over the identified property.<sup>2</sup> 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.<sup>3</sup> If that interest holder does not intervene and the proceedings are prosecuted to a judicial sale, the property is forever discharged from all such unrecorded interests and liens, preventing impaired title.<sup>4</sup> 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.<sup>5</sup>

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 entitled to record a notice of lis pendens as the action is founded on a duly recorded instrument, the mortgage.<sup>6</sup> The established understanding of lis pendens is that, except as otherwise provided by law, the lis pendens 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.<sup>7</sup> 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:<sup>8</sup>

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

<sup>2</sup> S. 48.23, F.S.

<sup>3</sup> S. 48.23(1)(d), F.S.

<sup>4</sup> Id.

<sup>5</sup> *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. 4<sup>th</sup> DCA 20014).

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

<sup>7</sup> 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 Civil Justice & Claims Subcommittee Staff).

<sup>8</sup> 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 in that case 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.<sup>9</sup>

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.<sup>10</sup> The Court held that 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.<sup>11</sup> This ruling confirms that the operation of the notice of lis pendens is a bar to enforcement against the property of all interests or liens, 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:<sup>12</sup>

"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, the Town of 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 Town's motion and certified the following question to the Florida Supreme Court:

"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 the Town of Lauderdale-by-the-Sea's Petition for Review.<sup>13</sup>

### **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 upholds the final appellate resolution of *Ober*.

The bill applies to pending actions.

<sup>9</sup> *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).

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

<sup>11</sup> *Id.* at 954.

<sup>12</sup> *Id.*

<sup>13</sup> *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 617 Covenants and Restrictions  
**SPONSOR(S):** Edwards  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 266

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MM MacNamara	Bond YB
2) Local, Federal & Veterans Affairs Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

The bill amends laws related to covenants and restrictions on real property. Specifically, the bill:

- Replaces the term "homeowners' association" with "property owners' association," thus extending statutory provisions regarding preservation and revival of covenants and restrictions affecting real property to a broader range of associations, notably commercial property owners' associations;
- Authorizes real property parcel owners who were subject to covenants and restrictions but who do not have a homeowners' association to use the same mechanisms as a homeowners' association to revitalize extinguished covenants and restrictions;
- Simplifies the procedures for renewal of the covenants and restrictions of a homeowners association; and
- Requires a homeowners association to annually consider preservation of the covenants and restrictions and requires an association to file a summary preservation every five years.

The bill appears to have an indeterminate minimal positive impact on the clerks of circuit courts and an equal indeterminate negative impact on property owners' association related to recording fees to preserve covenants or restrictions.

The effective date of the bill is October 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background: The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.<sup>1</sup> In general, MRTA provides that any person vested with any estate in land of record for 30 years or more has a marketable record title free and clear of most claims or encumbrances against the land. Current law includes 9 exceptions to the applicability of MRTA.<sup>2</sup>

##### MRTA and Property Owners Associations

One effect of MRTA is that homeowner association covenants and restrictions can lose effect after 30 years. In order to protect such covenants, MRTA has long provided for renewal of such covenants. Renewal starts the 30 time period over again. However, many associations fail to timely file a renewal of their covenants, primarily due to neglect rather than intent. Formerly, MRTA would apply in such cases and accordingly the covenants and restrictions expired and were unenforceable. In 2004, Part III of ch. 720, F.S., was enacted to provide a means by which covenants and restrictions of a mandatory homeowners' association may be revived.<sup>3</sup> In 2007, nonmandatory homeowners' associations became eligible for revitalization.<sup>4</sup> Revitalization requires the creation of an organizing committee, notice to all affected property owners, approval by a majority of the homeowners, approval by the Department of Economic Opportunity, and the recording of notice in the public records.<sup>5</sup>

There are two categories of property owners who enact and enforce covenants and restrictions regarding their property and that of their neighbors who are impacted by MRTA, but have not been included in the laws regarding renewal or revival of their covenants and restrictions. These property owners are commercial landowners in office parks, industrial parks, and other commercial districts; and neighborhoods with enforceable covenants but no formal homeowners' association.

##### *Preservation and Revitalization of Covenants by a Commercial Property Owners' Association*

The bill provides a definition for the term community covenant or restriction and substitutes the term property owners' association for homeowners' association. A property owners' association includes a homeowners' association as defined in s. 720.301, F.S., a corporation or entity responsible for the operation of real property in which the voting membership is made up of the owners of the real property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, as well as an association of parcel owners authorized to enforce a community covenant or restriction. The bill also makes changes in s. 712.01, F.S., to conform to these new terms.

The bill replaces all instances of the term "homeowners' association" found in ch. 712, F.S., with the term "property owners' association." The effect is to expand MRTA laws on preservation and revitalization of covenants or restrictions to these associations, that is, to expand the law to cover commercial associations.

The bill provides that Part III of ch. 720, F.S., comprised of ss. 720.403-407, F.S., is intended to provide mechanisms for revitalization of covenants or restrictions by all types of communities and property associations, not just residential communities.

---

<sup>1</sup> *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1227 (Fla. 2004).

<sup>2</sup> s. 712.03, F.S.

<sup>3</sup> ch. 2004-345, L.O.F.

<sup>4</sup> ch. 2007-173, L.O.F.

<sup>5</sup> part III of ch. 720, F.S.

### *Revitalization of Residential Covenants Not Related to a Homeowners' Association*

There are residential communities in which there are recorded covenants and restrictions similar to those found in a homeowners association, but no association was ever created. Under current law, individual owners can file notice of preservation of covenants before they expire, see ss. 712.05 and 712.06, F.S., but there are no means of revitalizing such covenants and restrictions as a neighborhood.

The bill creates s. 712.12, F.S., relating to covenant or restriction revitalization by real property owners not subject to a homeowners' association. The bill provides that the real property owners may use the process available to a homeowners' association in ss. 720.403-.407, F.S., to revive covenants or restrictions that have lapsed under MRTA. The real property owners are excepted from needing to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the required approval in writing. The organizing committee of the community may execute the revived covenants in the name of the community and the community name can be indexed as the grantee of the covenants with the parcel owners listed as grantors. A real property owner who has ceased to be subject to covenants or restrictions as of October 1, 2018, may commence an action by October 1, 2019, to determine if revitalization would unconstitutionally deprive the parcel owner of right or property. Revived covenants or restrictions do not affect the rights of a real property owner which are recognized by a court order in an action commenced by October 1, 2019, and may not be subsequently altered without the consent of the affected parcel owner.

### *Amended Procedures for Preservation of Existing Covenants*

Sections 712.05 and 712.06, F.S., provide that a homeowners' association wishing to timely renew its covenants may only do so under the following conditions:

- The board must give written notice to every parcel owner of the impending preservation of the covenants;<sup>6</sup>
- The board must give written notice to every parcel owner of a meeting of the board of directors where the directors will decide whether to renew the covenants;<sup>7</sup>
- The board of directors of the association must approve the renewal by a two-thirds vote;<sup>8</sup> and
- Notice of the renewal must be recorded in the Official Records of the county.<sup>9</sup>

In addition to allowing written notice in accordance with s. 712.06, F.S., the bill changes this procedure to:

- Provide that compliance by a homeowners association with newly created s. 720.3032, F.S. (see discussion herein) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Provide that an amendment to a covenant or restriction that is indexed under the legal name of the property owners' association and references the recording information of the covenant or restriction to be preserved may substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Repeal the requirement that the board achieve a two-thirds vote; and
- Repeal the requirement that affected property owners be furnished notice of the board meeting to vote on preservation.

### Additional Requirements of the Board of Directors of a Homeowners' Association

Currently, there is no statutory requirement that a board of directors of a homeowners association regularly consider the need for preservation of the covenants and restrictions of the real property in their neighborhood. The bill amends s. 720.303(2), F.S., requiring the board of directors for a

---

<sup>6</sup> s. 712.06(1)(b), F.S.

<sup>7</sup> s. 712.05(1), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> s. 712.06(2), F.S.

homeowners' association to consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This consideration must occur at the first board meeting after the annual meeting of the members.

The bill creates s. 720.3032, F.S., to require that a homeowners' association must file in the official records of the county in which it is located a notice detailing:

- The legal name of the association;
- The mailing and physical addresses of the association;
- The names of the affected subdivision plats and condominiums, or the common name of the community;
- The name, address, and telephone number for the current community association management company or manager, if any;
- An indication as to whether the association desires to preserve the covenants or restrictions affecting the community from extinguishment pursuant to MRTA;
- The name and recording information of those covenants or restrictions affecting the community which the association wishes to preserve;
- A legal description of the community affected by the covenants or restrictions; and
- The signature of a duly authorized officer of the association.

The bill creates a statutory form for such information. The bill further provides that the filing of the completed form is considered a substitute for the notice required for preservation of the covenants pursuant to ss. 712.05 and 712.06, F.S.

The failure to file this notice does not affect the validity or enforceability of any covenant or restriction on real property. A copy of this notice must be included as a part of the next notice of meeting or other mailing sent to all members of the association. The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

#### Other Changes Made by the Bill

The bill also provides a short title of the "Marketable Record Title Act" for ch. 712, F.S.; and makes changes to conform various statutory and definitional cross references.

#### B. SECTION DIRECTORY:

**Section 1:** Creates s. 712.001, F.S., creating a short title.

**Section 2:** Amends s. 712.01, F.S., relating to definitions applicable to the Marketable Record Title Act.

**Section 3:** Amends s. 712.05, F.S., relating to the effect of filing notice to preserve a covenant or restriction.

**Section 4:** Amends s. 712.06, F.S., relating to the contents of a notice to preserve a covenant or restriction and the recording and indexing of the notice.

**Section 5:** Amends s. 712.11, F.S., relating to covenant revitalization.

**Section 6:** Creates s. 712.12, F.S., relating to covenant or restriction revitalization by parcel owners not subject to a homeowners' association.

**Section 7:** Amends s. 720.303, F.S., relating to board meetings of a homeowners' association.

**Section 8:** Creates s. 720.3032, F.S., relating to notice of association information and preservation of covenants or restrictions from the Marketable Record Title Act.

**Section 9:** Amends s. 702.09, F.S., relating to definitions applicable to foreclosure of mortgages and statutory liens.

**Section 10:** Amends s. 702.10, F.S., relating to an order to show cause in a mortgage foreclosure.

**Section 11:** Amends s. 712.095, F.S., to conform a cross reference.

**Section 12:** Amends s. 720.403, F.S., relating to preservation of communities and revival of a declaration of covenants.



**Section 13:** Amends s. 720.404, F.S., relating to eligible communities and requirements for revival of a declaration of covenants.

**Section 14:** Amends s. 720.405, F.S., relating to the organizing committee and parcel owner approval for revival of a declaration of covenants.

**Section 15:** Amends s. 720.407, F.S., relating to recording of a declaration of covenants.

**Section 16:** Provides an effective date of October 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:

The bill requires the recording of documents in the public records of the county. Recording is subject to a fee of \$10.00 for the first page and \$8.50 for every subsequent page, payable to the recording department (in most counties, the clerk of the court).<sup>10</sup> The net revenues to county recorders are unknown.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Section 8 of the bill allows associations to prepare and record a notice. The recording fee is nominal (\$10 for the first page, \$8.50 for additional pages). Because the form is in statute, associations may be able to complete the task without assistance, or a community association manager can assist an association with preparation and filing without utilizing an attorney.

### 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:

Impairment of Contracts

To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and

obligations. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*<sup>11</sup> set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

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 covenants and restrictions;  
3 creating s. 712.001, F.S.; providing a short title;  
4 amending s. 712.01, F.S.; defining and redefining  
5 terms; amending s. 712.05, F.S.; revising the notice  
6 filing requirements for a person claiming an interest  
7 in land and other rights; authorizing a property  
8 owners' association to preserve and protect certain  
9 covenants or restrictions from extinguishment, subject  
10 to specified requirements; providing that a failure in  
11 indexing does not affect the validity of the notice;  
12 extending the length of time certain covenants or  
13 restrictions are preserved; deleting a provision  
14 requiring a two-thirds vote by members of an  
15 incorporated homeowners' association to file certain  
16 notices; providing that a property owners' association  
17 or clerk of the circuit court is not required to  
18 provide certain additional notice for a specified  
19 notice that is filed; conforming provisions to changes  
20 made by the act; amending s. 712.06, F.S.; exempting a  
21 specified summary notice and amendment from certain  
22 notice content requirements; revising the contents  
23 required to be specified by certain notices;  
24 conforming provisions to changes made by the act;  
25 amending s. 712.11, F.S.; conforming provisions to

26 changes made by the act; creating s. 712.12, F.S.;

27 defining terms; authorizing the parcel owners of a

28 community not subject to a homeowners' association to

29 use specified procedures to revive certain covenants

30 or restrictions, subject to certain exceptions and

31 requirements; authorizing a parcel owner to commence

32 an action by a specified date under certain

33 circumstances for a judicial determination that the

34 covenants or restrictions did not govern that parcel

35 as of a specified date and that any revitalization of

36 such covenants or restrictions as to that parcel would

37 unconstitutionally deprive the parcel owner of rights

38 or property; providing applicability; amending s.

39 720.303, F.S.; requiring a board to take up certain

40 provisions relating to notice filings at the first

41 board meeting; creating s. 720.3032, F.S.; requiring

42 any property owners' association desiring to preserve

43 covenants from potential termination after a specified

44 period by certain operation to record in the official

45 records of each county in which the community is

46 located a notice subject to certain requirements;

47 providing a document form for recording by an

48 association to preserve certain covenants or

49 restrictions; requiring a copy of the filed notice to

50 be sent to all members; requiring the original signed

HB 617

2018

51 notice to be recorded with the clerk of the circuit  
52 court or other recorder; amending ss. 702.09 and  
53 702.10, F.S.; conforming provisions to changes made by  
54 the act; amending s. 712.095, F.S.; conforming a  
55 cross-reference; amending ss. 720.403, 720.404,  
56 720.405, and 720.407, F.S.; conforming provisions to  
57 changes made by the act; providing an effective date.  
58

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

61 Section 1. Section 712.001, Florida Statutes, is created  
62 to read:

63 712.001 Short title.—This chapter may be cited as the  
64 "Marketable Record Title Act."

65 Section 2. Section 712.01, Florida Statutes, is reordered  
66 and amended to read:

67 712.01 Definitions.—As used in this chapter, the term ~~law~~:

68 (1) "Community covenant or restriction" means any  
69 agreement or limitation contained in a document recorded in the  
70 public records of the county in which a parcel is located which:

71 (a) Subjects the parcel to any use restriction that may be  
72 enforced by a property owners' association; or

73 (b) Authorizes a property owners' association to impose a  
74 charge or assessment against the parcel or the parcel owner.

75 (4) ~~(1)~~ The term "Person" includes the as used herein

76 ~~denotes~~ singular or plural, natural or corporate, private or  
 77 governmental, including the state and any political subdivision  
 78 or agency thereof as the context for the use thereof requires or  
 79 denotes and including any property owners' ~~homeowners'~~  
 80 association.

81 ~~(6)-(2)~~ "Root of title" means any title transaction  
 82 purporting to create or transfer the estate claimed by any  
 83 person ~~and~~ which is the last title transaction to have been  
 84 recorded at least 30 years before ~~prior to~~ the time when  
 85 marketability is being determined. The effective date of the  
 86 root of title is the date on which it was recorded.

87 ~~(7)-(3)~~ "Title transaction" means any recorded instrument  
 88 or court proceeding that ~~which~~ affects title to any estate or  
 89 interest in land and that ~~which~~ describes the land sufficiently  
 90 to identify its location and boundaries.

91 ~~(5)-(4)~~ "Property owners' association" ~~The term~~  
 92 ~~"homeowners' association"~~ means a homeowners' association as  
 93 defined in s. 720.301, a corporation or other entity responsible  
 94 for the operation of property in which the voting membership is  
 95 made up of the owners of the property or their agents, or a  
 96 combination thereof, and in which membership is a mandatory  
 97 condition of property ownership, or an association of parcel  
 98 owners which is authorized to enforce a community covenant or  
 99 restriction ~~use restrictions~~ that is ~~are~~ imposed on the parcels.

100 ~~(3)-(5)~~ The term "Parcel" means any real property that

101 ~~which is used for residential purposes that is subject to~~  
 102 ~~exclusive ownership and which is subject to any covenant or~~  
 103 ~~restriction of a property owners' ~~homeowners'~~ association.~~

104 (2) ~~(6)~~ ~~The term "Covenant or restriction" means any~~  
 105 ~~agreement or limitation contained in a document recorded in the~~  
 106 ~~public records of the county in which a parcel is located which~~  
 107 ~~subjects the parcel to any use or other restriction or~~  
 108 ~~obligation which may be enforced by a ~~homeowners'~~ association or~~  
 109 ~~which authorizes a ~~homeowners'~~ association to impose a charge or~~  
 110 ~~assessment against the parcel or the owner of the parcel or~~  
 111 ~~which may be enforced by the Florida Department of Environmental~~  
 112 ~~Protection pursuant to chapter 376 or chapter 403.~~

113 Section 3. Section 712.05, Florida Statutes, is amended to  
 114 read:

115 712.05 Effect of filing notice.—

116 (1) A person claiming an interest in land or other right  
 117 subject to extinguishment under this chapter ~~a ~~homeowners'~~~~  
 118 ~~association desiring to preserve a covenant or restriction~~ may  
 119 preserve and protect such interest or right ~~the same~~ from  
 120 extinguishment by the operation of this chapter ~~act~~ by filing  
 121 for record, at any time during the 30-year period immediately  
 122 following the effective date of the root of title, a written  
 123 notice in accordance with s. 712.06 ~~this chapter~~.

124 (2) A property owners' association may preserve' and  
 125 protect a community covenant or restriction from extinguishment

126 by the operation of this chapter by filing for record, at any  
127 time during the 30-year period immediately following the  
128 effective date of the root of title:

129 (a) A written notice in accordance with s. 712.06; or

130 (b) A summary notice in substantial form and content as  
131 required under s. 720.3032(2); or an amendment to a covenant or  
132 restriction that is indexed under the legal name of the property  
133 owners' association and references the recording information of  
134 the covenant or restriction to be preserved. Failure of a  
135 summary notice or amendment to be indexed to the current owners  
136 of the affected property does not affect the validity of the  
137 notice or vitiate the effect of the filing of such notice.

138 (3) A ~~Such~~ notice under subsection (1) or subsection (2)  
139 preserves an interest in land or other ~~such claim~~ of right  
140 subject to extinguishment under this chapter, or a ~~such~~ covenant  
141 or restriction or portion of such covenant or restriction, for  
142 not less than ~~up to~~ 30 years after filing the notice unless the  
143 notice is filed again as required in this chapter. A person's  
144 disability or lack of knowledge of any kind may not delay the  
145 commencement of or suspend the running of the 30-year period.  
146 Such notice may be filed for record by the claimant or by any  
147 other person acting on behalf of a claimant who is:

148 (a) Under a disability;

149 (b) Unable to assert a claim on his or her behalf; or

150 (c) One of a class, but whose identity cannot be



151 established or is uncertain at the time of filing such notice of  
 152 claim for record.

153  
 154 ~~Such notice may be filed by a homeowners' association only if~~  
 155 ~~the preservation of such covenant or restriction or portion of~~  
 156 ~~such covenant or restriction is approved by at least two-thirds~~  
 157 ~~of the members of the board of directors of an incorporated~~  
 158 ~~homeowners' association at a meeting for which a notice, stating~~  
 159 ~~the meeting's time and place and containing the statement of~~  
 160 ~~marketable title action described in s. 712.06(1)(b), was mailed~~  
 161 ~~or hand delivered to members of the homeowners' association at~~  
 162 ~~least 7 days before such meeting. The property owners'~~  
 163 ~~homeowners' association or clerk of the circuit court is not~~  
 164 required to provide additional notice pursuant to s. 712.06(3)  
 165 for a notice filed under subsection (2). The preceding sentence  
 166 is intended to clarify existing law.

167 ~~(4)(2)~~ It is ~~shall~~ not be necessary for the owner of the  
 168 marketable record title, as described in s. 712.02 ~~herein~~  
 169 ~~defined~~, to file a notice to protect his or her marketable  
 170 record title.

171 Section 4. Subsections (1) and (3) of section 712.06,  
 172 Florida Statutes, are amended to read:

173 712.06 Contents of notice; recording and indexing.—

174 (1) To be effective, the notice referred to in s. 712.05,  
 175 other than the summary notice and the amendment referred to in

176 s. 712.05(2)(b), must ~~shall~~ contain:

177 (a) The name or description and mailing address of the  
 178 claimant or the property owners' ~~homeowners'~~ association  
 179 desiring to preserve any covenant or restriction ~~and the name~~  
 180 ~~and particular post office address of the person filing the~~  
 181 ~~claim or the homeowners' association.~~

182 (b) The name and mailing ~~post office~~ address of an owner,  
 183 or the name and mailing ~~post office~~ address of the person in  
 184 whose name the said property is assessed on the last completed  
 185 tax assessment roll of the county at the time of filing, who,  
 186 for purpose of such notice, shall be deemed to be an owner;  
 187 ~~provided,~~ however, if a property owners' ~~homeowners'~~ association  
 188 is filing the notice, ~~then~~ the requirements of this paragraph  
 189 may be satisfied by attaching to and recording with the notice  
 190 an affidavit executed by the appropriate member of the board of  
 191 directors of the property owners' ~~homeowners'~~ association  
 192 affirming that the board of directors of the property owners'  
 193 ~~homeowners'~~ association caused a statement in substantially the  
 194 following form to be mailed or hand delivered to the members of  
 195 that property owners' ~~homeowners'~~ association:

196  
 197 STATEMENT OF MARKETABLE TITLE ACTION

198  
 199 The [name of property owners' ~~homeowners'~~ association] (the  
 200 "Association") has taken action to ensure that the [name of

201 declaration, covenant, or restriction], recorded in Official  
 202 Records Book . . . . , Page . . . . , of the public records of . . . .  
 203 County, Florida, as may be amended from time to time, currently  
 204 burdening the property of each and every member of the  
 205 Association, retains its status ~~as the source of marketable~~  
 206 ~~title~~ with regard to the affected real property ~~the transfer of~~  
 207 ~~a member's residence~~. To this end, the Association shall cause  
 208 the notice required by chapter 712, Florida Statutes, to be  
 209 recorded in the public records of . . . . County, Florida. Copies  
 210 of this notice and its attachments are available through the  
 211 Association pursuant to the Association's governing documents  
 212 regarding official records of the Association.

213  
 214 (c) A full and complete description of all land affected  
 215 by such notice, which description shall be set forth in  
 216 particular terms and not by general reference, but if said claim  
 217 is founded upon a recorded instrument or a covenant or a  
 218 restriction, ~~then~~ the description in such notice may be the same  
 219 as that contained in such recorded instrument or covenant or  
 220 restriction, provided the same shall be sufficient to identify  
 221 the property.

222 (d) A statement of the claim showing the nature,  
 223 description, and extent of such claim or other right subject to  
 224 extinguishment under this chapter or, in the case of a covenant  
 225 or restriction, a copy of the covenant or restriction or a

226 reference to the book and page or instrument number in which the  
 227 same is recorded, except that it is ~~shall~~ not ~~be~~ necessary to  
 228 show the amount of any claim for money or the terms of payment.

229 (e) If such claim or other right subject to extinguishment  
 230 under this chapter is based upon an instrument of record or a  
 231 recorded covenant or restriction, such instrument of record or  
 232 recorded covenant or restriction shall be deemed sufficiently  
 233 described to identify the same if the notice includes a  
 234 reference to the book and page in which the same is recorded.

235 (f) Such notice shall be acknowledged in the same manner  
 236 as deeds are acknowledged for record.

237 (3) The person providing the notice referred to in s.  
 238 712.05, other than a notice for preservation of a community  
 239 covenant or restriction, shall:

240 (a) Cause the clerk of the circuit court to mail by  
 241 registered or certified mail to the purported owner of said  
 242 property, as stated in such notice, a copy thereof and shall  
 243 enter on the original, before recording the same, a certificate  
 244 showing such mailing. For preparing the certificate, the  
 245 claimant shall pay to the clerk the service charge as prescribed  
 246 in s. 28.24(8) and the necessary costs of mailing, in addition  
 247 to the recording charges as prescribed in s. 28.24(12). If the  
 248 notice names purported owners having more than one address, the  
 249 person filing the same shall furnish a true copy for each of the  
 250 several addresses stated, and the clerk shall send one such copy

251 to the purported owners named at each respective address. Such  
 252 certificate shall be sufficient if the same reads substantially  
 253 as follows:

254  
 255 I hereby certify that I did on this ....., mail by  
 256 registered (or certified) mail a copy of the foregoing notice to  
 257 each of the following at the address stated:

258  
 259 ... (Clerk of the circuit court) ...

260 of .... County, Florida,

261 By... (Deputy clerk) ...

262

263 The clerk of the circuit court is not required to mail to the  
 264 purported owner of such property any such notice that pertains  
 265 solely to the preserving of any covenant or restriction or any  
 266 portion of a covenant or restriction; or

267 (b) Publish once a week, for 2 consecutive weeks, the  
 268 notice referred to in s. 712.05, with the official record book  
 269 and page number in which such notice was recorded, in a  
 270 newspaper as defined in chapter 50 in the county in which the  
 271 property is located.

272 Section 5. Section 712.11, Florida Statutes, is amended to  
 273 read:

274 712.11 Covenant revitalization.—A property owners'  
 275 ~~homeowners'~~ association not otherwise subject to chapter 720 may

276 use the procedures set forth in ss. 720.403-720.407 to revive  
 277 covenants that have lapsed under the terms of this chapter.

278 Section 6. Section 712.12, Florida Statutes, is created to  
 279 read:

280 712.12 Covenant or restriction revitalization by parcel  
 281 owners not subject to a homeowners' association.-

282 (1) As used in this section, the term:

283 (a) "Community" means the real property that is subject to  
 284 a covenant or restriction that is recorded in the county where  
 285 the property is located.

286 (b) "Covenant or restriction" means any agreement or  
 287 limitation imposed by a private party and not required by a  
 288 governmental agency as a condition of a development permit, as  
 289 defined in s. 163.3164, which is contained in a document  
 290 recorded in the public records of the county in which a parcel  
 291 is located and which subjects the parcel to any use restriction  
 292 that may be enforced by a parcel owner.

293 (c) "Parcel" means real property that is used for  
 294 residential purposes and that is subject to exclusive ownership  
 295 and any covenant or restriction that may be enforced by a parcel  
 296 owner.

297 (d) "Parcel owner" means the record owner of legal title  
 298 to a parcel.

299 (2) The parcel owners of a community not subject to a  
 300 homeowners' association may use the procedures set forth in ss.

301 720.403-720.407 to revive covenants or restrictions that have  
302 lapsed under the terms of this chapter, except:

303 (a) A reference to a homeowners' association or articles  
304 of incorporation or bylaws of a homeowners' association under  
305 ss. 720.403-720.407 is not required to revive the covenants or  
306 restrictions.

307 (b) The approval required under s. 720.405(6) must be in  
308 writing, and not at a meeting.

309 (c) The requirements under s. 720.407(2) may be satisfied  
310 by having the organizing committee execute the revived covenants  
311 or restrictions in the name of the community.

312 (d) The indexing requirements under s. 720.407(3) may be  
313 satisfied by indexing the community name in the covenants or  
314 restrictions as the grantee and the parcel owners as the  
315 grantors.

316 (3) With respect to any parcel that has ceased to be  
317 governed by covenants or restrictions as of October 1, 2018, the  
318 parcel owner may commence an action by October 1, 2019, for a  
319 judicial determination that the covenants or restrictions did  
320 not govern that parcel as of October 1, 2018, and that any  
321 revitalization of such covenants or restrictions as to that  
322 parcel would unconstitutionally deprive the parcel owner of  
323 rights or property.

324 (4) Revived covenants or restrictions that are implemented  
325 pursuant to this section do not apply to or affect the rights of

326 the parcel owner which are recognized by any court order or  
 327 judgment in any action commenced by October 1, 2019, and any  
 328 such rights so recognized may not be subsequently altered by  
 329 revived covenants or restrictions implemented under this section  
 330 without the consent of the affected parcel owner.

331 Section 7. Paragraph (e) is added to subsection (2) of  
 332 section 720.303, Florida Statutes, to read:

333 720.303 Association powers and duties; meetings of board;  
 334 official records; budgets; financial reporting; association  
 335 funds; recalls.—

336 (2) BOARD MEETINGS.—

337 (e) At the first board meeting, excluding the  
 338 organizational meeting, which follows the annual meeting of the  
 339 members, the board shall consider the desirability of filing  
 340 notices to preserve the covenants or restrictions affecting the  
 341 community or association from extinguishment under the  
 342 Marketable Record Title Act, chapter 712, and to authorize and  
 343 direct the appropriate officer to file notice in accordance with  
 344 s. 720.3032.

345 Section 8. Section 720.3032, Florida Statutes, is created  
 346 to read:

347 720.3032 Notice of association information; preservation  
 348 from Marketable Record Title Act.—

349 (1) Any property owners' association desiring to preserve  
 350 covenants from potential termination after 30 years by operation



351 of chapter 712 may record in the official records of each county  
352 in which the community is located a notice specifying:

353 (a) The legal name of the association.

354 (b) The mailing and physical addresses of the association.

355 (c) The names of the affected subdivision plats and  
356 condominiums or, if not applicable, the common name of the  
357 community.

358 (d) The name, address, and telephone number for the  
359 current community association management company or community  
360 association manager, if any.

361 (e) Indication as to whether the association desires to  
362 preserve the covenants or restrictions affecting the community  
363 or association from extinguishment under the Marketable Record  
364 Title Act, chapter 712.

365 (f) A listing by name and recording information of those  
366 covenants or restrictions affecting the community which the  
367 association desires to be preserved from extinguishment.

368 (g) The legal description of the community affected by the  
369 covenants or restrictions, which may be satisfied by a reference  
370 to a recorded plat.

371 (h) The signature of a duly authorized officer of the  
372 association, acknowledged in the same manner as deeds are  
373 acknowledged for record.

374 (2) Recording a document in substantially the following  
375 form satisfies the notice obligation and constitutes a summary

376 notice as specified in s. 712.05(2)(b) sufficient to preserve  
 377 and protect the referenced covenants and restrictions from  
 378 extinguishment under the Marketable Record Title Act, chapter  
 379 712.

381 Notice of ...(name of association)... under s. 720.3032, Florida  
 382 Statutes, and notice to preserve and protect covenants and  
 383 restrictions from extinguishment under the Marketable Record  
 384 Title Act, chapter 712, Florida Statutes.

385  
 386 Instructions to recorder: Please index both the legal name  
 387 of the association and the names shown in item 3.

- 388 1. Legal name of association: ....  
 389 2. Mailing and physical addresses of association: ....  
 390 ....

391 3. Names of the subdivision plats, or, if none, common  
 392 name of community: ....

393 4. Name, address, and telephone number for management  
 394 company, if any: .....

395 5. This notice does .... does not .... constitute a notice  
 396 to preserve and protect covenants or restrictions from  
 397 extinguishment under the Marketable Record Title Act.

398 6. The following covenants or restrictions affecting the  
 399 community which the association desires to be preserved from  
 400 extinguishment:

401 ... (Name of instrument)...

402 ... (Official Records Book where recorded & page)...

403 ... (List of instruments)...

404 ... (List of recording information)...

405 7. The legal description of the community affected by the  
 406 listed covenants or restrictions is: ... (Legal description,  
 407 which may be satisfied by reference to a recorded plat)...

408 This notice is filed on behalf of ... (Name of  
 409 association) ... as of ... (Date)....

410 ... (Name of association)...

411  
 412 By: ....

413 ... (Name of individual officer)...

414 ... (Title of officer)...

415 ... (Notary acknowledgment)...

416  
 417 (3) A copy of the notice, as filed, must be included as  
 418 part of the next notice of meeting or other mailing sent to all  
 419 members.

420 (4) The original signed notice must be recorded in the  
 421 official records of the clerk of the circuit court or other  
 422 recorder for the county.

423 Section 9. Section 702.09, Florida Statutes, is amended to  
 424 read:

425 702.09 Definitions.—For the purposes of ss. 702.07 and

426 | 702.08, the words "decree of foreclosure" shall include a  
 427 | judgment or order rendered or passed in the foreclosure  
 428 | proceedings in which the decree of foreclosure shall be  
 429 | rescinded, vacated, and set aside; the word "mortgage" shall  
 430 | mean any written instrument securing the payment of money or  
 431 | advances and includes liens to secure payment of assessments  
 432 | arising under chapters 718 and 719 and liens created pursuant to  
 433 | the recorded covenants of a property owners' ~~homeowners'~~  
 434 | association as defined in s. 712.01; the word "debt" shall  
 435 | include promissory notes, bonds, and all other written  
 436 | obligations given for the payment of money; the words  
 437 | "foreclosure proceedings" shall embrace every action in the  
 438 | circuit or county courts of this state wherein it is sought to  
 439 | foreclose a mortgage and sell the property covered by the same;  
 440 | and the word "property" shall mean and include both real and  
 441 | personal property.

442 | Section 10. Subsection (1) of section 702.10, Florida  
 443 | Statutes, is amended to read:

444 | 702.10 Order to show cause; entry of final judgment of  
 445 | foreclosure; payment during foreclosure.—

446 | (1) A lienholder may request an order to show cause for  
 447 | the entry of final judgment in a foreclosure action. For  
 448 | purposes of this section, the term "lienholder" includes the  
 449 | plaintiff and a defendant to the action who holds a lien  
 450 | encumbering the property or a defendant who, by virtue of its

HB 617

2018

451 status as a condominium association, cooperative association, or  
452 property owners' ~~homeowners'~~ association, may file a lien  
453 against the real property subject to foreclosure. Upon filing,  
454 the court shall immediately review the request and the court  
455 file in chambers and without a hearing. If, upon examination of  
456 the court file, the court finds that the complaint is verified,  
457 complies with s. 702.015, and alleges a cause of action to  
458 foreclose on real property, the court shall promptly issue an  
459 order directed to the other parties named in the action to show  
460 cause why a final judgment of foreclosure should not be entered.

461 (a) The order shall:

462 1. Set the date and time for a hearing to show cause. The  
463 date for the hearing may not occur sooner than the later of 20  
464 days after service of the order to show cause or 45 days after  
465 service of the initial complaint. When service is obtained by  
466 publication, the date for the hearing may not be set sooner than  
467 30 days after the first publication.

468 2. Direct the time within which service of the order to  
469 show cause and the complaint must be made upon the defendant.

470 3. State that the filing of defenses by a motion, a  
471 responsive pleading, an affidavit, or other papers before the  
472 hearing to show cause that raise a genuine issue of material  
473 fact which would preclude the entry of summary judgment or  
474 otherwise constitute a legal defense to foreclosure shall  
475 constitute cause for the court not to enter final judgment.

476           4. State that a defendant has the right to file affidavits  
477 or other papers before the time of the hearing to show cause and  
478 may appear personally or by way of an attorney at the hearing.

479           5. State that, if a defendant files defenses by a motion,  
480 a verified or sworn answer, affidavits, or other papers or  
481 appears personally or by way of an attorney at the time of the  
482 hearing, the hearing time will be used to hear and consider  
483 whether the defendant's motion, answer, affidavits, other  
484 papers, and other evidence and argument as may be presented by  
485 the defendant or the defendant's attorney raise a genuine issue  
486 of material fact which would preclude the entry of summary  
487 judgment or otherwise constitute a legal defense to foreclosure.  
488 The order shall also state that the court may enter an order of  
489 final judgment of foreclosure at the hearing and order the clerk  
490 of the court to conduct a foreclosure sale.

491           6. State that, if a defendant fails to appear at the  
492 hearing to show cause or fails to file defenses by a motion or  
493 by a verified or sworn answer or files an answer not contesting  
494 the foreclosure, such defendant may be considered to have waived  
495 the right to a hearing, and in such case, the court may enter a  
496 default against such defendant and, if appropriate, a final  
497 judgment of foreclosure ordering the clerk of the court to  
498 conduct a foreclosure sale.

499           7. State that if the mortgage provides for reasonable  
500 attorney fees and the requested attorney fees do not exceed 3

501 percent of the principal amount owed at the time of filing the  
502 complaint, it is unnecessary for the court to hold a hearing or  
503 adjudge the requested attorney fees to be reasonable.

504 8. Attach the form of the proposed final judgment of  
505 foreclosure which the movant requests the court to enter at the  
506 hearing on the order to show cause.

507 9. Require the party seeking final judgment to serve a  
508 copy of the order to show cause on the other parties in the  
509 following manner:

510 a. If a party has been served pursuant to chapter 48 with  
511 the complaint and original process, or the other party is the  
512 plaintiff in the action, service of the order to show cause on  
513 that party may be made in the manner provided in the Florida  
514 Rules of Civil Procedure.

515 b. If a defendant has not been served pursuant to chapter  
516 48 with the complaint and original process, the order to show  
517 cause, together with the summons and a copy of the complaint,  
518 shall be served on the party in the same manner as provided by  
519 law for original process.

520

521 Any final judgment of foreclosure entered under this subsection  
522 is for in rem relief only. This subsection does not preclude the  
523 entry of a deficiency judgment where otherwise allowed by law.  
524 The Legislature intends that this alternative procedure may run  
525 simultaneously with other court procedures.

HB 617

2018

526 (b) The right to be heard at the hearing to show cause is  
527 waived if a defendant, after being served as provided by law  
528 with an order to show cause, engages in conduct that clearly  
529 shows that the defendant has relinquished the right to be heard  
530 on that order. The defendant's failure to file defenses by a  
531 motion or by a sworn or verified answer, affidavits, or other  
532 papers or to appear personally or by way of an attorney at the  
533 hearing duly scheduled on the order to show cause presumptively  
534 constitutes conduct that clearly shows that the defendant has  
535 relinquished the right to be heard. If a defendant files  
536 defenses by a motion, a verified answer, affidavits, or other  
537 papers or presents evidence at or before the hearing which raise  
538 a genuine issue of material fact which would preclude entry of  
539 summary judgment or otherwise constitute a legal defense to  
540 foreclosure, such action constitutes cause and precludes the  
541 entry of a final judgment at the hearing to show cause.

542 (c) In a mortgage foreclosure proceeding, when a final  
543 judgment of foreclosure has been entered against the mortgagor  
544 and the note or mortgage provides for the award of reasonable  
545 attorney fees, it is unnecessary for the court to hold a hearing  
546 or adjudge the requested attorney fees to be reasonable if the  
547 fees do not exceed 3 percent of the principal amount owed on the  
548 note or mortgage at the time of filing, even if the note or  
549 mortgage does not specify the percentage of the original amount  
550 that would be paid as liquidated damages.



HB 617

2018

551 (d) If the court finds that all defendants have waived the  
552 right to be heard as provided in paragraph (b), the court shall  
553 promptly enter a final judgment of foreclosure without the need  
554 for further hearing if the plaintiff has shown entitlement to a  
555 final judgment and upon the filing with the court of the  
556 original note, satisfaction of the conditions for establishment  
557 of a lost note, or upon a showing to the court that the  
558 obligation to be foreclosed is not evidenced by a promissory  
559 note or other negotiable instrument. If the court finds that a  
560 defendant has not waived the right to be heard on the order to  
561 show cause, the court shall determine whether there is cause not  
562 to enter a final judgment of foreclosure. If the court finds  
563 that the defendant has not shown cause, the court shall promptly  
564 enter a judgment of foreclosure. If the time allotted for the  
565 hearing is insufficient, the court may announce at the hearing a  
566 date and time for the continued hearing. Only the parties who  
567 appear, individually or through an attorney, at the initial  
568 hearing must be notified of the date and time of the continued  
569 hearing.

570 Section 11. Section 712.095, Florida Statutes, is amended  
571 to read:

572 712.095 Notice required by July 1, 1983.—Any person whose  
573 interest in land is derived from an instrument or court  
574 proceeding recorded subsequent to the root of title, which  
575 instrument or proceeding did not contain a description of the

576 land as specified by s. 712.01(7) ~~s. 712.01(3)~~, and whose  
 577 interest had not been extinguished prior to July 1, 1981, shall  
 578 have until July 1, 1983, to file a notice in accordance with s.  
 579 712.06 to preserve the interest.

580 Section 12. Section 720.403, Florida Statutes, is amended  
 581 to read:

582 720.403 Preservation of ~~residential~~ communities; revival  
 583 of declaration of covenants.—

584 (1) Consistent with required and optional elements of  
 585 local comprehensive plans and other applicable provisions of the  
 586 Community Planning Act, property owners ~~homeowners~~ are  
 587 encouraged to preserve existing residential and other  
 588 communities, promote available and affordable housing, protect  
 589 structural and aesthetic elements of their ~~residential~~  
 590 community, and, as applicable, maintain roads and streets,  
 591 easements, water and sewer systems, utilities, drainage  
 592 improvements, conservation and open areas, recreational  
 593 amenities, and other infrastructure and common areas that serve  
 594 and support the ~~residential~~ community by the revival of a  
 595 previous declaration of covenants and other governing documents  
 596 that may have ceased to govern some or all parcels in the  
 597 community.

598 (2) In order to preserve a ~~residential~~ community and the  
 599 associated infrastructure and common areas for the purposes  
 600 described in this section, the parcel owners in a community that

601 was previously subject to a declaration of covenants that has  
 602 ceased to govern one or more parcels in the community may revive  
 603 the declaration and the ~~homeowners'~~ association for the  
 604 community upon approval by the parcel owners to be governed  
 605 thereby as provided in this act, and upon approval of the  
 606 declaration and the other governing documents for the  
 607 association by the Department of Economic Opportunity in a  
 608 manner consistent with this act.

609 (3) Part III of this chapter is intended to provide  
 610 mechanisms for the revitalization of covenants or restrictions  
 611 for all types of communities and property associations and is  
 612 not limited to residential communities.

613 Section 13. Section 720.404, Florida Statutes, is amended  
 614 to read:

615 720.404 Eligible ~~residential~~ communities; requirements for  
 616 revival of declaration.—Parcel owners in a community are  
 617 eligible to seek approval from the Department of Economic  
 618 Opportunity to revive a declaration of covenants under this act  
 619 if all of the following requirements are met:

620 (1) All parcels to be governed by the revived declaration  
 621 must have been once governed by a previous declaration that has  
 622 ceased to govern some or all of the parcels in the community;

623 (2) The revived declaration must be approved in the manner  
 624 provided in s. 720.405(6); and

625 (3) The revived declaration may not contain covenants that

626 are more restrictive on the parcel owners than the covenants  
 627 contained in the previous declaration, except that the  
 628 declaration may:

629 (a) Have an effective term of longer duration than the  
 630 term of the previous declaration;

631 (b) Omit restrictions contained in the previous  
 632 declaration;

633 (c) Govern fewer than all of the parcels governed by the  
 634 previous declaration;

635 (d) Provide for amendments to the declaration and other  
 636 governing documents; and

637 (e) Contain provisions required by this chapter for new  
 638 declarations that were not contained in the previous  
 639 declaration.

640 Section 14. Subsections (1), (3), (5), and (6) of section  
 641 720.405, Florida Statutes, are amended to read:

642 720.405 Organizing committee; parcel owner approval.—

643 (1) The proposal to revive a declaration of covenants and  
 644 an a-homeowners' association for a community under the terms of  
 645 this act shall be initiated by an organizing committee  
 646 consisting of not less than three parcel owners located in the  
 647 community that is proposed to be governed by the revived  
 648 declaration. The name, address, and telephone number of each  
 649 member of the organizing committee must be included in any  
 650 notice or other document provided by the committee to parcel

HB 617

2018

651 owners to be affected by the proposed revived declaration.

652 (3) The organizing committee shall prepare the full text  
653 of the proposed articles of incorporation and bylaws of the  
654 revived ~~homeowners'~~ association to be submitted to the parcel  
655 owners for approval, unless the association is then an existing  
656 corporation, in which case the organizing committee shall  
657 prepare the existing articles of incorporation and bylaws to be  
658 submitted to the parcel owners.

659 (5) A copy of the complete text of the proposed revised  
660 declaration of covenants, the proposed new or existing articles  
661 of incorporation and bylaws of the ~~homeowners'~~ association, and  
662 a graphic depiction of the property to be governed by the  
663 revived declaration shall be presented to all of the affected  
664 parcel owners by mail or hand delivery not less than 14 days  
665 before the time that the consent of the affected parcel owners  
666 to the proposed governing documents is sought by the organizing  
667 committee.

668 (6) A majority of the affected parcel owners must agree in  
669 writing to the revived declaration of covenants and governing  
670 documents of the ~~homeowners'~~ association or approve the revived  
671 declaration and governing documents by a vote at a meeting of  
672 the affected parcel owners noticed and conducted in the manner  
673 prescribed by s. 720.306. Proof of notice of the meeting to all  
674 affected owners of the meeting and the minutes of the meeting  
675 recording the votes of the property owners shall be certified by

HB 617

2018

676 a court reporter or an attorney licensed to practice in the  
677 state.

678 Section 15. Subsection (3) of section 720.407, Florida  
679 Statutes, is amended to read:

680 720.407 Recording; notice of recording; applicability and  
681 effective date.—

682 (3) The recorded documents shall include the full text of  
683 the approved declaration of covenants, the articles of  
684 incorporation and bylaws of the ~~homeowners'~~ association, the  
685 letter of approval by the department, and the legal description  
686 of each affected parcel of property. For purposes of chapter  
687 712, the association is deemed to be and shall be indexed as the  
688 grantee in a title transaction and the parcel owners named in  
689 the revived declaration are deemed to be and shall be indexed as  
690 the grantors in the title transaction.

691 Section 16. This act shall take effect October 1, 2018.



## 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		MM MacNamara	Bond NB
2) Judiciary Committee			

### 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 to such recognition. Some exceptions are mandatory, others are discretionary.

The bill 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: Foreign Judgments**

A person who holds a civil judgment against another person has certain legal rights pursuant to that judgment 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 clearly could regulate whether and how states recognize a judgment from a foreign country under the 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)<sup>1</sup> 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.<sup>2</sup>

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 under 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 jurisdiction over the subject matter.<sup>3</sup>

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;

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

<sup>2</sup> 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 November 21, 2017).

<sup>3</sup> s. 55.605(1)(a-c), F.S.

- 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;
- 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 in that case as would be provided by the United States Constitution and the State Constitution.<sup>4</sup>

### **Effect of Proposed Changes**

The bill 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 two additional exceptions are newly adopted provisions of the Uniform Foreign Money-Judgements Recognition Act.<sup>5</sup> Moreover, 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 not 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 as part of the Uniform Act, 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.<sup>6</sup>

Consequently, the exception provided for in the bill would allow a Florida court to not 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.

<sup>4</sup> s. 55.605(2)(a-h), F.S.

<sup>5</sup>[http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra\\_am05\\_bin\\_der.pdf](http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_am05_bin_der.pdf), p. 12-14 (last visited November 21, 2017).

<sup>6</sup> *Id.* at p. 13, lines 12-19.

## Due Process of Law

The United States Constitution and the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. Although there is no precise definition of "due process," the term embodies a fundamental conception of fairness.<sup>7</sup> 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.<sup>8</sup>

The bill allows, but does not require, a Florida court to not 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.<sup>9</sup>

Similar to the other exception provided for in the bill, this exception would allow a Florida court to not 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 the bill is effective 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.

---

<sup>7</sup> See *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.).

<sup>8</sup> See *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).

<sup>9</sup> See FN. 3, *supra*, p. 13, lines 30-35.

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 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.





**STORAGE NAME:** h6515.CJC  
**DATE:** 11/29/17

November 29, 2017

SPECIAL MASTER'S FINAL REPORT

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

Re: 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 stopped truck. The crash resulted in disabling damage to each of the three vehicles. 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 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.<sup>1</sup>

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 driver of the bus, 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 already reached the maximum 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 only remedy at this point 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, every claim bill must be reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

At the time of the accident, the County bus was being operated by a County employee in the scope of his employment with the County. 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 to Claimant when it negligently failed to brake and rear-ended a van, causing the accident.

---

<sup>1</sup> 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 a van, causing the van to rear-end Claimant's truck.

Damages

The amount of damages for \$25,000 is 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 to this day, 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% of the total recovery, 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.<sup>2</sup>

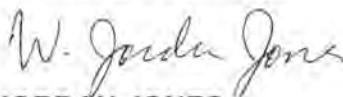
SUGGESTED AMENDMENTS:

The bill should be amended to reflect that Claimant's current married name is Cathleen L. Waller.

RECOMMENDATIONS:

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

---

<sup>2</sup> 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  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A bill to be entitled  
 An act for the relief of Cathleen Smiley by Brevard  
 County; providing for an appropriation to compensate  
 Cathleen Smiley for personal injuries and damages  
 sustained in an automobile accident caused by a  
 Brevard County employee; providing for payment by  
 Brevard County; providing a limitation on the payment  
 of compensation and attorney fees; providing an  
 effective date.

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

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

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

WHEREAS, at the time of the accident, Ms. Smiley was  
 without personal resources for medical insurance, other than  
 nominal personal injury protection, to adequately care for the

26 injuries she suffered as a result of the accident, and

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

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

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

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

40 WHEREAS, on January 25, 2016, a consent judgment was  
41 entered after Ms. Smiley and Brevard County agreed to a  
42 stipulated judgment in the amount of \$25,000 in case number 05-  
43 2000-CA-004291-XXXX-XX, and

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

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

51 WHEREAS, after these property damage, medical, and injury  
 52 claims were settled, only \$98,590 remained to resolve the other  
 53 claims filed in connection with the accident, and

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

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

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

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

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

76 and would support same, NOW, THEREFORE,

77

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

79

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

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

87 Section 3. The amount paid by Brevard County pursuant to  
 88 s. 768.28, Florida Statutes, and the amount awarded under this  
 89 act are intended to provide the sole compensation for all  
 90 present and future claims arising out of the factual situation  
 91 described in this act which resulted in injuries and damages to  
 92 Cathleen Smiley. The total amount paid for attorney fees  
 93 relating to this claim may not exceed 25 percent of the amount  
 94 awarded under this act.

95 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

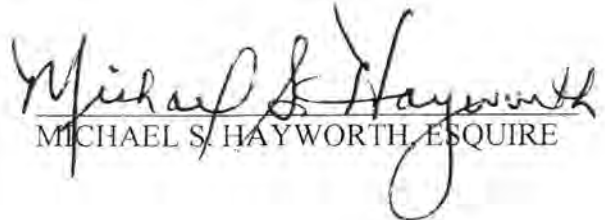
STATE OF FLORIDA

COUNTY OF BREVARD

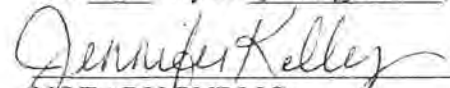
PERSONALLY appeared before me, a Notary Public, MICHAEL S. HAYWORTH, ESQUIRE, who upon being duly sworn, deposes and states:

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 31<sup>st</sup> day of October, 2017.

  
NOTARY PUBLIC  
My Commission Expires: 1/9/2021



Jennifer Kelly  
NOTARY PUBLIC  
STATE OF FLORIDA  
Comm# GG061000  
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>



Amendment No. 1

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	_____	

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Altman offered the following:

**Amendment (with title amendment)**

Remove lines 85-94 and insert:

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 \$6,250.00, no amount may be paid for lobbyist fees, and the total amount paid





Amendment No. 1

17 for costs and other similar expenses relating to this claim may  
18 not exceed \$2,343.12.

19

20

-----

21

**T I T L E   A M E N D M E N T**

22

Remove lines 8-9 and insert:

23

of fees and costs; providing an effective date.





**STORAGE NAME:** h6517.CJC  
**DATE:** 11/29/17

November 29, 2017

SPECIAL MASTER'S FINAL REPORT

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

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

**THIS IS A CONTESTED CLAIM IN THE AMOUNT OF \$750,000<sup>1</sup> 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, while 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, 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. On Claimant's third test drive around the block,

---

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

the accident occurred.

Around 1:45 p.m., Lynn Godden, an Orange County employee on duty at the time, was driving an Orange 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 flying into the air a distance of 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. In the ambulance logs, it is reported that 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 Orange 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, although it appears many (if not all) of the bills were paid by third parties such as Medicaid or the Department of Veteran Affairs. There are outstanding liens against any award Claimant may receive.

Claimant continues to suffer the effects of his injuries, suffering from what is apparently a recurring leg infection. He went on to complete his college degree but struggled to find employment until recently. He is now employed at Image Depot Express in Lakeland, Florida, where he earns twelve dollars an hour doing graphic design work. Claimant receives social security disability

for about \$800 per month, along with Veteran Affairs benefits from past military service.

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

LITIGATION HISTORY:

On February 14, 2007, Claimant filed suit against Orange County in circuit court, alleging negligence by Mr. Godden and Orange County. Before trial, Claimant and his wife divorced, and she settled her claim against Orange 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
<b>Total Damages</b>	<b><u>\$4,814,785.37</u></b>

The trial 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 (that is, 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 an amount, 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 in the accident. Respondent asserts that Claimant was traveling at a speed of up to 50 miles per hour at the time of the accident and implies 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, every claim bill must be reviewed *de novo* in light of the standard elements of negligence.

Duty & Breach

Mr. Godden 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.<sup>2</sup> 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 Orange County, and thus Respondent is liable for Mr. Godden's actions under the doctrine of respondeat superior. Mr. Godden breached his duty to Claimant when he 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.<sup>3</sup>

To support its argument that Claimant's negligence contributed to the accident, 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. It is undisputed that Claimant was not wearing a helmet.

Claimant's speed at the time of the crash was hotly 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 told the first responders that he was traveling about 50 mph. 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, testified for Claimant that Claimant was traveling 25 miles per hour or less

---

<sup>2</sup> See s. 316.123(2)(a), F.S.

<sup>3</sup> In Florida, the doctrine of comparative fault provides for apportionment of the loss among those whose fault contributed to the occurrence. See *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. See s. 768.81(2), F.S.

based on where Claimant's body and 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 instead.

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, there was some evidence that a hospital record reflected Claimant having had some alcohol on the day of the accident. Additionally, Respondent cites to Claimant's two prior DUI convictions<sup>4</sup> 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 alcohol. It appears that no blood alcohol analysis was performed at the hospital.

I find that the jury's determination that Claimant was 33% responsible and Respondent was 67% responsible is wholly reasonable. The jury had the opportunity to evaluate these factors and ultimately 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 to this day. 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, with Claimant's expert estimating the average annual cost at \$55,164, and Respondent's expert estimating it 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 now overweight and diabetic.

---

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

Respondent asserts that many, if not all, of the medical costs have been shouldered by third parties such as the Department of Veteran Affairs and Medicaid.<sup>5</sup> Respondent also suggests Claimant needs a new prosthetic only every ten years instead of every five.

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 instant claim bill, Claimant seeks only \$750,000 plus the possible 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. Out of this amount, 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. 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. Last session, 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 it died in Senate Judiciary. Current House Bill 6517 seeks the lesser amount of \$750,000 plus the extinguishing of certain medical liens.<sup>6</sup>

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, Senate Sponsor  
Ashley Istler, Senate Special Master

<sup>5</sup> The Department of Veteran Affairs has a lien for about \$181,000 and Medicaid has a lien for about \$42,000 (reduced from \$335,000).

<sup>6</sup> Senate Bill 54 (2018) seeks the full \$2,813,536.09 but does not state that any liens are to be extinguished.



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 attorney fees; 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

HB 6517

2018

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. The total amount of attorney fees relating to this  
79 claim may not exceed 25 percent of the amount awarded under this  
80 act.

81       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.**

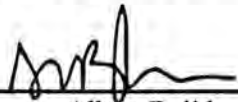
---

**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.

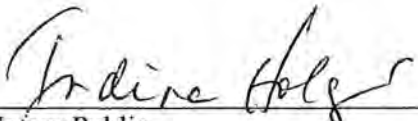
**FURTHER, AFFIANT SAYETH NOT**

  
 \_\_\_\_\_  
**DAVID B. MOFFETT**

**STATE OF FLORIDA  
COUNTY OF ORANGE**

The foregoing instrument was subscribed and sworn to before me this 4<sup>th</sup> 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:



Amendment No. 1

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: Civil Justice & Claims  
 2 Subcommittee

3 Representative Cortes, B. offered the following:

**Amendment (with title amendment)**

6 Remove lines 78-80 and insert:

7 Allan Smith. Of the amount awarded under this act, the total  
 8 amount paid for attorney fees may not exceed \$150,000.00, the  
 9 total amount paid for lobbyist fees may not exceed \$37,500.00,  
 10 and the total amount paid for costs and other similar expenses  
 11 relating to this claim may not exceed \$71,511.15.

12 -----  
 13  
 14 **T I T L E A M E N D M E N T**

15 Remove line 8 and insert:

16 fees and costs; providing an effective date.