



Judiciary Committee

Thursday, March 17, 2011

9:00 AM

404 HOB

Meeting Packet

**Dean Cannon
Speaker**

**William Snyder
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Thursday, March 17, 2011 09:00 am

End Date and Time: Thursday, March 17, 2011 10:30 am

Location: 404 HOB

Duration: 1.50 hrs

Consideration of the following bill(s):

HB 101 Violations of Injunctions for Protection by Cruz
CS/HB 253 Limited Liability Companies by Civil Justice Subcommittee, Stargel, McBurney
CS/HB 277 Statutes of Limitations by Civil Justice Subcommittee, Goodson
HB 325 Estates by Wood
HB 469 Individual Retirement Accounts by Stargel
HB 4135 District Court Marshals by McBurney
HB 4137 Marshal of the Supreme Court by McBurney
HB 7023 Judiciary by Civil Justice Subcommittee, Steube

NOTICE FINALIZED on 03/15/2011 16:12 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 101 Violations of Injunctions for Protection

SPONSOR(S): Cruz and others

TIED BILLS: IDEN./SIM. BILLS: SB 240

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	Williams	Cunningham
2) Justice Appropriations Subcommittee	15 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee		Williams <i>JD</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Currently, a person commits a first degree misdemeanor if the person willfully violates an injunction for protection against repeat violence, sexual violence, or dating violence. This bill adds the following to the list of ways in which a person could violate such injunctions for protection:

- Knowingly and intentionally coming within 100 feet of the petitioner’s motor vehicle, whether or not that vehicle is occupied;
- Defacing or destroying the petitioner’s personal property, including the petitioner’s motor vehicle; or
- Refusing to surrender firearms or ammunition if ordered to do so by the court.

The bill also adds the following to the existing list of ways in which a person could violate an injunction for protection against repeat violence, sexual violence, or dating violence:

- Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member.

The bill would make the list of ways in which a person could violate an injunction for protection against repeat violence, sexual violence, or dating violence identical to the list of ways a person could violate an injunction for protection against domestic violence.

The bill provides additional ways in which a person can violate an injunction for protection, and that such violations are first degree misdemeanors. Therefore, this bill could have an impact on county jails. The bill is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Section 784.046, F.S., relates to the issuance of injunctions for protection against repeat violence,¹ dating violence,² and sexual violence.³ The statute specifies the following:

- Petitions for injunctions for protection must allege the incidents of repeat violence, sexual violence, or dating violence and must include the specific facts and circumstances that form the basis upon which relief is sought.
- Upon the filing of the petition, the court must set a hearing to be held at the earliest possible time. The respondent must be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing.
- When it appears to the court that an immediate and present danger of violence exists, the court may grant a temporary injunction which may be granted in an ex parte hearing, pending a full hearing, and may grant such relief as the court deems proper.
- The court must enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection.⁴
- The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.⁵

Section 784.047, F.S., provides criminal penalties for violating a temporary or permanent injunction for protection against repeat violence, sexual violence, or dating violence. The statute specifies that a person commits a first degree misdemeanor⁶ if they willfully violate an injunction for protection against repeat violence, sexual violence, or dating violence by:

- Refusing to vacate the dwelling that the parties share;
- Going to the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;
- Committing an act of repeat violence, sexual violence, or dating violence against the petitioner;
- Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner; or
- Telephoning, contacting, or otherwise communicating with the petitioner directly or indirectly, unless the injunction specifically allows indirect contact through a third party.⁷

¹ "Repeat violence" is defined as, "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member." Section 784.046(1), F.S.

² "Dating violence" is defined as, "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on the consideration of the following factors: a dating relationship must have existed within the past 6 months; the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and the frequency and type of interaction between the persons involved in the relationship must have included that the persons have been involved over time and on a continuous basis during the course of the relationship. The term does not include violence in a casual acquaintanceship or violence between individuals who only have engaged in ordinary fraternization in a business or social context." *Id.*

³ "Sexual violence" is defined as, "any one incident of sexual battery, as defined in chapter 794; a lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age; luring or enticing a child, as described in chapter 787; sexual performance by a child, as described in chapter 827; or any other forcible felony wherein a sexual act is committed or attempted; regardless of whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney." *Id.*

⁴ The court may impose monetary fines for noncompliance of a violation of injunction. Criminal penalties are imposed pursuant to s. 784.047, F.S.

⁵ Section 784.046(7)(c), F.S.

⁶ A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a \$1,000 fine. *See* ss. 775.082 and 775.083.

⁷ Section 784.047, F.S.

Effect of the Bill

The bill adds the following to the above list of ways in which a person could violate an injunction for protection against repeat violence, sexual violence, or dating violence:

- Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is occupied;
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle;
- Refusing to surrender firearms or ammunition if ordered to do so by the court.

The bill also adds the following to the existing list of ways in which a person could violate an injunction for protection against repeat violence, sexual violence, or dating violence:

- Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member.

It should be noted that s. 741.31, F.S., which provides penalties for violating an injunction for protection against domestic violence,⁸ contains the same provisions as those added by the bill.

B. SECTION DIRECTORY:

Section 1. Amends s. 784.047, F.S., relating to penalties for violating protective injunction against violators.

Section 2. Provides an effective date of July 1, 2011.

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:

See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill provides additional ways in which a person can violate an injunction for protection, and that such violations are first degree misdemeanors. Therefore, this bill could have an impact on county jails.

⁸ Section 741.28, F.S., defines "domestic violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member."

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Currently, the bill is effective July 1, 2011. Generally, bills that impose criminal penalties are effective on October 1 so as to give adequate notice to the public, state attorneys, public defenders, and other interested parties.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to violations of injunctions for
 3 protection; amending s. 784.047, F.S.; adding
 4 circumstances that violate an injunction for protection
 5 against repeat violence, sexual violence, or dating
 6 violence; providing an effective date.

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

9
 10 Section 1. Section 784.047, Florida Statutes, is amended
 11 to read:

12 784.047 Penalties for violating protective injunction
 13 against violators.—A person who willfully violates an injunction
 14 for protection against repeat violence, sexual violence, or
 15 dating violence, issued pursuant to s. 784.046, or a foreign
 16 protection order accorded full faith and credit pursuant to s.
 17 741.315 by:

- 18 (1) Refusing to vacate the dwelling that the parties
- 19 share;
- 20 (2) Going to, or being within 500 feet of, the
- 21 petitioner's residence, school, place of employment, or a
- 22 specified place frequented regularly by the petitioner and any
- 23 named family or household member;
- 24 (3) Committing an act of repeat violence, sexual violence,
- 25 or dating violence against the petitioner;
- 26 (4) Committing any other violation of the injunction
- 27 through an intentional unlawful threat, word, or act to do
- 28 violence to the petitioner; ~~or~~

29 (5) Telephoning, contacting, or otherwise communicating
30 with the petitioner directly or indirectly, unless the
31 injunction specifically allows indirect contact through a third
32 party;

33 (6) Knowingly and intentionally coming within 100 feet of
34 the petitioner's motor vehicle, whether or not that vehicle is
35 occupied;

36 (7) Defacing or destroying the petitioner's personal
37 property, including the petitioner's motor vehicle; or

38 (8) Refusing to surrender firearms or ammunition if
39 ordered to do so by the court,

40

41 commits a misdemeanor of the first degree, punishable as
42 provided in s. 775.082 or s. 775.083.

43

Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 253 Limited Liability Companies
SPONSOR(S): Civil Justice Subcommittee; Stargel and McBurney
TIED BILLS: IDEN./SIM. **BILLS:** SB 1152

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N, As CS	Billmeier	Bond
2) Judiciary Committee		Billmeier <i>LAB</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

A limited liability company is a form of business entity where owners have limited personal liability for the debts and actions of the limited liability company, similar to a corporation, but management and tax flexibility, similar to a partnership. When a monetary judgment is entered against a member of a limited liability company, Florida law provides for a "charging order" that directs the limited liability company to pay profits and distributions intended for the judgment debtor to the judgment creditor. By entering a charging order, the judgment creditor is paid without disrupting management of the limited liability company.

The Florida Supreme Court recently held that Florida's statutory charging order provision is not the exclusive means by which a judgment creditor can execute a judgment against a debtor owning all of the interest in a single-member limited liability company. The court ordered the judgment debtor to surrender all right, title, and interest in the member's single-member limited liability company to satisfy an outstanding judgment.

This bill provides, with one exception, that a charging order is the "sole and exclusive remedy" by which a judgment creditor may satisfy a judgment from a judgment debtor's interest in a limited liability company. The exception arises in situations where a limited liability company has only one member. The bill provides that the court may order the sale of a member's interest in a single member limited liability company if distributions under a charging order will not satisfy the judgment in a reasonable time.

The fiscal impact of the bill on state and local governments is speculative. The Department of State does not anticipate an effect on state revenues or expenditures during the next three fiscal years.

This bill takes effect upon becoming a law and applies retroactively.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Introduction

In *Olmstead v. Federal Trade Commission*, 44 So.3d 76 (Fla. 2010), the Florida Supreme Court held that Florida's statutory charging order provision is not the exclusive means that a judgment creditor can execute a judgment against the owner of a single-member limited liability company and held that a court can order that judgment debtor surrender all right, title, and interest in the member's single-member limited liability company to satisfy an outstanding judgment. While the court's holding does not specifically apply to limited liability companies with more than one member, the court's reasoning would likely apply to all limited liability companies.

This bill provides that a charging order is the sole and exclusive means to satisfy a judgment from the judgment debtor's transferrable interest in a limited liability company with more than one member. The bill provides that the charging order is not the exclusive remedy in cases involving a limited liability company with only one member.

Limited Liability Companies

Sections 608.401-608.705, F.S., comprise the Florida Limited Liability Company Act ("LLC Act"). A limited liability company ("LLC") is a business entity where owners have limited personal liability for the debts and actions of the LLC, similar to a corporation, but management and tax flexibility, similar to a partnership. Owners of a LLC are called members. Florida law allows a single-member LLC. Ownership shares, often called "membership interests," "member's interest, or "interest," are considered personal property. A member's interest in a LLC may be assigned but the assignee's interest is generally limited to sharing in the profits and losses and receiving distributions from the LLC.¹ Generally, an assignee does not receive any rights relating to management of the LLC.² Section 608.433(1), F.S., provides that an assignee may become a member only if the other members consent, unless the operating agreement or articles of organization provide otherwise. A LLC may file as a corporation, a partnership, or a sole proprietorship for federal income tax purposes, so the LLC business entity provides tax flexibility.³

According to the Florida Division of Corporations, there are 548,893 active LLCs in Florida.⁴ The number of LLC filings has generally increased over the last ten years. In 2000, 19,186 documents related to LLCs were filed with the Division of Corporations. In 2010, 138,287 such documents were filed with the Division.⁵

Enforcement of Judgments and Charging Orders

A judgment is an order of the court creating an obligation, such as a debt. Chapter 56, F.S., provides mechanisms for execution of judgments. Section 56.061, F.S., provides that "lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations shall be subject to levy and sale upon execution." The statute allows a judgment creditor to take stock held by a judgment debtor to satisfy the judgment.

¹ The provisions related to assignments are the same as provisions related to partnerships, whereby if a partner transfers his or her interest, the remaining partners are not required to accept the new partner as an equal for management and voting purposes.

² See, generally, *Olmstead v. Federal Trade Commission*, 44 So.3d. 76, 77-81 (Fla. 2010)(providing background information on LLCs under Florida law).

³ See, <http://www.irs.gov/businesses/small/article/0,,id=98277,00.html> (accessed January 27, 2011).

⁴ http://www.sunbiz.org/corp_stat.html (accessed January 28, 2011).

⁵ *Id.*

A charging order is an order directing the members of a LLC to pay a judgment debtor's share of the LLC profits or distributions to a judgment creditor. The judgment creditor is not involved in the management decisions of the LLC but merely collects the judgment debtor's share of profits or distributions.⁶ Florida has codified the charging order in the LLC Act. Section 608.433(4), F.S., provides:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of such interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's interest.

The theory behind the charging order is that a judgment creditor can be paid from the profits or distributions from the LLC without the disruption of the business caused by inserting another member into the group or the damage caused to other members if the business, or portions of it, was sold to pay the judgment creditor.⁷ As a federal court has explained, "a charging order protects the autonomy of the original members, and their ability to manage their own enterprise."⁸ A limitation of the charging order remedy is that a creditor cannot recover unless the voting members of the LLC distribute profits. If the LLC does not make a distribution, the judgment creditor is not paid.

The charging order is not unique to the LLC business structure. Florida's Revised Uniform Partnership Act of 1995, ss. 620.81001 -620.9902, F.S., and Florida's Revised Uniform Limited Partnership Act of 2005, ss. 620.1101-620.2205, F.S., similarly provide charging order remedies in partnership and limited partnership law.

The *Olmstead* Decision

In *Olmstead*, a federal court asked the Florida Supreme Court whether, under Florida law, a court may order a judgment debtor to surrender all "right, title, and interest" in the debtor's single-member LLC to satisfy an outstanding judgment. In *Olmstead*, the Federal Trade Commission ("FTC") alleged *Olmstead* was operating an "advance-fee credit card scam" and sued for unfair and deception trade practices.⁹ The FTC prevailed and obtained an order directing *Olmstead* to surrender all right, title, and interest in his LLC. *Olmstead*, the judgment debtor and sole member of a LLC, argued that a charging order under s. 608.433(4), F.S., was the sole and exclusive remedy available against his ownership interest in the LLC. He argued that no other remedy was applicable. The FTC argued that other remedies were available under Florida law and that the statutory charging order was not the sole remedy.¹⁰

The court held that a charging order under s. 608.433(4), F.S., was not the exclusive remedy. The court noted that s. 56.061, F.S., provides that stock in corporations is subject to sale and execution to satisfy a judgment and that because a LLC is "type of corporate entity," an ownership interest in a LLC is reasonably understood to be corporate stock and subject to execution under the statute.¹¹ The court rejected arguments that s. 608.433(4), F.S., displaced s. 56.061, F.S. It noted that Florida's partnership and limited partnership statutes contain similar charging order provisions but those provisions provide that the charging order is the exclusive remedy and that specific language relating to an exclusive remedy is not present in the LLC statute.¹² Accordingly, the court said:

⁶ See *City of Arkansas City v. Anderson*, 752 P.2d 673, 681-84 (Kan. 1988)(discussing the charging order at common law and under the Uniform Partnership Act).

⁷ See, generally, *City of Arkansas City*, 752 P.2d at 682.

⁸ *In re: First Protection, Inc.*, 2010 WL 5059589 (9th Cir. BAP (Ariz.)) at 6.

⁹ *Olmstead*, 44 So. 3d at 78.

¹⁰ *Olmstead*, 44 So.3d at 77-78.

¹¹ *Olmstead*, 44 So.3d at 80.

¹² *Olmstead*, 44 So.3d at 81-82.

Specifically, we conclude that there is no reasonable basis for inferring that the provision authorizing the use of charging orders under section 608.433(4) establishes the sole remedy for a judgment creditor against a judgment debtor's interest in a single-member LLC... Section 608.433(4) does not displace the creditor's remedy available under section 56.061 with respect to a debtor's ownership interest in a single-member LLC.¹³

Criticism of *Olmstead*

In dissent, Justice Lewis argued that the majority opinion was rewriting the LLC Act to create a remedy not contemplated by the Legislature. He said that a reading of all of ch. 608, F.S., and not merely the provisions cited by the majority, makes clear that the LLC Act displaces ch. 56, F.S.¹⁴ Justice Lewis warned:

This is extremely important and has far-reaching impact because the principles used to ignore the LLC statutory language under the current factual circumstances apply with equal force to multimember LLC entities and, in essence, today's decision crushes a very important element for all LLCs in Florida. If the remedies available under the LLC Act do not apply here because the phrase "exclusive remedy" is not present, the same theories apply to multimember LLCs and render the assets of all LLCs vulnerable.¹⁵

Commenters have explained the concern of some business law practitioners:

As a result of the dissenting opinion, many practitioners are concerned that a multiple-member Florida LLC arrangement may not provide charging order protection, although that is not what the majority held. As discussed below, there is a good chance that there will be legislative clarification of this court-created "uncertainty by implication." In the interim, advisors should alert their clients to the exposure and consider bifurcating Florida LLC membership interests into voting and nonvoting interests, converting Florida LLCs to limited partnerships or limited liability limited partnerships, moving Florida LLCs to jurisdictions that have a more stable charging order protection law, or implementing other divestment of management control strategies.¹⁶

Effect of Proposed Changes

This bill contains "whereas" clauses to express the Legislature's intent that *Olmstead* not apply to multimember LLCs. The bill defines charging order as "a lien on the judgment debtor's limited liability company interest or assignee rights." It provides that a judgment creditor has only the rights of an assignee of a LLC interest to receive distributions to which the judgment debtor would have otherwise been entitled from the LLC.

This bill provides, with one exception, that a charging order is the "sole and exclusive remedy" by which a judgment creditor of a member or member's assignee may satisfy a judgment from a judgment debtor's interest in a LLC or rights to distributions from a LLC.

The exception arises in situations where a LLC has only one member. The bill provides that the court may order the sale of a member's interest in a LLC if the judgment creditor establishes that distributions under a charging order will not satisfy the judgment in a reasonable time. Upon such a showing, the court may order the sale of the interest in the LLC pursuant to a foreclosure sale. The bill provides that the judgment creditor may make such a showing within a reasonable time after entry of the judgment

¹³ *Olmstead*, 44 So.3d at 83.

¹⁴ *Olmstead*, 44 So.3d at 83-84 (Lewis dissenting).

¹⁵ *Olmstead*, 44 So.3d at 84 (Lewis dissenting).

¹⁶ Gassman, Denicolo, Koche, and Wells, *After Olmstead: Will a Multiple-member LLC Continue to Have Charging Order Protection*, The Florida Bar Journal, Vol. 84, No. 10, December, 2010. (accessed at

<http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/f3631c387f59325c852577ea0060b5e6!OpenDocument>).

and at the time the judgment creditor applies for entry of the charging order. If the court orders a foreclosure sale, the purchaser at the sale obtains the member's entire interest in the LLC, the purchaser becomes the member of the LLC, and the person whose interest is sold ceases to be a member of the LLC.

The bill contains language indicating that its provisions are clarifying and apply retroactively.

This bill takes effect upon become a law.

B. SECTION DIRECTORY:

Section 1 amends s. 608.433, F.S., relating to right of assignee to become member.

Section 2 indicates legislative intent that the bill apply retroactively.

Section 3 provides that the bill becomes effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments"

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See "Fiscal Comments."

D. FISCAL COMMENTS:

The fiscal impact of this bill is unknown and speculative. The Department of State does not anticipate a fiscal impact on state governments over the next three fiscal years. The fiscal impact on Florida LLCs is not known. It is not known how many, if any, LLCs would relocate or not locate in Florida because of *Olmstead* and it is not known how many LLCs will locate or remain in Florida due to this bill. It is not known how many LLCs, if any, would incur additional costs due to changing legal status in response to *Olmstead*.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

This bill provides that it is intended to be clarifying and remedial and shall apply retroactively. Retroactive application of legislation can implicate the due process provisions of the Constitution.¹⁷ As a general matter, statutes which do not alter vested rights but relate only to remedies or procedure can be applied retroactively.¹⁸

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.¹⁹

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 9, 2011, the Civil Justice Subcommittee adopted an amendment providing that a court can order a foreclosure sale of a member's interest in a LLC under certain circumstances. The amendment also included numerous grammatical and stylistic changes. The bill was reported favorably as a committee substitute.

This analysis is drafted to the committee substitute.

¹⁷ See *State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

¹⁸ See *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d. 494 (Fla. 1999).

¹⁹ *Lowry v. Parole and Probation Commission*, 473 So. 2d 1248, 1250 (Fla. 1985)(internal citations omitted).

29 WHEREAS, the Legislature finds that the uncertainty of the
 30 breadth of the Court's holding in Olmstead may persuade
 31 businesses and investors located in Florida to organize LLCs
 32 under the law in other jurisdictions where a charging order is
 33 the exclusive remedy available to a judgment creditor of a
 34 member of a multimember LLC, and

35 WHEREAS, the Legislature further finds it necessary to
 36 amend s. 608.433, Florida Statutes, to remediate the potential
 37 effect of the holding in Olmstead and to clarify that the
 38 current law does not extend to a member of a multimember LLC
 39 organized under Florida law and to provide procedures for
 40 application of the holding in Olmstead to a member of a single-
 41 member LLC organized under Florida law, NOW, THEREFORE,

42
 43 Be It Enacted by the Legislature of the State of Florida:

44
 45 Section 1. Section 608.433, Florida Statutes, is amended
 46 to read:

47 608.433 Right of assignee to become member.—

48 (1) Unless otherwise provided in the articles of
 49 organization or operating agreement, an assignee of a limited
 50 liability company interest may become a member only if all
 51 members other than the member assigning the interest consent.

52 (2) An assignee who has become a member has, to the extent
 53 assigned, the rights and powers, and is subject to the
 54 restrictions and liabilities, of the assigning member under the
 55 articles of organization, the operating agreement, and this
 56 chapter. An assignee who becomes a member also is liable for the

57 obligations of the assignee's assignor to make and return
 58 contributions as provided in s. 608.4211 and wrongful
 59 distributions as provided in s. 608.428. However, the assignee
 60 is not obligated for liabilities which are unknown to the
 61 assignee at the time the assignee became a member and which
 62 could not be ascertained from the articles of organization or
 63 the operating agreement.

64 (3) If an assignee of a limited liability company interest
 65 becomes a member, the assignor is not released from liability to
 66 the limited liability company under s. ~~ss.~~ 608.4211, s.
 67 608.4228, or s. ~~and~~ 608.426.

68 (4) (a) On application to a court of competent jurisdiction
 69 by any judgment creditor of a member or a member's assignee, the
 70 court may enter a charging order against the limited liability
 71 company interest of the judgment debtor or assignee rights for
 72 ~~charge the limited liability company membership interest of the~~
 73 ~~member with payment of the unsatisfied amount of the judgment~~
 74 plus with interest.

75 (b) A charging order constitutes a lien on the judgment
 76 debtor's limited liability company interest or assignee rights.
 77 Under a charging order ~~To the extent so charged~~, the judgment
 78 creditor has only the rights of an assignee of a limited
 79 liability company interest to receive any distribution or
 80 distributions to which the judgment debtor would otherwise have
 81 been entitled from the limited liability company, to the extent
 82 of the judgment, including ~~such~~ interest.

83 (c) This chapter does not deprive any member or member's
 84 assignee of the benefit of any exemption law ~~laws~~ applicable to

85 the member's limited liability company interest or the
 86 assignee's rights to distributions from the limited liability
 87 company.

88 (5) Except as provided in subsections (6) and (7), a
 89 charging order is the sole and exclusive remedy by which a
 90 judgment creditor of a member or member's assignee may satisfy a
 91 judgment from the judgment debtor's interest in a limited
 92 liability company or rights to distributions from the limited
 93 liability company.

94 (6) In the case of a limited liability company having only
 95 one member, if a judgment creditor of a member or member's
 96 assignee establishes to the satisfaction of a court of competent
 97 jurisdiction that distributions under a charging order will not
 98 satisfy the judgment within a reasonable time, a charging order
 99 is not the sole and exclusive remedy by which the judgment
 100 creditor may satisfy the judgment against a judgment debtor who
 101 is the sole member of a limited liability company or the
 102 assignee of the sole member, and upon such showing, the court
 103 may order the sale of that interest in the limited liability
 104 company pursuant to a foreclosure sale. A judgment creditor may
 105 make a showing to the court that distributions under a charging
 106 order will not satisfy the judgment within a reasonable time at
 107 any time after the entry of the judgment and may do so at the
 108 same time that the judgment creditor applies for the entry of a
 109 charging order.

110 (7) In the case of a limited liability company having only
 111 one member, if the court orders foreclosure sale of a judgment
 112 debtor's interest in the limited liability company or of a

113 charging order lien against the sole member of the limited
 114 liability company pursuant to subsection (6):

115 (a) The purchaser at the court-ordered foreclosure sale
 116 obtains the member's entire limited liability company interest,
 117 not merely the member's transferable interest;

118 (b) The purchaser at the sale becomes the member of the
 119 limited liability company; and

120 (c) The person whose limited liability company interest is
 121 sold pursuant to the foreclosure sale or is the subject of the
 122 foreclosed charging order ceases to be a member of the limited
 123 liability company.

124 Section 2. The amendment to s. 608.433, Florida Statutes,
 125 made by this act is intended by the Legislature to be clarifying
 126 and remedial in nature and shall apply retroactively.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 277 Statutes of Limitations
SPONSOR(S): Civil Justice Subcommittee; Goodson
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 594

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Billmeier	Bond
2) Government Operations Subcommittee	11 Y, 1 N	Thompson	Williamson
3) Judiciary Committee		Billmeier <i>LMB</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

A statute of limitations is a time period after which no legal case can be brought relating to an injury or wrong. Current law provides that the statute of limitations for a wrongful death action against the state or one of its political subdivisions is four years; but, the statute of limitations for a wrongful death action brought against a person is two years.

This bill changes the statute of limitations in a wrongful death action brought against the state or one of its agencies or subdivisions from four years to two years.

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

The bill is effective July 1, 2011, applying to causes of action accruing on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Wrongful Death Actions

Sections 768.16-768.26, F.S., comprise the "Florida Wrongful Death Act" ("Wrongful Death Act"). The Wrongful Death Act provides that when a death is caused by negligence, wrongful act, default, or breach of contract, the person responsible is liable for damages.¹ The action may be brought by the decedent's personal representative and recovery is for the benefit of the decedent's estate and survivors.² Damages recoverable under the Wrongful Death Act include:

- The person who paid medical and funeral expenses may recover those expenses;
- Each survivor may recover the value of lost support and services;
- Each survivor may recover the value of future support and services;
- A spouse may recover for lost companionship and protection and for mental pain and suffering;
- Minor children, and all children if there is no surviving spouse, may recover for lost companionship, instruction, and guidance and for mental pain and suffering;
- Each parent of a deceased minor child may recover for mental pain and suffering;
- Each parent of a deceased adult child may recover for mental pain and suffering if there are no other survivors; and
- The decedent's estate may recover lost earnings.³

Statutes of Limitations

A statute of limitations is a time period after which no legal case can be brought relating to an injury or wrong. Section 95.11, F.S., sets forth time limitations for commencing civil actions in Florida. The time limitations range from 30 days to 20 years. Section 95.11(4)(d), F.S., provides that actions for wrongful death must be commenced within two years of the death from when the cause of action accrues.⁴ This is usually the date of the decedent's death.

Section 768.28, F.S., provides for tort actions against the state and its subdivisions. Section 768.28(14), F.S., creates special limitations periods for actions against the state and its subdivisions. It provides:

Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues; except that an action for contribution must be commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4).

In *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981), the Florida Supreme Court ruled that the four year statute of limitations contained in s. 768.28, F.S., is applicable to actions against political subdivisions of the state rather than the two year statute of limitations relating to wrongful death actions in s. 95.11, F.S.

¹ See s. 768.19, F.S.

² See s. 768.20, F.S.

³ See s. 768.21, F.S.

⁴ Section 95.031, F.S., provides that the statute of limitations begins to run from the time that the cause of action accrues and provides that the cause of action accrues once the last element constituting the cause of action occurs.

Effect of Proposed Changes

This bill provides that the two year statute of limitations at s. 95.11(4), F.S., applies to wrongful death actions brought against the state or one of its agencies or political subdivisions instead of the four year statute of limitations provision contained in s. 768.28, F.S.

This bill takes effect on July 1, 2011, and applies to causes of action accruing on or after that date.

B. SECTION DIRECTORY:

Section 1: Amends s. 768.28, F.S., relating to waiver of sovereign immunity in tort actions.

Section 2: Provides a July 1, 2011, effective date and for prospective application.

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:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 9, 2011, the Civil Justice Subcommittee adopted an amendment applying the provisions of the bill to causes of actions accruing on or after the effective date of the bill. The bill was reported favorably as a committee substitute.

This analysis is drafted to the Committee Substitute.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 325 Estates
SPONSOR(S): Wood
TIED BILLS: None **IDEN./SIM. BILLS:** SB 648

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Woodburn	Bond
2) Judiciary Committee		Woodburn <i>W</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Where a person dies without a will or some other means of devising his or her estate such as a trust, the person is considered intestate. Current law provides that, in an intestate estate where all of the surviving descendants are also descendants of the surviving spouse, the surviving spouse receives the first \$60,000 plus one-half of the remaining estate. This bill provides that the surviving spouse in this situation receives the entire estate.

Current law provides that, if a will is unambiguous, a court may only look to the will itself to determine distribution of the estate, even if the actual terms of the will do not reflect the intent of the deceased. The bill allows a court to modify an unambiguous will to correct mistakes of law, to correct mistakes of fact, or to create a favorable tax result. The bill also provides for an award of attorneys fees and costs directly against an individual in certain proceedings involving certain will challenges.

Current law allows a person to revoke a will. If the will was revoked through publication such revocation may be challenged on grounds of fraud, duress, mistake, or undue influence. If, however, the revocation was by action (such as physical destruction of the will), it may not be challenged. The bill provides that any will revocation may be challenged by an interested party, regardless of the method of revocation.

A revocable trust is a common substitute for a will that allows the individual who created the trust (known as the "settlor") the ability to reclaim the property from the trust at anytime by revoking the trust. Current law does not provide a means to challenge the revocation of a revocable trust where the revocation was procured under fraud, duress, mistake or undue influence. The bill provides that, after the death of the settlor, an interested party can challenge the past revocation of a revocable trust on the grounds that the revocation was procured by fraud, duress, mistake or undue influence.

Attorneys fees in trust proceedings are awarded in various circumstances and do not necessarily follow the same method of awarding fees in a typical civil action. There is confusion on whether certain civil procedures regarding awarding of attorneys fees pertain to proceedings involving trusts. The bill provides that the rules of civil procedure generally apply to judicial proceedings involving trusts, but that the time requirements for filing for attorneys fees apply with exceptions for two probate proceeding categories.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Probate Law in General

Probate is the court supervised process for indentifying the assets of a deceased person's (decedent) estate, paying the decedent's debts and distributing the assets of the estate to the decedent's beneficiaries.¹ Probate is a necessary step under Florida law to pass the ownership of the estate's assets to the decedent's beneficiaries.²

Assets subject to probate are those owned by the decedent that did not pass automatically to another person upon the death of the decedent. For instance, a home owned jointly with a spouse or a checking account in both names would typically pass outside of probate. Assets held in a trust where the trust has testamentary provisions pass outside of probate. On the other hand, most assets titled solely in the name of the deceased would be part of the probate estate.

There are various legal instruments that direct the court on how to divide the assets of a deceased person. If the decedent died leaving assets subject to probate and did not have a valid will at his or her death, the decedent is considered intestate.

Intestate Estate

When an individual dies (the decedent) without a will, a person's will is declared invalid, or assets are not distributed by a valid will, then the individual is considered "intestate." Since there is no will to direct the distribution of assets, Florida law provides the distribution of assets that remain after paying debts and the expense of conducting the probate proceedings.³

Florida law on intestate succession provides that various family members receive a share of the decedent's estate:

- If there are no surviving descendents⁴ of the decedent, then the spouse receives the entire intestate estate.⁵
- If there are surviving descendents of the decedent, who are all also lineal descendents of the surviving spouse, then the surviving spouse receives the first \$60,000 in property of the estate, plus one-half of the remaining balance of the estate subject to distribution.⁶
- If there are surviving descendents of the decedent, one or more of whom are not lineal descendents of the surviving spouse, then the surviving spouse receives one half of the estate and the lineal descendents receive the other half.⁷
- There are additional provisions for distribution in situations beyond these, which distribute assets to other family members, but those are not relevant to the changes made in this bill. See ss. 732.103 and 732.104, F.S.

¹ See Chs. 731-735, F.S., for Florida Probate Code.

² There are alternatives to probate, including trust arrangements. Trusts arrangements transfer ownership of the assets to the trust prior to the death of the owner.

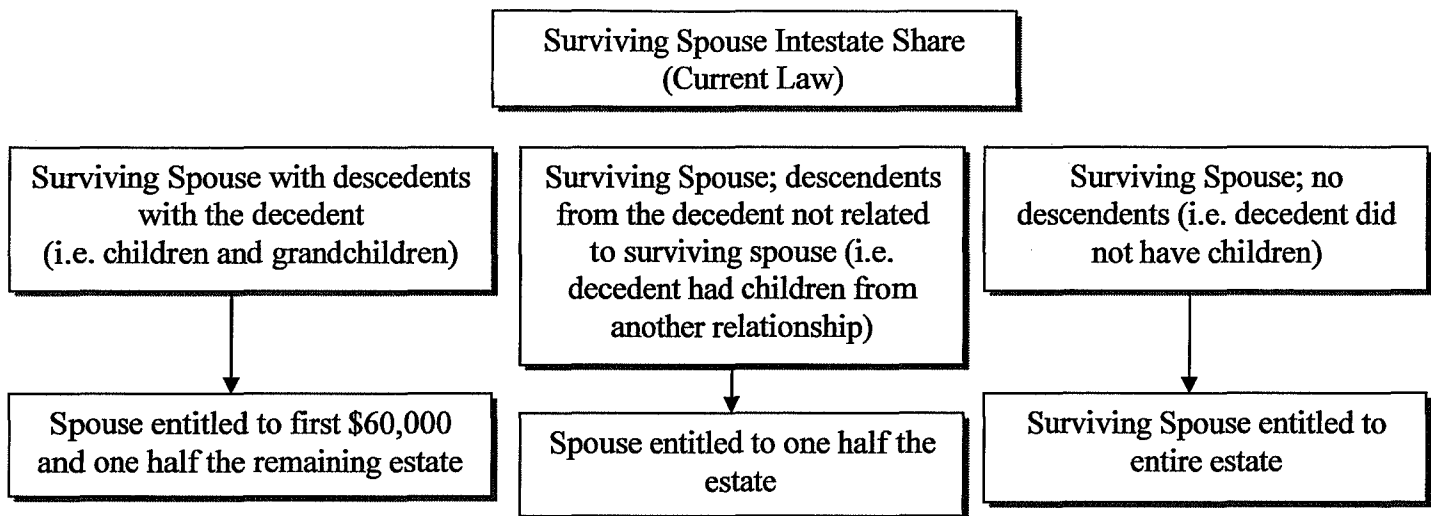
³ Section 732.101, F.S.

⁴ Descendants are children, grandchildren, great-grandchildren, etc.

⁵ Section 732.102(1), F.S.

⁶ Section 732.102(2), F.S.

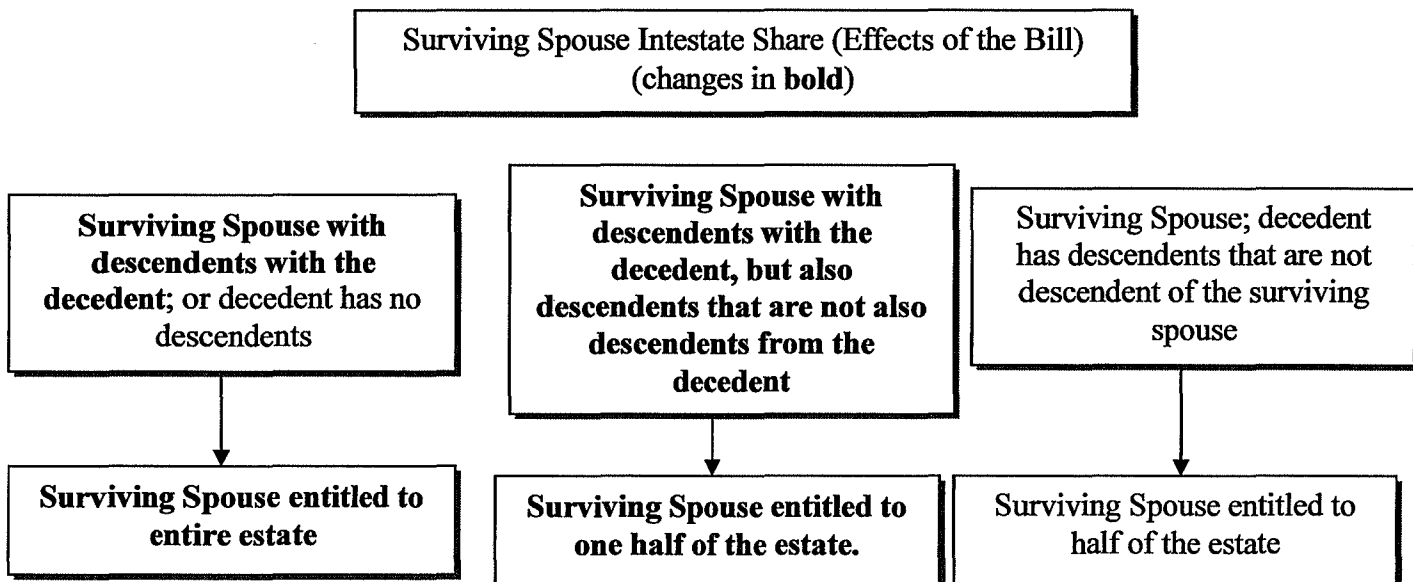
⁷ Section 732.102(3), F.S.



Effect of the Bill- Intestate Share of Spouse (Section 1)

The bill amends s. 732.102(2), F.S., to provide that the intestate share of a surviving spouse, where all of the decedent's descendants are also descendants of the surviving spouse, is the entire estate. For example, if a husband passes away and was survived by his wife and two children and the wife was the mother of both children and neither had any other children, the wife would now inherit the entire estate rather than the first \$60,000 and half of the remaining estate.

The bill also creates s. 732.102(4), F.S., to provide that if the surviving spouse has descendants that are also descendants of the decedent, but the surviving spouse also has a descendant not related to the decedent, then the surviving spouse's intestate share is half of the estate. The lineal descendants of the decedent would inherit the remaining half of the estate under s. 732.103, F.S.



Wills

A will is a written instrument that names the beneficiaries whom the decedent wants to receive his or her probate assets after his or her death.⁸ The decedent also designates a personal representative to administer the estate. There are several requirements for a valid will in the state of Florida including:

- The person (testator) be 18 years of age or older (or an emancipated minor) and be of sound mind.⁹
- The testator or someone at the direction of the testator in the testator's presence must sign the will at the end.¹⁰
- The signing of the will must be in the presence of two witnesses.¹¹
- The two witnesses must sign the will in the presence of the testator and each other.¹²

A will may also devise assets of the estate into a trust or may create a trust, which is considered a testamentary trust.

Reformation of a Will

Florida law allows the reformation of a will in the case of an ambiguity.¹³ One court has described the legal standards of reformation:

The paramount objective in constructing a will is to ascertain the intent of the testator. The will as a whole should be considered in order to ascertain the testamentary scheme. The construction of the will which leads to a valid testamentary disposition is favored over one which results in intestacy. If possible, the intent should be determined from the will itself. However, in case of ambiguity, extrinsic evidence is admissible to explain the intent of the testator.¹⁴

In some circumstances a mistake does not always involve an ambiguity but instead involves a mistake of fact or law. An example of an unambiguous mistake is *Azcunce v. Estate of Azcunce*.¹⁵ In *Azcunce*, a father drafted a codicil¹⁶ to his will prior to the birth of his fourth child.¹⁷ The will allowed for the creation of a trust for his wife and three children when he died. His fourth child was born shortly after the publication of the codicil. Under current law, the fourth child would be considered a pretermitted child and would be entitled to a share of the estate.¹⁸ The issue in the case was that the father then drafted and published another codicil after the birth of child which did not mention the child. The publication of the second codicil, which republished the previous will with the amendments, also terminated the child's pretermitted status. Shortly after the publication of the codicil, the father died of a sudden heart attack.¹⁹

The mother, on behalf of the minor child, filed suit challenging the will and requesting the child's pretermitted share of the estate under s. 732.302, F.S.²⁰ The court ruled that the republication of the will when the father published the second codicil terminated the child's pretermitted status and therefore the father had effectively disinherited his daughter.²¹ The court noted that,

⁸ Section 732.2025(4), F.S.

⁹ Section 732.501, F.S.

¹⁰ Section 732.502(1)(a), F.S.

¹¹ Section 732.502(1)(b), F.S.

¹² Section 732.502(1)(c), F.S.

¹³ A will may be void if it is found to be procured by fraud, duress, mistake or undue influence under s. 732.5165, F.S.

¹⁴ *Wilson v. First Florida Bank*, 498 So.2d 1289, 1291 (Fla. 2d DCA 1986) (Internal citations omitted).

¹⁵ *Azcunce v. Estate of Azcunce*, 586 So.2d 1216 (Fla. 3d DCA 1991).

¹⁶ A codicil is an amendment to a will that in this case amended the will and republished the previous will with the amendment.

¹⁷ *Azcunce* at 1218.

¹⁸ See s. 732.302, F.S.

¹⁹ *Azcunce* at 1218-19.

²⁰ *Id.* at 1219.

²¹ *Id.*

...there is utterly no ambiguity in the subject will and codicils which would authorize the taking of parol evidence herein...the mistake of which Patricia claims amounts, at best, to the draftsman's alleged professional negligence in failing to apprise the [father] of the need to expressly provide for Patricia in the second codicil; this is not the type of mistake which voids a will under Section 732.5165, Florida Statutes.²²

There was evidence that the father did not want to disinherit his daughter, but the court could not look at such evidence because there was no ambiguity to the will. The court ruled that the daughter was not entitled to any share of the deceased estate.

Attorneys Fees and Costs in Probate Proceedings

In probate proceedings, the party challenging the will or offering an alternative will may seek attorneys fees and costs from the estate provided that:

- The will is due form;
- There is not a contingency arrangement between the proponent and the attorney; and
- The action was brought in good faith.²³

Probate proceedings are one of the few legal proceedings in which the losing party may still collect attorneys fees.²⁴ When awarding attorneys fees and costs, a probate court has the discretion to direct from which part of the estate the attorneys fees and costs are to be paid.²⁵ The court does not have the ability to tax attorneys fees of the opposing party against the will proponent directly, instead the court may direct the fees against the person's share of the estate, if any.

An attorney may also request attorneys fees from the estate directly if the attorney provided valuable services which benefitted the estate.²⁶ In a proceeding against the personal representative of an estate for improper exercise of power or breach of fiduciary duty, the court may award costs and attorneys fees directly against either party.²⁷ A proceeding against the personal representative differs from other probate proceedings in awarding attorneys fees because the attorneys fees and costs may be awarded directly against any party in the form of a judgment.²⁸ The court awards the costs and attorneys fees as in chancery actions.²⁹

Effect of the Bill (Sections 2, 3, and 4)

The bill creates s. 732.615, F.S., to provide that a court may reform a will even if it is unambiguous. A person challenging the will would have to prove by clear and convincing evidence³⁰ that both the testator's intent and the terms of the will were affected by a mistake of fact or law.³¹ A court may look to extrinsic evidence in these circumstances even if the evidence contradicts the plain meaning of the will.

²² *Id.*

²³ Section 733.106(2), F.S.

²⁴ Wallace, Douglas A, "The Recovery of Attorney's Fees and Costs for the Unsuccessful Offer of a Will for Probate," Fla. B.J. pg.1 (Jan. 2002).

²⁵ Section 733.106(4), F.S.

²⁶ Section 733.106(3), F.S. See *In Re Gleason's Estate*, 74 So.2d 360, 362 (Fla. 1954) (Attorney may be awarded attorneys fees directly from the estate if he or she rendered a valuable service and the service benefitted the estate).

²⁷ Section 733.609, F.S.

²⁸ Section 733.609(1) & (2), F.S.

²⁹ Chancery action is an action in equity. "The general rule is that costs follow the results of the litigation but in equity this rule may be departed from according to the circumstances." *Schwartz v. Zaconick*, 74 So.2d 108, 110 (Fla. 1954).

³⁰ "[A] workable definition of clear and convincing evidence must contain both qualitative and quantitative standards...clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

³¹ The bill language mirrors the language that applies to trusts in s. 736.0415, F.S.

In the example of the *Azcunce* case, the changes provided in the bill may have allowed the court to look at the extrinsic evidence regarding the deceased's intent to not disinherit his daughter even though the will was unambiguous and the extrinsic evidence contradicted the plain meaning of the will.

The bill creates s. 732.616, F.S., to provide that any interested person may petition to modify a testator's will in order to achieve the testator's tax objectives, provided such modification is not contrary to the testator's probable intent. This change would allow a party to seek modification of the will in order to achieve a tax advantage intended by the testator so long as the modification is not contrary to the testator's probable intent.

The bill creates s. 733.1061, F.S., to provide that in the newly created actions under s.732.615 and s. 732.616, F.S., "the court shall award taxable costs as in chancery actions, including attorneys fees and guardian ad litem fees."³² A chancery action for attorneys fees and costs is an action in equity that is similar to a prevailing party provision for attorneys fees and costs, but equity does give the court discretion if the circumstances demand.³³ The new section would give the court the ability to charge attorneys fees and costs directly to a party. The bill also gives the court the discretion to tax the fees and costs against a party's interest in the estate or other property of the party that is not part of the estate.

Voided Will - Fraud, Duress, Mistake and Undue Influence

Section 732.5165, F.S., provides that a will is void if the execution is procured by fraud, duress, mistake or undue influence. "Undue influence comprehends over persuasion, coercion, or force that destroys or hampers the free agency and will power of the testator."³⁴ "If a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises."³⁵ The Florida Supreme Court has found that the following criteria are relevant to determining whether a beneficiary has been improperly active in procuring a will:

- Presence of the beneficiary at the execution of the will;
- Presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
- Recommendation by the beneficiary of an attorney to draw the will;
- Knowledge of the contents of the will by the beneficiary prior to execution;
- Giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
- Securing of witnesses to the will by the beneficiary; and
- Safekeeping of the will by the beneficiary subsequent to execution.³⁶

Will contestants are not required to prove all the criteria, but a showing of a significant number will create a rebuttable presumption of undue influence under s. 733.107(2), F.S. If the presumption of undue influence is created, it shifts the burden of proof from the party challenging the will to the proponent of the will.³⁷

Revoking a Will by Publication or Act

Section 732.505, F.S., provides that a will may be revoked by writing. A will or codicil, or any part of either, is revoked:

³² The language mirrors part of s. 733.609, F.S.

³³ "In chancery or equity actions, the well settled rule is that 'costs follow the judgment unless there are circumstances that render application of this rule unjust'" *In Re Estate of Simon*, 549 So.2d 210, 212 (Fla. 3d DCA 1989).

³⁴ *RBC Ministries v. Tompkins*, 974 So.2d 569, 571 (Fla. 2d DCA 2008) (quoting *Newman v. Smith*, 82 So. 236, 246 (Fla. 1918)).

³⁵ *Carpenter v. Carpenter*, 253 So.2d 697, 701 (Fla. 1971).

³⁶ *Carpenter* at 702.

³⁷ *RBC Ministries* at 571-72.

- By a subsequent inconsistent will or codicil, even though the subsequent inconsistent will or codicil does not expressly revoke all previous will or codicils, but the revocation extends only so far as the inconsistency; or
- By a subsequent will, codicil, or other writing executed with the same formalities required for the execution of wills declaring the revocation.

A will may also be revoked by act. Section 732.506, F.S., provides that:

A will or codicil is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by burning, tearing, canceling, defacing, obliterating, or destroying it with the intent, and for the purpose, of revocation.

A revocation by subsequent writing can be challenged as having been influenced by fraud, duress, mistake or undue influence. However, there is no apparent means to challenge revocation by act.

Effect of the Bill (Section 5 and Section 6)

The bill amends s. 732.5165, F.S., to allow an interested person to challenge the revocation of a will on the grounds of fraud, duress, mistake, or undue influence. This change will apply to revocation through a written instrument or through an act (i.e. destroying the will).

The bill amends s. 732.518, F.S., to provide that a challenge to a revocation of a will may not be commenced before the death of the testator. The bill would provide the same limitations that currently apply to challenging wills to challenging will revocations.

Trusts and Revocable Trusts

A trust is a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (beneficiary).³⁸ A trust must include specific property, reflect the settlor's intent, and be created for a lawful purpose.³⁹

There are many different types of trusts, including a revocable trust. A revocable trust is a trust in which the settlor may, without the consent of the trustee, revoke the trust.⁴⁰ Unless the terms of a trust expressly provide that the trust is irrevocable, then the settlor may revoke or amend the trust at any time.⁴¹ The capacity requirement is the same for a revocable trust as it is for a will.⁴² The Florida Supreme Court has ruled that:

a revocable trust is a 'a unique type of transfer' and 'by definition..., when a settlor sets up a revocable trust, he or she has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property.' The settlor's retention of control 'distinguishes a revocable trust from other types of conveyances...' ⁴³

Revocable trusts are commonly used as will substitutes and as an alternative to probate.

Challenging the Revocation of a Revocable Trust

A court may void a trust if the creation of the trust is procured by fraud, duress, mistake, or undue influence.⁴⁴ However, revocation of a trust cannot be challenged under these grounds. For instance, in

³⁸ Black's Law Dictionary (9th ed. 2009), trust.

³⁹ Id.

⁴⁰ Section 736.0103(15), F.S.

⁴¹ Section 736.0602(1), F.S.

⁴² Section 736.0601, F.S.

⁴³ *MacIntyre v. Wedell*, 12 So.3d 273, 274 (Fla. 4th DCA 2009)(quoting *Florida National Bank of Palm Beach County v. Genova*, 460 So.2d 895 (Fla. 1985)).

⁴⁴ See s. 736.0406, F.S.

Florida National Bank of Palm Beach County v. Genova, the Florida Supreme Court ruled that the principle of undue influence is not applicable when revoking a revocable trust.⁴⁵ In the facts of the case, Mrs. Genova, who was 76, had married Mr. Genova, who was 32.⁴⁶ The couple was divorced a year later but then remarried a year after the divorce. Mrs. Genova had established a revocable trust with Florida National Bank of Palm Beach County as the trustee.⁴⁷ Mrs. Genova attempted to revoke her trust, but the trust officer refused to do so suspecting undue influence on the part of Mrs. Genova's husband.⁴⁸ Mrs. Genova filed an action to force the bank to revoke the trust shortly after. The Supreme Court ruled that, "Mrs. Genova has the power to revoke this trust at any time she wishes to do so."⁴⁹ The Court further noted that:

The courts have no place in trying to save person such as Mrs. Genova, the otherwise competent settlor of a revocable trust, from what may or may not be her own imprudence with her own assets. When she created this trust, she provided a means to save herself from her own incompetence, and the courts can and should zealously protect her from her own mental capacity. However, when she created this trust, she also reserved the absolute right to revoke it if she were not incompetent. In order for this to remain a desirable feature of a trust instrument, the right to revoke should also be absolute.⁵⁰

The Florida Fourth District Court of Appeal furthered the opinion in *Genova* to include barring challenges to the revocation of a revocable trust under undue influence after the death of the settlor.⁵¹

Effects of the Bill (Section 7 and 8)

The bill amends s. 736.0207, F.S., to provide that the validity of a revocable trust or the revocation of part of a revocable trust cannot be challenged until the trust becomes irrevocable by its terms, or until after the settlor's death.

The bill amends s. 736.0406, F.S., to provide that the amendment and restatement of a trust procured by fraud, duress, mistake or undue influence is void. The bill also provides that the revocation of a revocable trust procured by fraud, duress, mistake or undue influence is void.

The bill amends s. 744.441(11), F.S. to provide that "there shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relate2 solely to a devise." This would limit the ability of a guardian to contest the revocation of trust for only testamentary dispositions by creating a rebuttable presumption that the guardian would have to overcome. The bill also adds that the subsection does not preclude a challenge after the ward's death.

Attorneys Fees and Costs in Trust Proceedings

Section 736.0201, F.S., provides that, with the exception of a proceeding for the construction of a testamentary trust, trust proceedings are governed by the Florida Rules of Civil Procedure. There are many instances where attorneys fees and costs are awarded in trust proceedings and these awards tend to be unique to trust proceedings.

⁴⁵ *Florida National Bank of Palm Beach County v. Genova*, 460 So.2d 895, 895 (Fla. 1985).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 896.

⁴⁹ *Id.*

⁵⁰ *Id.* at 898

⁵¹ *MacIntyre v. Wedell*, 12 So.3d 272 (Fla. 4th DCA 2009).

Rule 1.525 of the Florida Rules of Civil Procedure provides that:

Any party seeking a judgment taxing costs, attorneys fees or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

The rule was created in the civil litigation context "to cure the evil" of uncertainty created by tardy motions for fees and costs, and to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court.⁵² Application of the rule can be confusing in trust proceedings. In many trust proceedings the trustee is entitled to pay its attorneys fees and costs from trust assets. While in civil litigation taxation of attorneys fees is usually based on prevailing party considerations, trust actions do not necessarily follow the same considerations. Also, attorneys who have provided a benefit to the trust may apply directly for attorneys fees and costs.⁵³ Applying Rule 1.525 to lawsuits regarding trusts has created confusion for attorneys and the courts.⁵⁴

Effect of the Bill (Section 10)

The bill amends s. 736.0201, F.S., by adding the term "judicial" in order to provide that the Florida Rules of Civil Procedure (specifically at issue is Rule 1.525) apply to judicial proceedings concerning trusts. The bill creates s. 736.0201(6), F.S., to provide that Rule 1.525 applies to judicial proceedings concerning trusts but also provides two exceptions that would not qualify as taxation of costs or attorneys fees: (1) a trustee's payment of compensation or reimbursement of costs to persons employed by the trustee from assets of the trust or (2) a determination by the court directing from what part of the trust or fees shall be paid. A determination under s. 736.1004, F.S., in an action for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's powers would not apply to the either exception.

B. SECTION DIRECTORY:

Section 1 amends s. 732.102, F.S., relating to intestate share of the surviving spouse. This section is effective October 1, 2011.

Section 2 creates s. 732.615, F.S., relating to reformation of a will for mistakes. This section is effective July 1, 2011.

Section 3 creates s. 732.616, F.S., relating to modification of a will for tax objectives. This section is effective July 1, 2011.

Section 4 creates s. 733.1061, F.S., relating to attorneys fees and costs. This section is effective July 1, 2011.

Section 5 amends s. 732.5165, F.S., relating to revocation of a will.

Section 6 amends s. 732.518, F.S., relating to will contests.

Section 7 amends s. 736.0207, F.S., relating to trust, contest.

Section 8 amends s. 736.0406, F.S., relating to challenging of the revocation of a trust.

Section 9 amends s. 744.441, F.S., relating to powers of a guardian.

⁵² *Barco v. School Board of Pinellas County*, 975 So.2d 1116, 1123 (Fla. 2008).

⁵³ Florida Statutes awarding attorneys fees in trust proceedings include ss. 736.1004; 736.1005; 736.1006; 736.1007; 736.0201; 736.0206; 736.0410; 736.04113; 736.04113; 736.04115; 736.04117; 736.0412; 736.0413; 736.0414; 736.0415; 736.0416; and 736.0417, F.S.

⁵⁴ Scuderi and Zung-Clough, "Does Florida Rule of Civil Procedure 1.525 Apply to Probate and Trust Proceedings?" ActionLine (Fla. Bar RPPTL Section Winter 2009).

Section 10 amends s. 736.0201, F.S., relating to role of court in trust proceedings.

Section 11 provides an effective date upon becoming law unless otherwise provided in the bill.

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:

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

2. Other:

Section 10 of the bill amends s.736.0201, F.S., to exempt certain trust proceedings involving awarding of attorneys fees from Florida Rule of Civil Procedure 1.525 by providing that these proceedings "do not constitute taxation of costs or attorneys fees even if the payment is for services rendered or costs incurred in a judicial proceeding." Rule 1.525 provides the time in which a motion for attorneys fees must be filed. The bill also provides that "judicial" proceedings concerning trusts are governed by the rules of civil procedure.

Article V, s. 2(a) of the state constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts. Article II, s. 3 of the state constitution prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches." The courts have read these sections together in ruling that the Supreme Court has exclusive

rulemaking power, and the legislature has no power to amend procedural rules.⁵⁵ It is possible that the changes made by Section 10 of this bill may be interpreted as an attempt to amend a court rule.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

⁵⁵ *In Re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204 (Fla. 1973).

1 A bill to be entitled
2 An act relating to estates; amending s. 732.102, F.S.;
3 revising provisions relating to the intestate share of a
4 surviving spouse; creating s. 732.615, F.S.; providing a
5 right to reform the terms of a will to correct mistakes;
6 creating s. 732.616, F.S.; providing a right to modify the
7 terms of a will to achieve tax objectives; creating s.
8 733.1061, F.S.; providing for a court to award fees and
9 costs in reformation and modification proceedings either
10 against a party's share in the estate or in the form of a
11 personal judgment against a party individually; amending
12 s. 732.5165, F.S.; clarifying that a revocation of a will
13 is subject to challenge on the grounds of fraud, duress,
14 mistake, or undue influence; amending s. 732.518, F.S.;
15 specifying that a challenge to the revocation of a will
16 may not be commenced before the testator's death; amending
17 s. 736.0207, F.S.; clarifying when a challenge to the
18 revocation of a revocable trust may be brought; amending
19 s. 736.0406, F.S.; providing that the creation of a trust
20 amendment or trust restatement and the revocation of a
21 trust are subject to challenge on the grounds of fraud,
22 duress, mistake, or undue influence; amending s. 744.441,
23 F.S.; limiting the circumstances under which a guardian of
24 an incapacitated person may bring a challenge to a
25 settlor's revocation of a revocable trust; amending s.
26 736.0201, F.S.; clarifying that certain payments by a
27 trustee from trust assets are not taxation of attorney's

28 fees and costs subject to a specified Rule of Civil
 29 Procedure; providing effective dates.

30

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

32

33 Section 1. Effective October 1, 2011, subsections (2) and
 34 (3) of section 732.102, Florida Statutes, are amended, and
 35 subsection (4) is added to that section, to read:

36 732.102 Spouse's share of intestate estate.—The intestate
 37 share of the surviving spouse is:

38 (2) If the decedent is survived by one or more descendants
 39 ~~there are surviving descendants of the decedent,~~ all of whom are
 40 also ~~lineal~~ descendants of the surviving spouse, and the
 41 surviving spouse has no other descendant, the entire intestate
 42 estate the first \$60,000 of the intestate estate, plus one-half
 43 ~~of the balance of the intestate estate. Property allocated to~~
 44 ~~the surviving spouse to satisfy the \$60,000 shall be valued at~~
 45 ~~the fair market value on the date of distribution.~~

46 (3) If there are one or more surviving descendants of the
 47 ~~decedent who, one or more of whom~~ are not lineal descendants of
 48 the surviving spouse, one-half of the intestate estate.

49 (4) If there are one or more surviving descendants of the
 50 decedent, all of whom are also descendants of the surviving
 51 spouse, and the surviving spouse has one or more descendants who
 52 are not descendants of the decedent, one-half of the intestate
 53 estate.

54 Section 2. Effective July 1, 2011, section 732.615,
 55 Florida Statutes, is created to read:

56 732.615 Reformation to correct mistakes.—Upon application
 57 of any interested person, the court may reform the terms of a
 58 will, even if unambiguous, to conform the terms to the
 59 testator's intent if it is proved by clear and convincing
 60 evidence that both the accomplishment of the testator's intent
 61 and the terms of the will were affected by a mistake of fact or
 62 law, whether in expression or inducement. In determining the
 63 testator's original intent, the court may consider evidence
 64 relevant to the testator's intent even though the evidence
 65 contradicts an apparent plain meaning of the will.

66 Section 3. Effective July 1, 2011, section 732.616,
 67 Florida Statutes, is created to read:

68 732.616 Modification to achieve testator's tax
 69 objectives.—Upon application of any interested person, to
 70 achieve the testator's tax objectives the court may modify the
 71 terms of a will in a manner that is not contrary to the
 72 testator's probable intent. The court may provide that the
 73 modification has retroactive effect.

74 Section 4. Effective July 1, 2011, section 733.1061,
 75 Florida Statutes, is created to read:

76 733.1061 Fees and costs; will reformation and
 77 modification.—

78 (1) In a proceeding arising under s. 732.615 or s.
 79 732.616, the court shall award taxable costs as in chancery
 80 actions, including attorney's fees and guardian ad litem fees.

81 (2) When awarding taxable costs, including attorney's fees
 82 and guardian ad litem fees, under this section, the court in its
 83 discretion may direct payment from a party's interest, if any,

84 in the estate or enter a judgment which may be satisfied from
 85 other property of the party, or both.

86 Section 5. Section 732.5165, Florida Statutes, is amended
 87 to read:

88 732.5165 Effect of fraud, duress, mistake, and undue
 89 influence.—A will is void if the execution is procured by fraud,
 90 duress, mistake, or undue influence. Any part of the will is
 91 void if so procured, but the remainder of the will not so
 92 procured shall be valid if it is not invalid for other reasons.
 93 If the revocation of a will, or any part thereof, is procured by
 94 fraud, duress, mistake, or undue influence, such revocation is
 95 void.

96 Section 6. Section 732.518, Florida Statutes, is amended
 97 to read:

98 732.518 Will contests.—An action to contest the validity
 99 of all or part of a will or the revocation of all or part of a
 100 will may not be commenced before the death of the testator.

101 Section 7. Section 736.0207, Florida Statutes, is amended
 102 to read:

103 736.0207 Trust contests.—An action to contest the validity
 104 of all or part of a revocable trust, or the revocation of part
 105 of a revocable trust, may not be commenced until the trust
 106 becomes irrevocable by its terms or by the settlor's death. If
 107 all of a revocable trust has been revoked, an action to contest
 108 the revocation may not be commenced until after the settlor's
 109 death. ~~except~~ This section does not prohibit such action by the
 110 guardian of the property of an incapacitated settlor.

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111 Section 8. Section 736.0406, Florida Statutes, is amended
 112 to read:

113 736.0406 Effect of fraud, duress, mistake, or undue
 114 influence. ~~A trust is void~~ If the creation, amendment, or
 115 restatement of ~~a the~~ trust is procured by fraud, duress,
 116 mistake, or undue influence, the trust or ~~any part so procured~~
 117 ~~of the trust~~ is void. ~~if procured by such means, but~~ The
 118 remainder of the trust not procured by such means is valid if
 119 the remainder is not invalid for other reasons. If the
 120 revocation of a trust, or any part thereof, is procured by
 121 fraud, duress, mistake, or undue influence, such revocation is
 122 void.

123 Section 9. Subsection (11) of section 744.441, Florida
 124 Statutes, is amended to read:

125 744.441 Powers of guardian upon court approval.—After
 126 obtaining approval of the court pursuant to a petition for
 127 authorization to act, a plenary guardian of the property, or a
 128 limited guardian of the property within the powers granted by
 129 the order appointing the guardian or an approved annual or
 130 amended guardianship report, may:

131 (11) Prosecute or defend claims or proceedings in any
 132 jurisdiction for the protection of the estate and of the
 133 guardian in the performance of his or her duties. Before
 134 authorizing a guardian to bring an action described in s.
 135 736.0207, the court shall first find that the action appears to
 136 be in the ward's best interests during the ward's probable
 137 lifetime. There shall be a rebuttable presumption that an action
 138 challenging the ward's revocation of all or part of a trust is

139 | not in the ward's best interests if the revocation relates
 140 | solely to a devise. This subsection does not preclude a
 141 | challenge after the ward's death. If the court denies a request
 142 | that a guardian be authorized to bring an action described in s.
 143 | 736.0207, the court shall review the continued need for a
 144 | guardian and the extent of the need for delegation of the ward's
 145 | rights.

146 | Section 10. Subsection (1) of section 736.0201, Florida
 147 | Statutes, is amended, and subsection (6) is added to that
 148 | section, to read:

149 | 736.0201 Role of court in trust proceedings.—

150 | (1) Except as provided in subsections ~~subsection~~ (5) and
 151 | (6) and s. 736.0206, judicial proceedings concerning trusts
 152 | shall be commenced by filing a complaint and shall be governed
 153 | by the Florida Rules of Civil Procedure.

154 | (6) Rule 1.525, Florida Rules of Civil Procedure, shall
 155 | apply to judicial proceedings concerning trusts, except that the
 156 | following do not constitute taxation of costs or attorney's fees
 157 | even if the payment is for services rendered or costs incurred
 158 | in a judicial proceeding:

159 | (a) A trustee's payment of compensation or reimbursement
 160 | of costs to persons employed by the trustee from assets of the
 161 | trust.

162 | (b) A determination by the court directing from what part
 163 | of the trust fees or costs shall be paid, unless the
 164 | determination is made under s. 736.1004 in an action for breach
 165 | of fiduciary duty or challenging the exercise of, or failure to
 166 | exercise, a trustee's powers.

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167 | Section 11. Except as otherwise expressly provided in this
168 | act, this act shall take effect upon becoming a law and shall
169 | apply to all proceedings pending before such date and all cases
170 | commenced on or after the effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 469 Individual Retirement Accounts

SPONSOR(S): Stargel and others

TIED BILLS: None IDEN./SIM. BILLS: SB 978

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Woodburn	Bond
2) Insurance & Banking Subcommittee	13 Y, 0 N	Philpot	Cooper
3) Judiciary Committee		Woodburn <i>on</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

An Individual Retirement Account (IRA) is a form of retirement savings account that provides tax benefits to the owner of the account. The account is primarily used as a means of saving for retirement. When the owner of an IRA account dies the account may be transferred to a named beneficiary. When transferred to a beneficiary it is known as an Inherited IRA.

Florida law provides for protection of various assets from creditors, which protection also extends to bankruptcy proceedings. Under current Florida law, a regular IRA is exempt from creditor claims whereas an Inherited IRA is not.

The bill provides that an Inherited IRA retains the same protection from creditors that the original IRA enjoyed.

The bill takes effect upon becoming law and applies retroactively.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Introduction

In *Robertson v. Deeb*, the Florida 2nd District Court of Appeal held that s. 222.21(2)(a), F.S., does not exempt Inherited Individual Retirement Accounts (IRA) from creditor judgments.¹ The court reasoned that the statute only protects the original IRA and when the IRA is transferred to the beneficiary, the account loses its tax status and thus is no longer exempt under the statutory scheme. The decision was further applied in *In Re: Ard* by the Federal Bankruptcy Court for the Middle District of Florida allowing a trustee to include the debtors' inherited IRA in the bankruptcy estate.² The two decisions allow a creditor to garnish an Inherited IRA to satisfy a judgment and also prevent the Inherited IRA from being exempted during bankruptcy proceedings. The bill provides that the exemption from creditors that applies in s. 222.21(2)(a), F.S., for the original owner of an IRA will continue to apply after the IRA has been passed to the beneficiary.

Individual Retirement Account

An Individual Retirement Arrangement is a tax deferred or tax advantage retirement savings plan.³ The IRA is a form of retirement savings account that is established in accordance with I.R.C. §408 or §408A.⁴ An IRA is defined as, "...a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries,"⁵ and must also meet the following criteria:

- The trustee or custodian must be a bank, a federally insured credit union, a savings and loan association, or an entity approved by the IRS to act as trustee or custodian.
- The trustee or custodian generally cannot accept contributions of more than the deductible amount for the year. However, rollover contributions and employer contributions to a simplified employee pension can be more than this amount.
- Contributions, except rollover contributions, must be in cash.
- The owner must have a non-forfeitable right to the amount at all times.
- Money in the account cannot be used to buy a life insurance policy.
- Assets in the account cannot be combined with other property, except in a common trust fund or common investment fund.
- The owner must start receiving distributions at the age of 70 1/2 years.⁶

There are different types of IRA's, including the traditional IRA and the Roth IRA. The traditional IRA allows the owner of the account to make tax deductible contributions to the account and defer paying taxes on the income until withdrawals are made from the IRA after retirement.⁷ The Roth IRA⁸ allows an owner of the account to make non-tax deductible contributions into the account and make tax free withdrawals from the account upon retirement.⁹

¹ *Robertson v. Deeb*, 16 So.3d 936 (Fla. 2d DCA 2009).

² *In re: Ard*, 435 B.R. 719 (Bkrtcy. M.D. Fla. 2010).

³ See *Internal Revenue Publication, Publication 590, Individual Retirement Arrangements (IRA)* at 3 (2010).

⁴ Lynch and Griffin, "The *Robertson* Case: A Beneficiary by Any Other Name is Still a Beneficiary," *The Florida Bar Journal*, April 2010, Vol. 84, No.4.

⁵ 26 U.S.C. §408(a).

⁶ *IRS Publication 590* at 9.

⁷ *Id.* at 7.

⁸ A Roth IRA also differs from a traditional IRA in that the owner can open one at any age and does not have to take deductions at age 70 1/2.

⁹ *IRS Publication 590* at 57.

IRAs have become increasingly important since their creation in 1974.¹⁰ At the end of 2009, IRAs held \$4.3 trillion, or more than one quarter of the \$16.1 trillion in estimated total U.S. retirement assets and make up almost ten percent of U.S. households' total assets.¹¹ It is estimated that 41.4 percent of U.S. households owned one or more types of IRAs.¹²

When the owner of an IRA dies, the IRA may be left to a named beneficiary.¹³ If the beneficiary is someone other than the owner's spouse,¹⁴ the IRA is considered an Inherited IRA.¹⁵ The beneficiary has two options when inheriting an IRA:

1. The beneficiary must withdraw all of the funds from the original IRA within five years of the original owner's death, or
2. The beneficiary must transfer the funds to an inherited IRA and take annual distributions over the remaining lifespan of the beneficiary.¹⁶

The beneficiary of an inherited IRA may not make contributions to the account, must make withdrawals regardless of his or her age and, unlike the original IRA, there is no penalty for early withdrawals from the account.

IRA Asset Protection

A creditor can collect money owed to it by filing an action for a judgment in state court. A judgment is an order of the court creating an obligation, such as a debt. The creditor may then use that judgment to collect assets from the debtors by way of garnishment to satisfy the debt. Florida law protects various assets from creditor garnishments including retirement accounts. Individual Retirement Accounts are afforded such protection in s. 222.21(2)(a)1. and 2., F.S., which provides that:

Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:

1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;
2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

¹⁰ The IRA was created by the passage of the Employee Retirement and Security Act (ERISA) in 1974.

¹¹ *The IRA Investor Profile: Traditional IRA Investors' Rollover Activity, 2007 and 2008*. ICI Investment Company Institute www.ici.org. Last visited February 17, 2011.

¹² *Id.* at 3.

¹³ 26 U.S.C. §408(d)(3)(C)(ii).

¹⁴ An IRA inherited by a spouse is not considered an inherited IRA and is treated the same as the original account.

¹⁵ 26 U.S.C. §408(d)(3)(C)(ii).

¹⁶ 26 U.S.C. §401(a)(9).

The application of s. 222.21(2)(a), F.S., protects an owner's IRA from a creditor so long as the IRA follows IRS guidelines and retains its tax exempt status. Section 222.21(2)(a), F.S., applies to creditors in state court and in federal bankruptcy court.¹⁷

The 2nd DCA recently declined to extend the protection in s. 222.21(2)(a), F.S., to inherited IRAs in *Robertson v. Deeb*.¹⁸

Robertson v. Deeb & In Re: Ard

In *Robertson*, a creditor had obtained a judgment against Robertson and served a writ of garnishment on the trustee of Robertson's Inherited IRA. Robertson had been named beneficiary of his late father's IRA and upon his father's death, was given the option of keeping the IRA in his father's name and withdrawing all the proceeds from the IRA over the next five years or transferring the IRA into an Inherited IRA and take annual withdrawals from the account for the remainder of his life expectancy. Robertson chose the latter. Robertson claimed that his beneficial interest in the IRA was exempt from garnishment pursuant to s. 222.21(2)(a), F.S., "because he is a 'beneficiary' of the 'fund or account' that qualified as an IRA when his father was alive."¹⁹ The court ruled that section 222.21(2)(a), F.S., does not apply to Inherited IRAs,

...because the plain language of that section references only the original 'fund or account' and the tax consequences of inherited IRAs render them completely separate funds or accounts.²⁰

The Court reasoned that since the Inherited IRA was not the original IRA²¹ and the tax status was different,²² the exception in s. 222.21(2)(a), F.S., did not apply since the exception was conditioned on the tax status of the original account.

The decision in *Robertson* has been further applied in federal bankruptcy court in *In Re: Ard*.²³ In *In Re: Ard*, the debtor had an Inherited IRA similar to that in *Robertson*. The court noted the outcomes involving inherited IRAs "turned on the particular language of each state's law applicable to the exemption of IRAs."²⁴ The bankruptcy court, pursuant to the decision in *Robertson*, ruled that s. 222.21(2)(a), F.S., did not apply to an inherited IRA and thus not exempt in federal bankruptcy proceedings.²⁵ The debtor was therefore required to turn the IRA over to the bankruptcy trustee.

Effect of Proposed Changes

The bill contains "whereas" clauses to express the Legislature's intent that Inherited IRAs, as defined in s. 402(c) of the Internal Revenue Code, were intended to be exempt from the claims of creditors and that the decisions in *Robertson* and *In re: Ard* are contrary to the Legislature's intent.

The bill amends s. 222.21(2)(c), F.S., to provide that an IRA exempt from creditors under s. 222.21(2)(a), F.S., would continue to be exempt if the original IRA is transferred to an Inherited IRA. Under the proposed changes, when an owner of an IRA passes away, his or her named beneficiary would continue to enjoy the protection from creditors that the original owner enjoyed under s. 222.21(2)(a), F.S. This protection would most likely extend to protection in bankruptcy proceedings, as well.

¹⁷ 11 U.S.C. s. 522(b) (Federal Bankruptcy law allows a debtor to exempt certain property from bankruptcy proceedings according to state law).

¹⁸ *Robertson*, at 937.

¹⁹ *Id.* at 938.

²⁰ *Id.*

²¹ The court reasoned that the IRA ceased to be the original IRA when it was passed to a beneficiary.

²² The court noted that Inherited IRAs do not have a penalty for early withdrawals, distributions must be made, and Inherited IRAs are not entitled to contributions or rollovers into existing IRAs to point out the inconsistencies with the original IRA.

²³ *In re: Ard*, at 719.

²⁴ *Id.* at 722.

²⁵ *Id.*

The bill contains language indicating that its provisions are clarifying and apply retroactively.

The bill takes effect upon becoming a law.

B. SECTION DIRECTORY:

Section 1 amends s. 222.21(2)(c), F.S., relating to exemption of an IRA from claims of creditors.

Section 2 provides that the bill becomes effective upon becoming a 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:

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

2. Other:

This bill provides that it is intended to be clarifying and remedial and shall apply retroactively. Retroactive application of legislation can implicate the due process provisions of the Constitution.²⁶ As a general matter, statutes which do not alter vested rights but relate only to remedies or procedure can be applied retroactively.²⁷

²⁶ See *State Department of Transportation v. Knowles*, 402 So.2d 1155 (Fla. 1981).

²⁷ See *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d. 494 (Fla. 1999).

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.²⁸

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

²⁸ *Lowry v. Parole and Probation Commission*, 473 So.2d 1248, 1250 (Fla. 1985)(internal citations omitted).

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A bill to be entitled
An act relating to individual retirement accounts;
amending s. 222.21, F.S.; clarifying the exemption of
inherited individual retirement accounts from legal
processes; providing intent; providing for retroactive
application; providing an effective date.

WHEREAS, many residents of this state have individual
retirement accounts, relying upon the Legislature's intent that
individual retirement accounts be exempt from claims of
creditors, and

WHEREAS, the Legislature clearly intended in s.
222.21(2)(c), Florida Statutes, that inherited individual
retirement accounts included in s. 402(c) of the Internal
Revenue Code of 1986, as amended, be exempt from claims of
creditors of the owner, beneficiary, or participant of the
inherited individual retirement account, and

WHEREAS, in Robertson v. Deeb, 16 So. 3d 936 (Fla. 2d DCA
2009) the appellate court, contrary to the Legislature's intent,
held that an inherited individual retirement account was not
exempt from the beneficiaries' creditors because such an account
was not included in property described in s. 222.21, Florida
Statutes, a decision that was followed in the Bankruptcy Court
of the Middle District of Florida, In re: Ard, 435 B.R. 719
(Bkrtcy. M.D. Fla. 2010), NOW, THEREFORE,

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

29 Section 1. Paragraph (c) of subsection (2) of section
 30 222.21, Florida Statutes, is amended to read:

31 222.21 Exemption of pension money and certain tax-exempt
 32 funds or accounts from legal processes.—

33 (2)

34 (c) Any money or other assets or any interest in any fund
 35 or account that is ~~are~~ exempt from claims of creditors of the
 36 owner, beneficiary, or participant under paragraph (a) does ~~do~~
 37 not cease to be exempt after the owner's death to qualify for
 38 ~~exemption~~ by reason of a direct transfer or eligible rollover
 39 that is excluded from gross income under ~~s. 402(e) of the~~
 40 Internal Revenue Code of 1986, including, but not limited to, a
 41 direct transfer or eligible rollover to an inherited individual
 42 retirement account as defined in s. 408(d)(3) of the Internal
 43 Revenue Code of 1986, as amended. This paragraph is intended to
 44 clarify existing law, is remedial in nature, and shall have
 45 retroactive application to all inherited individual retirement
 46 accounts without regard to the date an account was created.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4135 District Court Marshals
SPONSOR(S): McBurney
TIED BILLS: None IDEN./SIM. BILLS: SB 974

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Woodburn	Bond
2) Judiciary Committee		Woodburn <i>OW</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Florida has five district courts of appeal. Each court appoints a marshal. This bill repeals the statutory requirement that requires the salary of the marshal to be set by general law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Marshals for the District Courts of Appeal

There are currently five district courts of appeal in the state.¹ Each district court of appeal is required to appoint a marshal.² Subsections 35.26(2), (3) and (4), F.S., provide that:

- The marshal has the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.
- The marshal is custodian of the headquarters occupied by the court and performs such other duties as directed by the court.
- The marshal is responsible for the security of the court.

Art. V s. 4(c) of the state constitution requires that a district court of appeal appoint a marshal and provides that the salary of the marshal "be fixed by general law."

Section 35.27, F.S., requires that the compensation of the marshal be provided by law.

Effect of the Bill

The bill repeals the statutory requirement that the compensation of the marshal be provided by law by repealing s. 35.27, F.S. This bill does not affect the constitutional requirement.

B. SECTION DIRECTORY:

Section 1 repeals s. 35.27, F.S., regarding salary of the marshal of a district court of appeal.

Section 2 provides an effective date of July 1, 2011.

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.

¹ Section 35.01, F.S.

² Section 35.26(1), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

HB 4135

2011

1 A bill to be entitled
2 An act relating to district court marshals; repealing s.
3 35.27 F.S., relating to compensation of the marshal;
4 providing an effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:


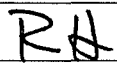
7
8 Section 1. Section 35.27, Florida Statutes, is repealed.
9 Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4137 Marshal of the Supreme Court

SPONSOR(S): McBurney

TIED BILLS: None IDEN./SIM. BILLS: SB 962

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Woodburn	Bond
2) Judiciary Committee		Woodburn 	Havlicak 

SUMMARY ANALYSIS

The Supreme Court appoints a marshal. This bill repeals the statutory requirement that requires the salary of the marshal to be set by general law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Marshal of the Supreme Court

Section 25.251, F.S., requires the Supreme Court to appoint a marshal. Sections 25.262 and 25.271, F.S., provide that:

- The marshal has the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.
- The marshal is the custodian of the Supreme Court building and grounds.
- The marshal is responsible for security of the court.

Art. V s. 3(c) of the state constitution requires that the Supreme Court appoint a marshal and provides that the salary of the marshal "be fixed by general law."

Section 25.281, F.S., requires that the compensation of the marshal be provided by law.

Effect of the Bill

The bill repeals the statutory requirement that the compensation of the marshal be provided by law by repealing s. 25.281, F.S. This bill does not affect the constitutional requirement.

B. SECTION DIRECTORY:

Section 1 repeals s. 25.281, F.S., regarding salary of the marshal of the Supreme Court.

Section 2 provides an effective date of July 1, 2011.

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:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

HB 4137

2011

1 A bill to be entitled
2 An act relating to the marshal of the Supreme Court;
3 repealing s. 25.281, F.S., relating to compensation of the
4 marshal; providing an effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Section 25.281, Florida Statutes, is repealed.
9 Section 2. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7023 PCB CVJS 11-03 Judiciary
SPONSOR(S): Civil Justice Subcommittee; Steube
TIED BILLS: IDEN./SIM. **BILLS:** SB 1398

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	15 Y, 0 N	Bond	Bond
1) Judiciary Committee		Bond <i>NB</i>	Havlicak <i>RN</i>

SUMMARY ANALYSIS

Terms of court were enacted to ensure that the circuit judges traveled to each of the counties on a regular basis. While terms of court were a necessity in the days of difficult travel and slow communications, the concept is long outdated and unnecessary.

HB 7023 repeals statutory requirements for terms of court and makes conforming changes.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

At one time, circuit court judges literally "rode the circuit," travelling from one county seat to the next for the purpose of conducting court. In a day of difficult travel and slow communications, it was important that the circuit judge show up on a date certain to conduct the court's business.¹ Terms of court were developed to fill that need, and were required by the state constitution² until Article V was substantially rewritten in 1957. Current law creates two or more terms of court in each of the counties. See ss. 26.22-.365, F.S.

In the past, on the first day of the term of court the circuit judge would conduct a ceremonial opening of the term of court, the clerk would summon a new grand jury, the sheriff would bring in the prisoners for a docket sounding, and the work of the circuit court would commence. The circuit judge was generally expected to stay in town until the judicial work was complete, but also was required to leave in time to make it to the next county for the start of that county's term of court. A circuit judge is fined \$50 a day for every day he or she is late starting a term of court.³

In the early days of the state, work as a supreme court justice was a part-time occupation. The justices similarly held terms of court in order that they have a fixed time to travel to Tallahassee to conduct appellate sessions. The concept for terms of court was adopted in statute when the intermediate district courts of appeal were created in 1957. Section 35.11, F.S., requires each of the district courts of appeal to meet at least once in every regular term in each judicial circuit within the district.

Today, terms of court are an archaic concept. It does not appear that any of the courts formally open a term of court with the traditional ceremony. Circuit judges come and go from each of the counties as needed and far more often than once every six months. Only one of the five district courts of appeal is known to regularly travel the district for the purpose of conducting oral argument. It is unknown when the last time a circuit judge was fined for nonappearance at the first day of a term.

Reference to terms of court is still relevant today for two purposes: designating the terms of local grand juries and limiting withdrawal of an appellate mandate.

Historically, although not explicitly required by statute, the terms of a grand jury coincide with the term of the court.

In the appellate courts, the terms of court limit an appellate court's ability to withdraw a mandate, a rare procedure. The Florida Supreme Court in 1932 explained the scope and limits of the power to withdraw:

But, be that as it may, a majority of the court have reached the conclusion that the correct rule, which should be recognized and applied in such situation, is that the jurisdiction of this court, like the jurisdiction of courts generally, persists to the end of the term, and then terminates, but that, during the term at which a judgment of this court is rendered, this court has jurisdiction and power which it may exercise, as the circumstances and justice of the case may require, to reconsider, revise, reform, or

¹ See <http://www.leoncountyfl.gov/2ndcircuit/index.php?Page=FirstHundred.php>, which describes the history of the Second Judicial Circuit, including how the terms of court provided for the circuit judge to travel down the Apalachicola River, and were changed to accommodate the arrival of steamboat service along the river (last accessed February 14, 2011).

² Article V, s. 8 of the Constitution of 1885 included this sentence: "Such Judge shall hold at least two terms of his court in each county within his Circuit every year, at such times and places as shall be prescribed by law, and may hold special terms."

³ Section 26.39, F.S.

modify its own judgments for the purpose of making the same accord with law and justice, and that it has power to recall its own mandate for the purpose of enabling it to exercise such jurisdiction and power in a proper case.⁴

Under current law, a mandate may only be withdrawn during the current term of the appellate court, which leads to the odd result of some appellate court opinions being subject to withdrawal for nearly six months while others may only be subject to withdrawal for a few days.

Effect of Bill

The bill repeals statutory terms of court applicable to the circuit courts, district courts of appeal, and Supreme Court. It also makes the following conforming changes:

- Repeals the fine for nonattendance by a circuit judge.
- Repeals a requirement that a circuit judge call the docket at the end of the term.
- Repeals a requirement that district courts of appeal hear oral arguments in each of the judicial circuits in every term of court.
- Repeals a requirement that criminal cases be heard in the term before civil cases.
- Repeals a requirement that a criminal case be heard in the same term of court that the indictment was handed down unless the court holds the case to the next term for good cause.
- Removes references to terms of court in statutes regarding county sheriffs.
- Removes references to terms of court in the definitions of two crimes.
- Removes the requirement that a criminal defendant show up on the first day of a term of court if the appearance bond is unclear.
- Requires the chief judge of the circuit to set the terms of a grand jury.
- Removes reference to terms of court in a statute requiring a witness in a criminal case to appear in court.

The bill creates two new conforming statutes. These new sections:

- Allow the Supreme Court to establish terms of court for the Supreme Court and for the lower courts, if the court wishes.
- Provide in statute that an appellate court may withdraw a mandate for up to 120 days after it is filed with the lower court. The conditions upon which withdrawal is allowed are taken from case law.

B. SECTION DIRECTORY:

Section 1 repeals ss. 25.051, 26.21, 26.22, 26.23, 26.24, 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33, 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365, 26.37, 26.38, 26.39, 26.40, 26.42, 35.10, 35.11, 907.05 and 907.055, F.S.

Section 2 amends s. 26.46, F.S., regarding jurisdiction of a resident judge.

Section 3 amends s. 30.12, F.S., regarding the power to appoint a sheriff.

Section 4 amends s. 30.15, F.S., regarding powers, duties and obligations of the sheriff.

Section 5 creates s. 43.43, F.S., regarding terms of court.

Section 6 creates s. 43.44, F.S., regarding mandates of appellate courts.

Section 7 amends s. 831.17, F.S., regarding offenses.

⁴ *Chapman v. St. Stephens Protestant Episcopal Church, Inc.*, 138 So. 630 (Fla. 1932). The *Chapman* case specifically provides that the power to withdraw a mandate may be limited by statute.

Section 8 amends s. 877.08, F.S., regarding coin-operated machines.

Section 9 amends s. 903.32, F.S., regarding defects in a criminal bond.

Section 10 amends s. 905.01, F.S., regarding grand jury terms.

Section 11 amends s. 905.09, F.S., regarding discharge and recall of a grand jury.

Section 12 amends s. 905.095, F.S., regarding extension of a grand jury term.

Section 13 amends s. 914.03, F.S., regarding attendance of witnesses.

Section 14 provides an effective date of January 1, 2012.

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:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
2 An act relating to the judiciary; repealing s. 25.051,
3 F.S., relating to regular terms of the Supreme Court;
4 repealing s. 26.21, F.S., relating to terms of the circuit
5 courts; repealing s. 26.22, F.S., relating to terms of the
6 First Judicial Circuit; repealing s. 26.23, F.S., relating
7 to terms of the Second Judicial Circuit; repealing s.
8 26.24, F.S., relating to terms of the Third Judicial
9 Circuit; repealing s. 26.25, F.S., relating to terms of
10 the Fourth Judicial Circuit; repealing s. 26.26, F.S.,
11 relating to terms of the Fifth Judicial Circuit; repealing
12 s. 26.27, F.S., relating to terms of the Sixth Judicial
13 Circuit; repealing s. 26.28, F.S., relating to terms of
14 the Seventh Judicial Circuit; repealing s. 26.29, F.S.,
15 relating to terms of the Eighth Judicial Circuit;
16 repealing s. 26.30, F.S., relating to terms of the Ninth
17 Judicial Circuit; repealing s. 26.31, F.S., relating to
18 terms of the Tenth Judicial Circuit; repealing s. 26.32,
19 F.S., relating to terms of the Eleventh Judicial Circuit;
20 repealing s. 26.33, F.S., relating to terms of the Twelfth
21 Judicial Circuit; repealing s. 26.34, F.S., relating to
22 terms of the Thirteenth Judicial Circuit; repealing s.
23 26.35, F.S., relating to terms of the Fourteenth Judicial
24 Circuit; repealing s. 26.36, F.S., relating to terms of
25 the Fifteenth Judicial Circuit; repealing s. 26.361, F.S.,
26 relating to terms of the Sixteenth Judicial Circuit;
27 repealing s. 26.362, F.S., relating to terms of the
28 Seventeenth Judicial Circuit; repealing s. 26.363, F.S.,

29 relating to terms of the Eighteenth Judicial Circuit;
 30 repealing s. 26.364, F.S., relating to terms of the
 31 Nineteenth Judicial Circuit; repealing s. 26.365, F.S.,
 32 relating to terms of the Twentieth Judicial Circuit;
 33 repealing s. 26.37, F.S., relating to requiring a judge to
 34 attend the first day of each term of the circuit court;
 35 repealing s. 26.38, F.S., relating to a requirement for a
 36 judge to state a reason for nonattendance; repealing s.
 37 26.39, F.S., relating to penalty for nonattendance of
 38 judge; repealing s. 26.40, F.S., relating to adjournment
 39 of the circuit court upon nonattendance of the judge;
 40 repealing s. 26.42, F.S., relating to calling all cases on
 41 the docket at the end of each term; repealing s. 35.10,
 42 F.S., relating to regular terms of the district courts of
 43 appeal; repealing s. 35.11, F.S., relating to special
 44 terms of the district courts of appeal; repealing s.
 45 907.05, F.S., relating to a requirement that criminal
 46 trials be heard in the term of court prior to civil cases;
 47 repealing s. 907.055, F.S., relating to a requirement that
 48 persons in custody be arraigned and tried in the term of
 49 court unless good cause is shown; amending ss. 26.46,
 50 30.12, and 30.15, F.S.; conforming provisions to changes
 51 made by the act; creating s. 43.43, F.S.; allowing the
 52 Supreme Court to set terms of court for the Supreme Court,
 53 district courts of appeal, and circuit courts; creating s.
 54 43.44, F.S.; providing that appellate courts may withdraw
 55 a mandate within 120 days after its issuance; amending ss.
 56 831.17, 877.08, 903.32, 905.01, 905.09, 905.095, and

57 914.03, F.S.; conforming provisions to changes made by the
 58 act; providing an effective date.

59

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

61

62 Section 1. Sections 25.051, 26.21, 26.22, 26.23, 26.24,
 63 26.25, 26.26, 26.27, 26.28, 26.29, 26.30, 26.31, 26.32, 26.33,
 64 26.34, 26.35, 26.36, 26.361, 26.362, 26.363, 26.364, 26.365,
 65 26.37, 26.38, 26.39, 26.40, 26.42, 35.10, 35.11, 907.05, and
 66 907.055, Florida Statutes, are repealed.

67

68 Section 2. Section 26.46, Florida Statutes, is amended to

69

70 read:
 71 26.46 Jurisdiction of resident judge after assignment.—
 72 When a circuit judge is assigned to another circuit, none of the
 73 circuit judges in such other circuit shall, because of such
 74 assignment, be deprived of or affected in his or her
 75 jurisdiction other than to the extent essential so as not to
 76 conflict with the authority of the temporarily assigned circuit
 77 judge as to the particular case or cases or class of cases, ~~or~~
~~in presiding at the particular term or part of term named or~~
~~specified in the assignment.~~

78

79 Section 3. Section 30.12, Florida Statutes, is amended to

80

81 read:
 82 30.12 Power to appoint sheriff.—Whenever any sheriff in
 83 the state shall fail to attend, in person or by deputy, ~~any term~~
 84 ~~of~~ the circuit court or county court of the county, from
 sickness, death, or other cause, the judge attending said court
 may appoint an interim a sheriff, who shall assume all the

85 | responsibilities, perform all the duties, and receive the same
 86 | compensation as if he or she had been duly appointed sheriff,
 87 | for only the said term of nonattendance court and no longer.

88 | Section 4. Paragraph (c) of subsection (1) of section
 89 | 30.15, Florida Statutes, is amended to read:

90 | 30.15 Powers, duties, and obligations.—

91 | (1) Sheriffs, in their respective counties, in person or
 92 | by deputy, shall:

93 | (c) Attend all sessions ~~terms~~ of the circuit court and
 94 | county court held in their counties.

95 | Section 5. Section 43.43, Florida Statutes, is created to
 96 | read:

97 | 43.43 Terms of courts.—The Supreme Court may establish
 98 | terms of court for the Supreme Court, the district courts of
 99 | appeal, and the circuit courts; may provide that district courts
 100 | and circuit courts may establish their own terms of court; or
 101 | may dispense with terms of court.

102 | Section 6. Section 43.44, Florida Statutes, is created to
 103 | read:

104 | 43.44 Mandate of an appeals court.—An appellate court has
 105 | the jurisdiction and power, as the circumstances and justice of
 106 | the case may require, to reconsider, revise, reform, or modify
 107 | its own judgments for the purpose of making the same accord with
 108 | law and justice. Accordingly, an appellate court has the power
 109 | to recall its own mandate for the purpose of enabling it to
 110 | exercise such jurisdiction and power in a proper case. A mandate
 111 | may not be recalled more than 120 days after it is filed with
 112 | the lower tribunal.

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113 Section 7. Section 831.17, Florida Statutes, is amended to
 114 read:

115 831.17 Violation of s. 831.16; second or subsequent
 116 conviction.—Whoever having been convicted of either of the
 117 offenses mentioned in s. 831.16, is again convicted of either of
 118 the same offenses, committed after the former conviction, ~~and~~
 119 ~~whoever is at the same term of the court convicted upon three~~
 120 ~~distinct charges of said offenses,~~ commits a felony of the
 121 second degree, punishable as provided in s. 775.082, s. 775.083,
 122 or s. 775.084.

123 Section 8. Subsection (4) of section 877.08, Florida
 124 Statutes, is amended to read:

125 877.08 Coin-operated vending machines and parking meters;
 126 defined; prohibited acts, penalties.—

127 (4) Whoever violates ~~the provisions of~~ subsection (3) a
 128 second or subsequent time commits, ~~and is convicted of such~~
 129 ~~second separate offense, either at the same term or a subsequent~~
 130 ~~term of court,~~ shall be guilty of a felony of the third degree,
 131 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

132 Section 9. Subsection (2) of section 903.32, Florida
 133 Statutes, is amended to read:

134 903.32 Defects in bond.—

135 (2) If no day, or an impossible day, is stated in a bond
 136 for the defendant's appearance before a trial court judge for a
 137 hearing or trial, the defendant shall be bound to appear 10 days
 138 after receipt of notice to appear by the defendant, the
 139 defendant's counsel, or any surety on the undertaking. ~~If no~~
 140 ~~day, or an impossible day, is stated in a bond for the~~

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141 ~~defendant's appearance for trial, the defendant shall be bound~~
 142 ~~to appear on the first day of the next term of court that will~~
 143 ~~commence more than 3 days after the undertaking is given.~~

144 Section 10. Subsection (3) of section 905.01, Florida
 145 Statutes, is amended to read:

146 905.01 Number and procurement of grand jury; replacement
 147 of member; term of grand jury.-

148 (3) The chief judge of each any circuit court shall
 149 regularly order ~~may dispense with~~ the convening of the grand
 150 jury for a at any term of 6 months ~~court by filing a written~~
 151 ~~order with the clerk of court directing that a grand jury not be~~
 152 ~~summoned.~~

153 Section 11. Section 905.09, Florida Statutes, is amended
 154 to read:

155 905.09 Discharge and recall of grand jury.-A grand jury
 156 that has been dismissed may be recalled at any time during the
 157 ~~same~~ term of the grand jury ~~court.~~

158 Section 12. Section 905.095, Florida Statutes, is amended
 159 to read:

160 905.095 Extension of grand jury term.-Upon petition of the
 161 state attorney or the foreperson of the grand jury acting on
 162 behalf of a majority of the grand jurors, the circuit court may
 163 extend the term of a grand jury impaneled under this chapter
 164 beyond the term ~~of court~~ in which it was originally impaneled. A
 165 grand jury whose term has been extended as provided herein shall
 166 have the same composition and the same powers and duties it had
 167 during its original term. In the event the term of the grand
 168 jury is extended under this section, it shall be extended for a

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169 | time certain, not to exceed a total of 90 days, and only for the
 170 | purpose of concluding one or more specified investigative
 171 | matters initiated during its original term.

172 | Section 13. Section 914.03, Florida Statutes, is amended
 173 | to read:

174 | 914.03 Attendance of witnesses.—A witness summoned by a
 175 | grand jury ~~or in a criminal case~~ shall remain in attendance
 176 | until excused by the grand jury. A witness summoned in a
 177 | criminal case shall remain in attendance until excused by the
 178 | court. A witness who departs without permission of the court
 179 | shall be in criminal contempt of court. ~~A witness shall attend~~
 180 | ~~each succeeding term of court until the case is terminated.~~

181 | Section 14. This act shall take effect January 1, 2012.