Judiciary Committee

Tuesday, April 12, 2011
1:00 PM
404 HOB

Meeting Packet

Dean Cannon
Speaker

William Snyder
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Tuesday, April 12, 2011 01:00 pm

End Date and Time: Tuesday, April 12, 2011 05:00 pm

Location: 404 HOB
Duration: 4.00 hrs

Consideration of the following bill(s):

CS/HB 81 Treatment-based Drug Court Programs by Health & Human Services Access Subcommittee, Rouson
CS/CS/HB 155 Privacy of Firearm Owners by Health & Human Services Committee, Criminal Justice Subcommittee, Brodeur
CS/HB 201 Negligence by Civil Justice Subcommittee, O'Toole
CS/HB 391 Expert Testimony by Civil Justice Subcommittee, Metz
CS/HB 405 Employment Liability for Persons with Disabilities by Civil Justice Subcommittee, Baxley
CS/HB 815 Powers of Attorney by Civil Justice Subcommittee, Harrison
CS/HB 821 Eyewitness Identification by Criminal Justice Subcommittee, Thurston
HB 927 Adverse Possession by Roberson, K.
CS/HB 941 Construction Liens by Civil Justice Subcommittee, Moraitis
CS/HB 1193 Health Insurance by Health & Human Services Quality Subcommittee, Hudson
HB 1247 Parental Notice of Abortion by Stargel

NOTICE FINALIZED on 04/08/2011 16:16 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 81 Treatment-based Drug Court Programs
SPONSOR(S): Health & Human Services Access Subcommittee, Rouson and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 400

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 1 N	Krol	Cunningham
2) Health & Human Services Access Subcommittee	14 Y, 0 N, As CS	Batchelor	Schoolfield
3) Justice Appropriations Subcommittee	12 Y, 1 N	McAuliffe	Jones Darity
4) Judiciary Committee		Krol TK	Havlicak RH

SUMMARY ANALYSIS

Post-adjudicatory drug courts serve non-violent, drug addicted offenders who typically have prior convictions. Upon successful completion, these offenders may have their adjudication withheld, probation reduced or terminated, or other sanctions reduced.

In 2009, the admission criteria for post-adjudicatory drug courts was created to include more serious prison-bound, non-violent offenders and to allow drug court judges to hear any probation or community control violations related to failed substance abuse tests. The goal was to increase state savings by diverting prison-bound offenders to drug court programming. However, the Office of Program Policy Analysis & Government Accountability recently reported that without further post-adjudicatory drug court program expansion the projected savings will not be realized.

CS/HB 81:

- Allows the drug court participant to have all their probation and community control violations heard by the judge presiding over the post-adjudicatory drug court.
- Allows an offender to be placed into a post-adjudicatory drug court after violating the terms of their probation or community control.
- Increases the number of sentencing points allowed for admission into the post-adjudicatory treatment-based drug court program from 52 to 60 to allow more offenders to be sentenced to the program.

The Criminal Justice Impact Conference met March 2, 2011 and determined that this bill will have an indeterminate impact on state prison beds. While there is a potential savings to the state by diverting offenders bound for prison incarceration, it largely relies on the discretionary nature of judicial behavior.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Drug Court Background

The drug court concept was developed in 1989 in Dade County as a response to a federal mandate to reduce the inmate population or lose federal funding. The Florida Supreme Court reported that a majority of the offenders being incarcerated due to drug-related crimes were "revolving back through the criminal justice system because of underlying problems of drug addiction." The Court felt that the delivery of treatment services needed to be coupled with the criminal justice system, strong judicial leadership, and partnerships to bring treatment and the criminal justice system together. There are two types of drug court programs: pre-trial diversion and post-adjudicatory.[1]

Pre-trial Diversion Drug Courts
Pre-trial diversion drug courts are designed for first-time offenders who, in lieu of the program, would likely be placed on county probation. Participants are diverted into the program prior to adjudication. Upon successful completion of the program, the offender's charges may be dropped.[2]

A person is eligible for pretrial diversion drug court if he or she is charged with a second or third degree felony for purchase or possession of a controlled substance under chapter 893, F.S., prostitution, tampering with evidence, solicitation for purchase of a controlled substance, or obtaining a prescription by fraud and he or she:

- Has not been charged with a crime involving violence, including but not limited to, murder, sexual battery, robbery, carjacking, home-invasion robbery, or any other crime involving violence;
- Has not previously been convicted of a felony nor been admitted to a felony pretrial program referred to in s. 948.08, F.S.; and
- Has not rejected on the record previously offered admission into the program.[3,4]

Post-adjudicatory Drug Courts
Post-adjudicatory drug courts serve non-violent, drug addicted offenders who have been adjudicated and typically have prior convictions. Post-adjudicatory drug courts generally use graduated sanctions when offenders violate program requirements by actions such as testing positive on drug tests, missing treatment sessions, or failing to report to court. These sanctions can include mandatory community service, extended probation, or jail stays.[5] Upon successful completion, these offenders may have their adjudication withheld, probation reduced or terminated, or other sanctions reduced.[6]

Post-adjudicatory Drug Court Expansion

In 2009, the Legislature appropriated $19 million in federal funds from the Edward Byrne Memorial Justice Assistance Grant to expand post-adjudicatory drug courts into eight counties.[7] Currently, there are 30 post-adjudicatory drug courts operating in 14 judicial circuits.[8]

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[1] *The Florida Drug Court System*, Publication by the Florida Supreme Court, revised January 2004, p.1.
[2] *State's Drug Courts Could Expand to Target Prison-Bound Adult Offenders*, Office of Program Policy Analysis & Government Accountability, Report No. 09-13.
[3] Section 948.08(6)(a), F.S.
[4] However, if the state attorney can prove that the defendant was involved in the dealing or selling of controlled substances, the court can deny the defendant's admission into a pretrial intervention program. Section 948.08(6)(a)2., F.S.
[5] OPPAGA Report No. 09-13.
[6] *Id.*
[7] *Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings*, Office of Program Policy Analysis & Government Accountability, Report No. 10-54.

Through the passage of Ch. 2009-64, L.O.F., the Legislature created criteria for admission to post-adjudicatory drug courts to include more serious prison-bound, non-violent offenders.[9] The goal was to divert these offenders from prison and reduce corrections costs by an estimated $95 million. The eligibility criteria for post-adjudicatory drug court is based on the sentencing court's assessment of the defendant's:

- Criminal history,[10]
- Substance abuse screening outcome,
- Amenability to the services of the program,
- Total sentence points (must be 52 or fewer),
- Agreement to enter the program, and
- The recommendation of the state attorney and the victim, if any.[11]

The 2009 expansion allowed for two ways for an offender to participate in post-adjudicatory drug court:

- An offender can be sentenced to drug court as a condition of their probation or community control.[12]
- An offender can be placed into drug court after violating the terms of their probation or community control due to a failed or suspect substance abuse treatment test.[13]

In addition, the expansion provided:

- Violations of probation or community control by a post-adjudicatory drug court participant due to a failed or suspect substance abuse test to be heard by the judge presiding over the post-adjudicatory drug court program. After a hearing on or admission of the violation, the judge disposes of such violation, as he or she deems appropriate.[14]
- A mitigating sentence factor[15] that allows a defendant to participate in a post-adjudicatory program if the defendant committed a nonviolent felony,[16] has a Criminal Punishment Code scoresheet total of 52 points or fewer after including points for the violation, and is amenable to the services and is otherwise qualified.

2010 OPPAGA Report

In 2010, the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) issued a report on the post-adjudicatory drug court expansion. OPPAGA reported the post-adjudicatory drug

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[8] Treatment-Based Drug Courts in Florida, Office of the State Courts Administrator, Updated October 28, 2010. On file with the Criminal Justice Subcommittee.

[9] Prior to 2009, Florida statutes did not address eligibility criteria for post-adjudicatory drug court.

[10] Section 948.06(2)(i)c., F.S., allows for a defendant who violated their probation or community control to be placed in a post-adjudicatory drug court if the underlying offense is a nonviolent felony. Section 948.01, F.S., states that a defendant can be sentenced to drug court as a condition of their probation or community control if they are a nonviolent felony offender. In both instances, nonviolent felony is defined as a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.

[11] Sections 397.334(3)(a), F.S.

[12] Section 948.01, F.S.

[13] Section 948.06(2)(i)a., F.S.

[14] Section 397.334(3)(b), F.S. Prior to 2009, violations by post-adjudicatory drug court participants had to be heard by the court that originally granted their probation or community control. Section 948.06, F.S.

[15] The Criminal Punishment Code applies to sentencing for felony offenses committed on or after October 1, 1998. A defendant's sentence is calculated based on points assigned for factors including: the offense for which the defendant is being sentenced; injury to the victim; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors. Section 921.0026, F.S., provides that a sentence may be "mitigated," which means that the length of a state prison sentence may be reduced or a non-prison sanction may be imposed even if the offender scored a prison sentence, if the court finds any permissible mitigating factor.

[16] Section 948.08(6), F.S., defines the term "nonviolent felony" as a third degree felony violation of chapter 810 (entitled Burglary and Trespass) or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.

courts were generally meeting standards for their operation, but that they were not likely to generate the projected cost savings. Specifically OPPAGA found that, initial admissions targets overestimated the potential population of offenders who would qualify for the programs, strict eligibility criteria limited admissions, and some programs appeared to be serving offenders who would be unlikely to be sentenced to prison in the absence of drug court.[17]

The Office of the State Court Administrator reported to OPPAGA that "as of June 30, 2010, the state had not spent approximately $18.1 million, or 96%, of the funds."[18] The state has until September 30, 2012 to spend the remaining amount before the money is reverted back to the federal government.

To prevent reverting the funds and to increase state savings by diverting prison-bound offenders, OPPAGA made the following suggestions to the Legislature:

- Expand drug court criteria to serve more prison-bound offenders by:
    - Authorizing drug courts to serve offenders who are cited for technical violations of probation other than a failed substance abuse test, if substance abuse was the main factor at the time of their violation, and
    - Giving judges discretion to allow offenders with prior violent offenses who are appropriate for treatment and do not present a risk to public safety to participate in expansion drug court.
- Include additional counties to divert more prison-bound offenders.
- Require existing expansion courts to serve predominantly prison-bound offenders.
- Shift federal drug court funds to other prison diversion programs.[19]

Effect of the Bill

CS/HB 81 removes the nonviolent felony offender admission criteria from s. 948.01, F.S., and mirrors the admission criteria found in s. 948.06, F.S., to allow a defendant to be placed into a post-adjudicatory drug court when the offense he or she committed was a nonviolent felony.

Currently only probation and community control violations related to a failed or suspect substance abuse test are heard by the judge presiding over the post-adjudicatory drug court. The bill allows the drug court participant to have all of their probation and community control violations heard by the presiding post-adjudicatory drug court judge.

The bill allows an offender to be placed into a post-adjudicatory drug court after violating any of the terms of their probation or community control. This expands current law which allows offenders to be placed into a post-adjudicatory drug court for only violations related to a failed or suspect substance abuse test.

The bill also increases the maximum amount of Criminal Punishment Code scoresheet points from 52 to 60 that an offender can have and still be eligible for participation in the post-adjudicatory drug court program. Whether having violated community supervision or before the court for sentencing on a substantive law violation, the candidate for a post-adjudicatory drug court program may not score more than 60 sentencing points.

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[17] *Without Changes, Expansion Drug Courts Unlikely to Realize Expected Cost Savings*, Office of Program Policy Analysis & Government Accountability, Report No. 10-54.
[18] *Id.* at p. 6.
[19] *Id.*

B. SECTION DIRECTORY:

Section 1. Amends s. 397.334, F.S., relating to treatment-based drug court programs.

Section 2. Amends s. 921.0026, F.S., relating to mitigating circumstances.

Section 3. Amends s. 948.01, F.S., relating to when a court may place defendant on probation or into community control.

Section 4. Amends s. 948.06, F.S., relating to violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.

Section 5. Amends s. 948.20, F.S., relating to drug offender probation.

Section 6. Provides an effective date of July 1, 2011.

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:

Substance abuse treatment providers could see a positive fiscal impact if more people become eligible for post-adjudicatory drug court.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference met March 2, 2011 and determined that this bill will have an indeterminate impact on state prison beds. While there is a potential savings to the state by diverting offenders bound for prison incarceration, it largely relies on the discretionary nature of judicial behavior.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to

raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 16, 2011, the Health & Human Services Access Subcommittee adopted a proposed committee substitute for House Bill 81. The proposed committee substitute made the following changes to HB 81:

- Removed language providing that a court has the discretion to allow offenders with prior violent felony offenses into post-adjudicatory treatment-based drug court programs on a case-by case basis.

The bill was reported favorably as a committee substitute. The analysis reflects the committee substitute.

A bill to be entitled

An act relating to treatment-based drug court programs; amending s. 397.334, F.S.; requiring all offenders sentenced to a postadjudicatory drug court program who are drug court participants who are the subject of a violation of probation or community control hearing under specified provisions to have the violation of probation or community control heard by the judge presiding over the drug court program; providing that treatment-based drug court programs may include postadjudicatory programs provided under specified provisions; amending s. 921.0026, F.S.; increasing the number of Criminal Punishment Code scoresheet total sentence points that a defendant may have and be eligible for a postadjudicatory treatment-based drug court program; amending s. 948.01, F.S.; increasing the number of Criminal Punishment Code scoresheet total sentence points that a defendant may have and be eligible for a postadjudicatory treatment-based drug court program; amending s. 948.06, F.S.; making defendants other than those who have violated probation or community control by a failed or suspect substance abuse test eligible for postadjudicatory treatment-based drug court programs; increasing the number of Criminal Punishment Code scoresheet total sentence points that a defendant may have and be eligible for a postadjudicatory treatment-based drug court program; amending s. 948.20, F.S.; increasing the number of Criminal Punishment Code scoresheet total sentence points that a defendant may have and be eligible

for a postadjudicatory treatment-based drug court program; providing an effective date.

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

Section 1. Paragraph (b) of subsection (3) and subsection (5) of section 397.334, Florida Statutes, are amended to read:

397.334 Treatment-based drug court programs.—

(3)

(b) An offender who is sentenced to a postadjudicatory drug court program and who, while a drug court participant, is the subject of a violation of probation or community control under s. 948.06~~, based solely upon a failed or suspect substance abuse test administered pursuant to s. 948.01 or s. 948.03,~~ shall have the violation of probation or community control heard by the judge presiding over the postadjudicatory drug court program. The judge shall dispose of any such violation, after a hearing on or admission of the violation, as he or she deems appropriate if the resulting sentence or conditions are lawful.

(5) Treatment-based drug court programs may include pretrial intervention programs as provided in ss. 948.08, 948.16, and 985.345, treatment-based drug court programs authorized in chapter 39, postadjudicatory programs <u>as provided in ss. 948.01, 948.06, and 948.20</u>, and review of the status of compliance or noncompliance of sentenced offenders through a treatment-based drug court program. While enrolled in a treatment-based drug court program, the participant is subject to a coordinated strategy developed by a drug court team under

subsection (4). The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of secure detention under chapter 985 if a child or a period of incarceration within the time limits established for contempt of court if an adult. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a treatment-based drug court program.

Section 2. Paragraph (m) of subsection (2) of section 921.0026, Florida Statutes, is amended to read:

921.0026 Mitigating circumstances.—This section applies to any felony offense, except any capital felony, committed on or after October 1, 1998.

(2) Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to:

(m) The defendant's offense is a nonviolent felony, the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 ~~52~~ points or fewer, and the court determines that the defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program as part of the sentence. For purposes of this paragraph, the term "nonviolent felony" has the same meaning as provided in s. 948.08(6).

Section 3. Paragraph (a) of subsection (7) of section 948.01, Florida Statutes, is amended to read:

948.01 When court may place defendant on probation or into community control.—

(7)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2009, the sentencing court may place the defendant into a postadjudicatory treatment-based drug court program if the defendant's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 ~~52~~ points or fewer, ~~and~~ the offense ~~defendant~~ is a nonviolent felony ~~offender~~, the defendant is amenable to substance abuse treatment, and the defendant otherwise qualifies under s. 397.334(3). The satisfactory completion of the program shall be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

Section 4. Paragraph (i) of subsection (2) of section 948.06, Florida Statutes, is amended to read:

948.06 Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision.—

(2)

(i)1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2009, the court may order the defendant to successfully complete a postadjudicatory treatment-based drug court program if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation ~~and the violation was due only to a failed or suspect substance abuse test~~;

b. The offender's Criminal Punishment Code scoresheet total sentence points under s. 921.0024 are 60 ~~52~~ points or fewer after including points for the violation;

c. The underlying offense is a nonviolent felony. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;

d. The court determines that the offender is amenable to the services of a postadjudicatory treatment-based drug court program;

e. The court has explained the purpose of the program to the offender and the offender has agreed to participate; and

f. The offender is otherwise qualified to participate in the program under the provisions of s. 397.334(3).

2. After the court orders the modification of community control or probation, the original sentencing court shall relinquish jurisdiction of the offender's case to the postadjudicatory treatment-based drug court program until the offender is no longer active in the program, the case is returned to the sentencing court due to the offender's termination from the program for failure to comply with the terms thereof, or the offender's sentence is completed.

Section 5. Section 948.20, Florida Statutes, is amended to read:

948.20 Drug offender probation.—

(1) If it appears to the court upon a hearing that the defendant is a chronic substance abuser whose criminal conduct is a violation of s. 893.13(2)(a) or (6)(a), or other nonviolent felony if such nonviolent felony is committed on or after July 1, 2009, and notwithstanding s. 921.0024 the defendant's Criminal Punishment Code scoresheet total sentence points are 60 ~~52~~ points or fewer, the court may either adjudge the defendant guilty or stay and withhold the adjudication of guilt. In either case, the court may also stay and withhold the imposition of sentence and place the defendant on drug offender probation or into a postadjudicatory treatment-based drug court program if the defendant otherwise qualifies. As used in this section, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08.

(2) ~~(1)~~ The Department of Corrections shall develop and administer a drug offender probation program which emphasizes a combination of treatment and intensive community supervision approaches and which includes provision for supervision of offenders in accordance with a specific treatment plan. The program may include the use of graduated sanctions consistent with the conditions imposed by the court. Drug offender probation status shall include surveillance and random drug testing, and may include those measures normally associated with community control, except that specific treatment conditions and other treatment approaches necessary to monitor this population may be ordered.

(3) ~~(2)~~ Offenders placed on drug offender probation are subject to revocation of probation as provided in s. 948.06.

Section 6. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 155 Privacy of Firearms Owners
SPONSOR(S): Health & Human Services Committee; Criminal Justice Subcommittee; Brodeur and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 432

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 6 N, As CS	Cunningham	Cunningham
2) Health & Human Services Committee	13 Y, 3 N, As CS	Holt	Gormley
3) Judiciary Committee		Cunningham	Havlicak RH

SUMMARY ANALYSIS

CS/CS/HB 155 creates s. 790.338, F.S., entitled "Medical privacy concerning firearms," that prohibits a licensed health care practitioner or licensed health care facility from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others. Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

The bill provides an emergency medical technician (EMT) or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

The bill provides for certain patient's rights concerning the ownership of firearms or ammunition under the Florida Patient's Bill of Rights and Responsibilities. The bill provides for disciplinary action for non-compliance by licensed health care practitioners and health care facilities.

The bill provides that insurers issuing the types of policies regulated pursuant to Chapter 627 are prohibited from discriminating, denying coverage, or increase premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for scheduled personal property coverage.

The bill appears to have an indeterminate, but likely insignificant negative fiscal impact on the Medical Quality Assurance Trust Fund within the Department of Health and no fiscal impact to local governments. (See Fiscal Comments.)

The bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Physicians Inquiring About Firearms

In recent months, there has been media attention surrounding an incident in Ocala, Florida, where, during a routine doctor's visit, a pediatrician asked a patient's mother whether there were firearms in the home. When the mother refused to answer, the doctor advised her that she had 30 days to find a new pediatrician.[1] The doctor stated that he asked all of his patients the same question in an effort to provide safety advice in the event there was a firearm in the home.[2] He further stated that he asked similar questions about whether there was a pool at the home, and whether teenage drivers use their cell phone while driving for similar reasons – to give safety advice to patients. The mother, however, felt that the question invaded her privacy.[3] This incident has led many to question whether it should be an accepted practice for a doctor to inquire about a patient's firearm ownership.

Various professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home. For example, the American Medical Association (AMA) encourages its members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children.[4] Additionally, the American Academy of Pediatrics recommends that pediatricians incorporate questions about guns into their patient history taking.[5]

Florida law contains numerous provisions relating to the regulation of the medical profession, regulation of medical professionals, and the sale, purchase, possession, and carrying of firearms.[6] However, Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.

Health Care Practitioners and Licensed Facilities

The Department of Health (DOH) and the relevant boards[7] within DOH regulate health care practitioners. Section 456.001(4), F.S., defines the term "health care practitioner" to include any individual licensed under the following chapters:

- Acupuncture (ch. 457, F.S.)
- Medical Practice (ch. 458, F.S.)
- Osteopathic Medicine (ch. 459, F.S.)
- Chiropractic Medicine (ch. 460, F.S.)
- Podiatric Medicine (ch. 461, F.S.)
- Naturopathy (ch. 462, F.S.)
- Optometry (ch. 463, F.S.)

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[1] Family and pediatrician tangle over gun question, http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg (last accessed January 27, 2011).
[2] *Id.*
[3] *Id.*
[4] H-145.990 Prevention of Firearm Accidents in Children https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fama1%2fpub%2fupload%2fmm%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-145.990.HTM (last accessed January 28, 2011).
[5] American Academy of Pediatrics: Firearm-Related Injuries Affecting the Pediatric Population. Pediatrics Vol. 105 No. 4, April 2000, pp. 888-895. http://aappolicy.aappublications.org/cgi/content/full/pediatrics;105/4/888 (last accessed January 28, 2011).
[6] *See, e.g.,* Chapters 456, 458, 790, F.S.
[7] "Board" is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the Department of Health, Division of Medical Quality Assurance. *See* s. 456.001(1), F.S.

- Nursing (ch. 464, F.S.)
- Pharmacy (ch. 465, F.S.)
- Dentistry, Dental Hygiene, and Dental Laboratories (ch. 466, F.S.)
- Midwifery (ch. 467, F.S.)
- Speech-Language Pathology and Audiology (Part I of ch. 468, F.S.)
- Nursing Home Administration (Part II of ch. 468, F.S.)
- Occupational Therapy (Part III of ch. 468, F.S.)
- Respiratory Therapy (Part V of ch. 468, F.S.)
- Dietetics and Nutrition Practice (X of ch. 468, F.S.)
- Athletic Trainers (Part XIII of ch. 468, F.S.)
- Orthotic, Prosthetics, and Pedorthics (Part XIV of ch. 468, F.S.)
- Electrolysis (ch. 478, F.S.)
- Massage Practice (ch. 480, F.S.)
- Clinical Laboratory Personnel (Part III of ch. 483, F.S.)
- Medical Physicists (Part IV of ch. 483, F.S.)
- Dispensing of Optical Devices and Hearing Aids (ch. 484, F.S.)
- Physical Therapy Practice (ch. 486, F.S.)
- Psychological Services (ch. 490, F.S.)
- Clinical, Counseling, and Psychotherapy Services (ch. 491, F.S.)

Section 456.072(2), F.S., provides various grounds for disciplinary action against health care practitioners. Penalties include:

- Refusal to certify, or to certify with restrictions, an application for a license;
- Suspension or permanent revocation of a license.
- Restriction of practice or license.
- Imposition of an administrative fine not to exceed $10,000 for each count or separate offense.
- Issuance of a reprimand or letter of concern.
- Placement of the licensee on probation for a period of time and subject to such conditions as the board or the DOH may specify.
- Corrective action.
- Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights.
- Refund of fees billed and collected from the patient or a third party on behalf of the patient.
- Requirement that the practitioner undergo remedial education.

The Agency for Health Care Administration (AHCA) regulates health care facilities under chapter 408 and chapter 395. Section 395.002(16), F.S., defines the term "licensed facility" as a licensed hospital, ambulatory surgical center, or mobile surgical facility. Section 395.1055, F.S., authorizes AHCA to adopt rules for these facilities, but does not expressly address disciplinary action. Section 395.003, F.S., authorizes AHCA to deny, modify, suspend, and revoke licenses for violations of applicable provisions of chapters 408 and 395.

Terminating the Doctor - Patient Relationship

The relationship between a physician and a patient is generally considered a private relationship and contractual in nature. According to the AMA, both the patient and the physician are free to enter into or decline the relationship.[8] Once a physician-patient relationship has been established, patients are free to terminate the relationship at any time.[9] Generally, doctors can only terminate existing relationships after giving the patient notice and a reasonable opportunity to obtain the services of another

[8] AMA Code of Medical Ethics, Opinion 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion912.shtml (last accessed February 7, 2011). Doctors who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination.

[9] AMA's Code of Medical Ethics, Opinion 9.06 *Free Choice. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion906.shtml* (last accessed February 7, 2011).

physician.[10] Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.

Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). HIPAA contains detailed requirements for the use or disclosure of protected health information (PHI). PHI is defined as all "individually identifiable health information" which includes information relating to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present, or future payment for the provision of health care to the individual,

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.[11] Covered entities may only use and disclose PHI as permitted by HIPAA or more protective state rules.[12] HIPAA establishes both civil monetary penalties and criminal penalties for the knowing use or disclosure of individually identifiable health information in violation of HIPAA.[13]

Confidentiality of Medical Records in Florida

Under s. 456.057(7), F.S., medical records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, medical records may be released without written authorization in the following circumstances:[14]

- When any person, firm, or corporation has procured or furnished such examination or treatment with the patient's consent.
- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

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[10] A health care provider owes a duty to the patient to provide the necessary and appropriate medical care to the patient with due diligence and to continue providing those services until: they are no longer needed by the patient; the relationship is ended with the consent of or at the request of the patient; or the health care provider withdraws from the relationship after giving the patient notice and a reasonable opportunity to obtain the services of another health care provider. The relationship typically terminates when the patient's medical condition is cured or resolved, and this often occurs at the last visit when the health care provider notes in his records that the patient is to return as needed. *See Saunders v. Lischkoff*, 188 So. 815 (Fla. 1939). *See also, Ending the Patient-Physician Relationship*, AMA White Paper http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/ending-patient-physician-relationship.shtml (last accessed February 7, 2011); AMA's Code of Medical Ethics, Opinion 8.115 *Termination of the Physician-Patient Relationship. http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion8115.shtml* (last accessed February 7, 2011).

[11] 45 C.F.R. s. 160.103

[12] In general, covered entities may use PHI for the purposes of treatment, payment and health care operations (TPO) without any special permission from a patient. Special permission, called an authorization, must be obtained for uses and disclosures other than for TPO. For some uses and disclosures, a covered entity need not obtain an authorization but must give the patient the opportunity to agree or object (e.g., give patients the option to disclose health information to family or friends). Finally, in some situations, such as reporting to public health authorities, emergencies, or in research studies in which a waiver has been obtained from an Institutional Review Board (IRB), a covered entity does not need to obtain an authorization or provide an opportunity to agree or object. *Health Insurance Portability and Accountability Act.* http://hipaa.yale.edu/overview/index.html (last accessed February 4, 2011).

[13] *Health Insurance Portability and Accountability Act.* http://hipaa.yale.edu/overview/index.html (last accessed February 4, 2011). Fines range from $100 to $50,000 per violation with specified annual caps. Criminal penalties include fines ranging from $50,000 to $250,000 and imprisonment of up to 10 years. *HIPAA Violations and Enforcement.* http://www.ama-assn.org/ama/pub/physician-resources/solutions-managing-your-practice/coding-billing-insurance/hipaahealth-insurance-portability-accountability-act/hipaa-violations-enforcement.shtml (last accessed February 4, 2011).

[14] S. 456.057(7)(a), F.S.

- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.
- To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s. 395.1027, F.S., and the professional organization that certifies poison control centers in accordance with federal law.

The Florida Supreme Court has addressed the issue of whether a health care provider, absent any of the above-referenced circumstances, can disclose confidential information contained in a patient's medical records as part of a medical malpractice action.[15] The Florida Supreme Court ruled that, pursuant to s. 455.241, F.S. (the predecessor to current s. 456.057(7)(a), F.S.), only a health care provider who is a defendant, or reasonably expects to become a defendant, in a medical malpractice action can discuss a patient's medical condition.[16] The Court also held that the health care provider can only discuss the patient's medical condition with his or her attorney in conjunction with the defense of the action.[17] The Court determined that a defendant's attorney cannot have ex parte discussions about the patient's medical condition with any other treating health care provider.

Regulation of Insurance

Florida's Insurance Code consists of Chapters 624 through 651, F.S. Chapter 627, F.S. specifies rate and contract requirements for the following types of insurance:

- Life
- Annuity Contracts
- Health
- Medicare Supplements
- Credit Life
- Disability
- Property
- Motor Vehicle
- Surety
- Title
- Long-term Care

Chapter 641 provides requirements for Health Maintenance Organizations and Prepaid Health Clinic Plans.

Section 626.9541, F.S., prohibits unfair methods of competition and deceptive acts or practices in the sale of insurance policies and the operation of insurance companies. Examples of prohibited acts include:

- Unlawful rebates.
- Misrepresentations and false advertising of insurance policies.
- Defamation.
- Boycott, coercion and intimidation.
- Unfair claim settlement practices.
- Illegal dealings in premiums, including excess or reduced charges for insurance.
- Refusal to insure on the basis of race, color, creed, marital status, or sex.
- Misrepresentation of agent qualifications.

Section 626.9541(1)(g), F.S., specifically prohibits unfair discrimination between individuals of the same actuarially supportable class for life, disability, and health insurance. Additionally, a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed

[15] *Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).
[16] *Id.*
[17] *Id.*

care provider may not discriminate against a person who sought medical or psychological treatment for abuse.

The penalty for violations of s. 626.9541, F.S.,[18] is a fine not greater than $5,000 for each nonwillful violation and not greater than $40,000 for each willful violation. Fines imposed against an insurer may not exceed an aggregate amount of $20,000 for all nonwillful violations arising out of the same action or an aggregate amount of $200,000 for all willful violations arising out of the same action.

Effect of the Bill

The bill creates s. 790.338, F.S., entitled "Medical privacy concerning firearms," which prohibits licensed health care practitioners and health care facilities from intentionally entering any disclosed information concerning firearm ownership into a patient's health record if the information is not relevant to the patient's medical care or safety, or the safety of others. Additionally, licensed health care providers and health care facilities are:

- To refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- To respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

The bill specifies that non-compliance by licensed health care practitioners and health care facilities constitutes grounds for disciplinary action under ss. 456.072 (2), and 395.1055, F.S.

Patients are permitted to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.

The bill provides an EMT or paramedic the authority to inquire in good faith, about the possession or presence of a firearm if they believe that it is relevant to the treatment of a patient during course and scope of a medical emergency or if the presence or possession of a firearm poses a threat of imminent danger to the patient or others.

Insurers issuing the types of policies regulated pursuant to Chapter 627 are prohibited from discriminating, denying coverage, or increase premiums on the basis that an insured or applicant possesses or owns a firearm or ammunition. However, insurers are allowed to consider the fair market value of firearms or ammunition when setting premiums for scheduled personal property coverage.

The bill amends the Florida's Patient's Bill of Rights and Responsibilities (s. 381.026, F.S.) specifying that:

- Health care providers and health care facilities should refrain from inquiring, whether oral or written, about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others.
- Patients have the right to decline to answer or provide any information concerning the ownership of a firearm and a decision not to answer does not alter existing law regarding a physician's authority to choose patients.
- Health care providers and health care facilities are prohibited from discriminating against a patient based upon whether patient exercises his or her constitutional right to own and possess firearms or ammunition.
- Health care providers and health care facilities are to respect a patient's right to own or possess a firearm and refrain from harassing a patient about firearm ownership during an examination.

[18] Section 624.9541, F.S., contains enhanced penalties for specific volitions of s. 626.9541, F.S. that are deemed fraudulent.

B. SECTION DIRECTORY:

Section 1. Creates s. 790.338, F.S., relating to medical privacy concerning firearms.

Section 2. Amends s. 381.026, F.S., relating to Florida's Patient's Bill of Rights and Responsibilities.

Section 3. Amends s. 456.072, F.S., relating to health care practitioner grounds for discipline.

Section 4. The bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None identified.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None identified.

2. Expenditures:

   None identified.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

DOH may see an increase in disciplinary cases of licensed health care practitioners who do not comply with s. 790.338, F.S. The increase in workload is unknown at this time, but most likely insignificant and could be handled within existing resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill specifies that violations of s. 790.338(1)-(4), F.S. constitute disciplinary action under ss. 456.072(2) and 395.1055, F.S. However, no express grounds for disciplinary action are found in s. 395.1055, F.S., so the effect of the bill is unclear.

Additionally, the bill creates s. 456.072(1)(mm), F.S., which states that violations of any subsection of s. 790.338,F.S., is grounds for discipline. This is in conflict with s. 790.338(8), F.S., which states that only violations of sections (1)–(4) are grounds for discipline.

Section 790.338, F.S., is entitled "Medical privacy concerning firearms." Section 790.338(7),F.S., prohibits an insurer from denying coverage or increasing a premium, or otherwise discriminating against an insured or applicant for insurance, based on the lawful ownership, possession, use, or storage of a firearm or ammunition. This provision concerns firearms, but not medical privacy. Since this provision is part of s. 790.338, F.S., a literal reading would be that a violation of the section is grounds for discipline of a health care provider. Otherwise, the bill does not contain any penalties for violation of the provision. Since the provision applies only to policies pursuant to Ch. 627, it applies to health insurance policies, but not to health maintenance organization contracts.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 8, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The strike-all amendment:

- Specifies that verbal or written inquiries by any public or private physician, nurse, or other medical staff regarding the ownership of a firearm by a patient or the family of a patient or the presence of a firearm in a patient's home or other domicile *are prohibited.*
- Provides that violations of s. 790.338, F.S., are noncriminal violations punishable by specified fines.
- Specifies that state attorneys who fail to investigate and prosecute complaints of violations of s. 790.338, F.S., may be held accountable under the appropriate Florida rules of professional conduct.
- Prohibits public funds from being used to defend the unlawful conduct of a person charged with a knowing and willful violation of s. 790.338, F.S., except as provided in the United States and Florida Constitutions.
- Requires state attorneys to notify the Attorney General of any fines assessed for violations of s. 790.338, F.S., and requires the Attorney General to bring a civil action to enforce any fine assessed if the fine is not paid after 90 days.
- Provides exceptions to the prohibitions in s. 790.338, F.S.
- Specifies that medical records created before the date the bill becomes law and the transfer of such records to another health care provider do not violate s. 790.338, F.S.

On April 4, 2011, the Health & Family Services Committee adopted a strike-all amendment to CS/HB 155 and reported the bill favorably. The strike-all amendment:

- Prohibits health care practitioners and health care facilities from intentionally entering information concerning firearm ownership into a patient's medical record if not relevant to the patient's medical care or safety or the safety of others.
- Requires health care practitioners and health care facilities to respect a patient's privacy and states that such entities should refrain from making inquiries concerning firearms unless relevant to the patient's medical care or safety or the safety of others.
- Authorizes emergency medical technicians and paramedics to make inquiries concerning firearms if he or she, in good faith, believes that such information is necessary to treat a patient during the course and scope of a medical emergency or that the presence or possession of a firearm would pose an imminent danger or threat to the patient or others.
- Specifies that a patient may refuse to answer or provide information regarding firearms.

- Prohibits a health care practitioner or health care facility from discriminating against a patient based solely upon the patient's ownership or possession of firearms or ammunition.
- Requires health care practitioners and health care facilities to respect a patient's right to own or possess a firearm and specifies that such entities should refrain from unnecessarily harassing a patient about firearm ownership during an examination.
- Prohibits insurers from denying coverage, increasing premiums, or otherwise discriminating against any insured or applicant for insurance on the basis of or reliance upon firearm ownership or possession.
- Provides violations of s. 790.338(1)-(4), F.S., constitute grounds for disciplinary action pursuant to ss. 456.072(2) and 395.1055, F.S.
- Amends the Patient's Bill of Rights and Responsibilities to include many of the above requirements and prohibitions.

This analysis is drafted to the Committee Substitute for Committee Substitute.

A bill to be entitled

An act relating to the privacy of firearm owners; creating s. 790.338, F.S.; providing that a licensed medical care practitioner or health care facility may not record information regarding firearm ownership in a patient's medical record; providing an exception for relevance of the information to the patient's medical care or safety or the safety of others; providing that unless the information is relevant to the patient's medical care or safety or the safety of others, inquiries regarding firearm ownership or possession should not be made by licensed health care practitioners or health care facilities; providing an exception for emergency medical technicians and paramedics; providing that a patient may decline to provide information regarding the ownership or possession of firearms; clarifying that a physician's authority to choose his or her patients is not altered by the act; prohibiting discrimination by licensed health care practitioners or facilities based solely upon a patient's firearm ownership or possession; prohibiting harassment of a patient regarding firearm ownership by a licensed health care practitioner or facility during an examination; prohibiting denial of insurance coverage, increased premiums, or any other form of discrimination by insurance companies issuing policies on the basis of an insured's or applicant's ownership, possession, or storage of firearms or ammunition; clarifying that an insurer is not prohibited from considering the fair market value of

firearms or ammunition in setting personal property coverage premiums; providing for disciplinary action; amending s. 381.026, F.S.; providing that unless the information is relevant to the patient's medical care or safety, or the safety of others, inquiries regarding firearm ownership or possession should not be made by licensed health care providers or health care facilities; providing that a patient may decline to provide information regarding the ownership or possession of firearms; clarifying that a physician's authority to choose his or her patients is not altered by the act; prohibiting discrimination by licensed health care providers or health care facilities based solely upon a patient's firearm ownership or possession; prohibiting harassment of a patient regarding firearm ownership during an examination by a licensed health care provider or health care facility; amending s. 456.072, F.S.; including the violation of the provisions of s. 790.338, F.S., as grounds for disciplinary action; providing an effective date.

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

Section 1. Section 790.338, Florida Statutes, is created to read:

790.338 Medical privacy concerning firearms; prohibitions; penalties, exceptions.—

(1) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others.

(2) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a health care practitioner or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others, may make such a verbal or written inquiry.

(3) Any emergency medical technician or paramedic acting under the supervision of an emergency medical services medical director under chapter 401 may make an inquiry concerning the possession or presence of a firearm if he or she, in good faith, believes that information regarding the possession of a firearm by the patient or the presence of a firearm in the home or domicile of a patient or a patient's family member is necessary to treat a patient during the course and scope of a medical emergency or that the presence or possession of a firearm would pose an imminent danger or threat to the patient or others.

(4) A patient may decline to answer or provide any information regarding ownership of a firearm by the patient or a family member of the patient, or the presence of a firearm in the domicile of the patient or a family member of the patient. A patient's decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician's authorization to choose his or her patients.

(5) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.

(6) A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.

(7) An insurer issuing any type of insurance policy pursuant to chapter 627 may not deny coverage, increase any premium, or otherwise discriminate against any insured or applicant for insurance on the basis of or upon reliance upon the lawful ownership or possession of a firearm or ammunition or the lawful use or storage of a firearm or ammunition. Nothing herein shall prevent an insurer from considering the fair market value of firearms or ammunition in the setting of premiums for scheduled personal property coverage.

(8) Violations of the provisions of subsections (1)-(4) constitute grounds for disciplinary action under ss. 456.072(2) and 395.1055.

Section 2. Paragraph (b) of subsection (4) of section 381.026, Florida Statutes, is amended to read:

381.026 Florida Patient's Bill of Rights and Responsibilities.—

(4) RIGHTS OF PATIENTS.—Each health care facility or provider shall observe the following standards:

(b) Information.—

1. A patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient. A patient may request such information from his or her responsible provider or the health care facility in which he or she is receiving medical services.

2. A patient in a health care facility has the right to know what patient support services are available in the facility.

3. A patient has the right to be given by his or her health care provider information concerning diagnosis, planned course of treatment, alternatives, risks, and prognosis, unless it is medically inadvisable or impossible to give this information to the patient, in which case the information must be given to the patient's guardian or a person designated as the patient's representative. A patient has the right to refuse this information.

4. A patient has the right to refuse any treatment based on information required by this paragraph, except as otherwise

provided by law. The responsible provider shall document any such refusal.

5. A patient in a health care facility has the right to know what facility rules and regulations apply to patient conduct.

6. A patient has the right to express grievances to a health care provider, a health care facility, or the appropriate state licensing agency regarding alleged violations of patients' rights. A patient has the right to know the health care provider's or health care facility's procedures for expressing a grievance.

7. A patient in a health care facility who does not speak English has the right to be provided an interpreter when receiving medical services if the facility has a person readily available who can interpret on behalf of the patient.

8. A health care provider or health care facility shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a health care provider or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or safety or others, may make such a verbal or written inquiry.

9. A patient may decline to answer or provide any information regarding ownership of a firearm by the patient or a

family member of the patient, or the presence of a firearm in the domicile of the patient or a family member of the patient. A patient's decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician's authorization to choose his or her patients.

10. A health care provider or health care facility may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.

11. A health care provider or health care facility shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.

Section 3. Subsection (mm) is added to subsection (1) of section 456.072, Florida Statutes, to read:

456.072 Grounds for discipline; penalties; enforcement.—

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(mm) Violating any of the provisions of s. 790.338.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 201 Negligence
SPONSOR(S): Civil Justice Subcommittee; O'Toole
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 142

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

SUMMARY ANALYSIS

Under general tort law, the doctrine known as comparative negligence provides that a jury must apportion fault between all persons found to be liable for the injury. The liable parties are then responsible for their portion of the damages.

A subset of negligence is a product liability claim, where a manufacturer of a product is held liable for a defect in their product that causes damages.

Crashworthiness cases are a subset of product liability claims in which the plaintiff claims that a defect in the manufacture or design of an automobile caused or enhanced injuries suffered during an automobile accident. Florida courts do not allow juries to hear evidence relating to the initial cause of the automobile accident because the court views the initial accident and the subsequent enhanced injury as two separate incidents.

The bill, in a crashworthiness case, requires a jury to distinguish between injuries caused by the initial accident and injuries caused by the alleged defect. If the jury can distinguish between the injuries then the jury may only consider the fault of the person or persons responsible for the defective product relating to the injuries directly caused by the product. If the jury cannot distinguish between the injuries then the jury may consider the fault of all persons responsible for the accident and the injuries.

The bill provides that first responders may collect a judgment in a negligence case under the doctrine of joint and several liability. The effect of this is that the first responder may collect the entire judgment amount from any defendant in a multi-defendant judgment rather than just that defendant's portion of the fault.

This bill may have a minimal nonrecurring expense to the State court system. The bill does not appear to have a fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Contributory Negligence and Comparative Negligence in Florida

Prior to 1973, Florida courts followed the legal doctrine of contributory negligence in tort actions.[1] Contributory negligence is a defense against a claim of negligence which provides that if a plaintiff is responsible in any way for his or her injury the plaintiff will not be able to recover any damages from the defendant.[2] For example, if the plaintiff was five percent responsible for the accident and the defendant was ninety-five percent responsible, the plaintiff would not be able to recover any damages from the defendant since he or she was partly responsible. The Florida Supreme Court, in *Hoffman v. Jones*, retreated from the application of contributory negligence and adopted pure comparative negligence.[3] The court reasoned that:

> . . . the most equitable result that can ever be reached by a court is the equation of liability with fault. Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine.[4]

The doctrine of comparative negligence is now codified in Florida law. The law provides that "any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery."[5] Current law explicitly provides that the comparative fault principles apply in products liability actions.[6] Under comparative negligence, if the plaintiff is five percent liable and the defendant is ninety-five percent, the plaintiff's awarded damages will be reduced by his or her amount of liability, in this case, five percent.

The legal doctrine of joint and several liability evolved with contributory negligence.[7] The application of joint and several liability allows a plaintiff to collect the full amount of damages against one of the defendants in a multiple defendant case.[8] For example, if one defendant was thirty-five percent at fault and the other defendant was sixty-five percent at fault, the plaintiff could recover the total amount of damages from either defendant regardless of the amount at fault.

In 2006 the Legislature generally repealed the application of joint and several liability for negligence actions.[9] It amended s. 768.81, F.S., to provide, subject to limited exceptions, for apportionment of damages in negligence cases according to each party's percentage of fault, rather than under joint and several liability.[10]

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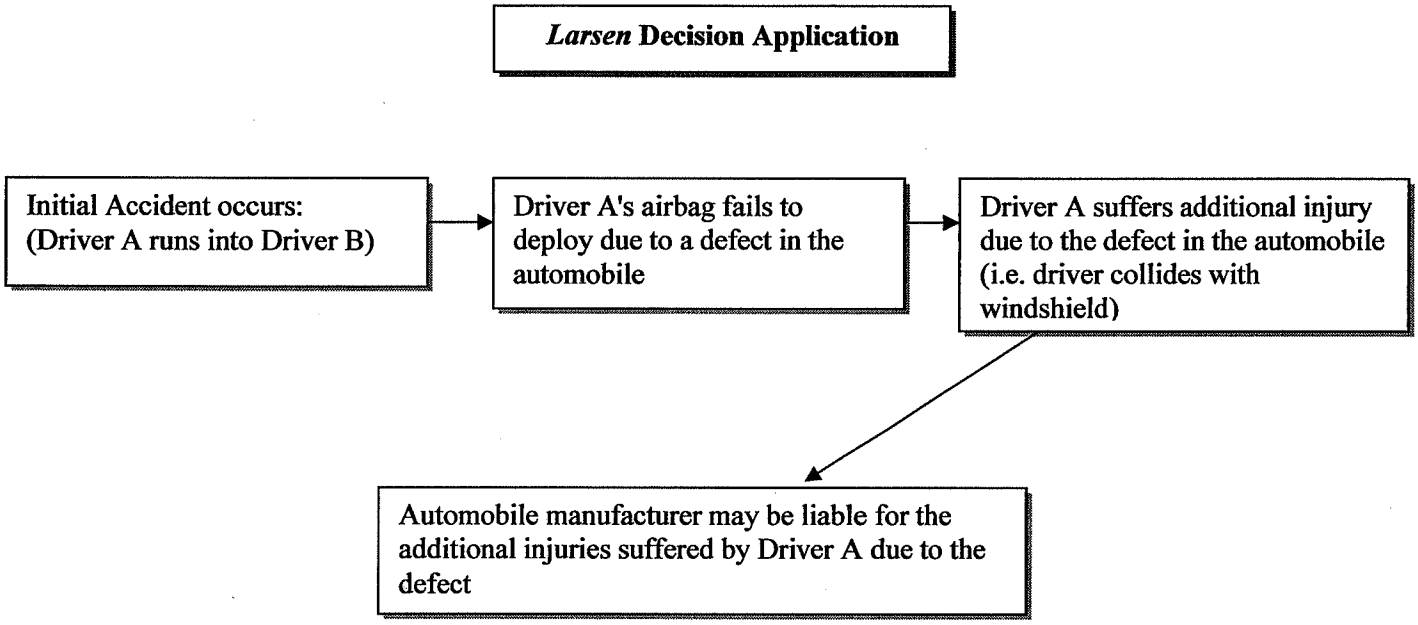
[1] *Louisville and Nash Railroad Company v. Yniestra*, 21 Fla. 700 (Fla. 1886) (Case in which Florida adopted contributory negligence)
[2] "The contributory negligence doctrine, which evolved from an 1809 English case, is described as an 'all or nothing rule' for the plaintiff" *Smith v. Dep't of Insurance*, 507 So.2d 1080, 1090 (Fla. 1987) (Describing English case *Butterfield v. Forester*, 103 Eng.Rep. 926 (K.B. 1809)).
[3] *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).
[4] *Id.* at 438.
[5] Section 768.81(2), F.S.
[6] Section 768.81(4)(a), F.S.
[7] *Smith v. Department of Insurance,* 507 So.2d 1080, 1091 (Fla. 1987).
[8] *Id.* at 1092.
[9] Chapter 2006-6, s. 1, L.O.F.
[10] Section 768.81(3), F.S.

Larsen Decision

Prior to 1968, courts in the United States did not allow those injured in automobile accidents to hold automobile manufacturers liable for injuries sustained where the negligence of the driver or a third party caused the accident, including scenarios in which an automobile defect contributed to the injuries sustained.[11] This changed with the U.S. Court of Appeal Eighth Circuit's decision in *Larsen v. General Motors Corp.*[12]

In *Larsen*, the plaintiff was injured after a head-on collision that caused the steering mechanism to strike the plaintiff in the head. The federal court held that, because automobile accidents involving collisions are often inevitable and foreseeable, manufacturers have a duty to exercise reasonable care in designing vehicles for the safety of users.[13]

When faced with the practical application of the crashworthiness doctrine, many jurisdictions continue to grapple with whether a defendant automobile manufacturer may introduce evidence of, or assert as a defense, the comparative fault or contributory negligence of the driver or a third party in causing the initial collision.[14] Some state courts have concluded that "introduction of principles of negligence into what would otherwise be a straightforward product liability case is not allowed."[15] Conversely, a majority of courts have allowed defendants to introduce evidence of the driver's or a third party's negligence in causing the initial collision.[16]



[11] Schwartz, Victor E., *Fairly Allocating Fault Between a Plaintiff whose Wrongful Conduct Caused a Car accident and a Automobile Manufacturer Whose Product Allegedly "Enhanced" the Plaintiff's Injuries* (2010). Available on file with the House of Representatives Civil Justice Subcommittee.
[12] *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).
[13] *Id.* at 502.
[14] Mary E. Murphy, Annotation, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim,* 69 A.L.R. 5TH 625, 625 (1999).
[15] *Id.*
[16] *Id.*

Majority View

A majority of states have adopted the view that a manufacturer's fault in causing additional or enhanced injuries may be reduced by the fault of a plaintiff or third party who caused or contributed to the primary collision.[17] For example, in a Delaware crashworthiness case, the plaintiff's automobile was struck by another vehicle when the plaintiff allegedly failed to stop at a stop sign.[18] As a result, the automobile's airbag deployed and crushed the plaintiff's fingers. The defendant automobile manufacturer argued that the plaintiff's recovery should be reduced by his comparative fault in failing to stop at the stop sign and causing the initial accident. The court concluded that the cause of the initial accident is a proximate cause of the subsequent collision and the resulting enhanced injuries to the plaintiff's fingers. The court further opined that:

> "[i]t is obvious that the negligence of a plaintiff who causes the initial collision is one of the proximate causes of all of the injuries he sustained, whether limited to those the original collision would have produced or including those enhanced by a defective product in the second collision."[19]

Some courts following the majority position have reasoned that, in crashworthiness cases, the person causing the initial collision may be liable for the subsequent negligence of the automobile manufacturer because any enhanced injuries resulting from the second collision are foreseeable consequences of the first collision.[20] For example, in an Alaska crashworthiness case, the court allowed the automobile manufacturer to assert that its liability for a defective seatbelt system should be reduced because the initial head-on collision was caused by a third party.[21] The court sided with the manufacturer, citing that "[a]n original tortfeasor is considered a proximate cause, as a matter of law, of injuries caused by subsequent negligen[ce]" of the manufacturer of the defective product.[22]

Other courts holding the majority view have also ruled that "general fairness and public policy considerations require that the fault of the original tortfeasor be considered in apportioning liability for enhanced injuries."[23] Courts have also recognized that the application of comparative fault in crashworthiness cases enhances the public's interest in deterring drivers from driving negligently.[24]

Minority View

A minority of courts have adopted the belief that an automobile manufacturer should be solely responsible for any product defects, therefore the manufacturer should also be solely liable for the enhanced injuries caused by those defects. The minority position results from "a stricter construction of the crashworthiness doctrine that treats each collision[25] as a separate event with independent legal causes and injuries."[26] Further reasoning behind the minority view is that a manufacturer maintains a duty to anticipate the foreseeable negligence of users of the automobile, as well as the foreseeable negligence of third parties.[27]

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[17] Edward M. Ricci et al., *The Minority Gets It Right: The Florida Supreme Court Reinvigorates the Crashworthiness Doctrine in D'Amario v. Ford*, 78 FLA. B.J. 14, 14 (June 2004). Some of the states recognizing the majority view include: Alaska, Arkansas, California, Colorado, Delaware, Louisiana, Indiana, North Carolina, North Dakota, Oregon, Tennessee, Washington, Wyoming, and Iowa.

[18] *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. Ct. 1997).

[19] *Id.* at 346.

[20] Ricci, *supra* note 9, at 18.

[21] *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998).

[22] *Id.* at 1217-18

[23] Ricci, *supra* note 9, at 18 (citing *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 695 (Tenn. 1995)).

[24] *Moore v. Chrysler Corp.*, 596 So.2d 225, 238 (La. Ct. App. 1992).

[25] The multiple collisions referenced to are the initial collision of the automobile with another automobile or some object, and the second collision between the physical body of the occupant and some other object which is typically some portion of the interior of the automobile.

[26] Ricci, *supra* note 9, at 18.

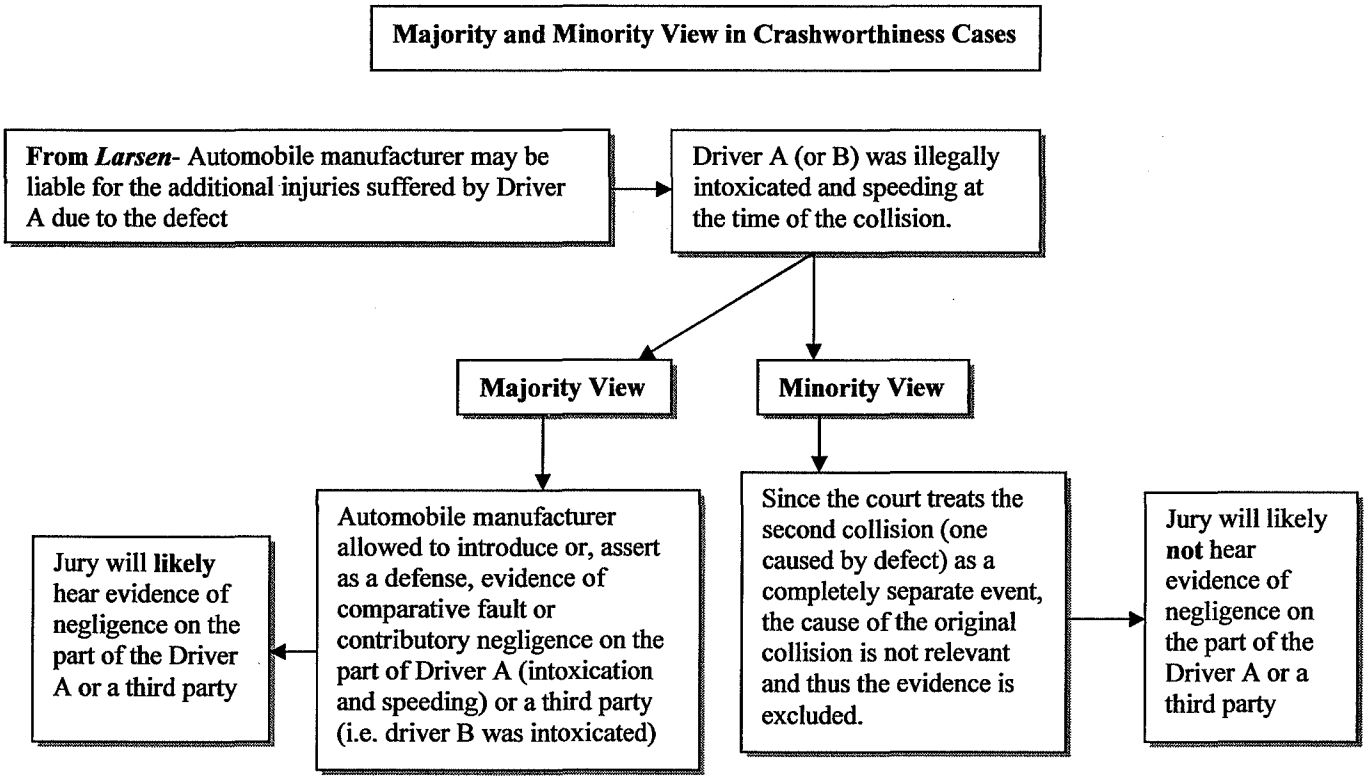
[27] Schwartz, *supra* note 1, at 10.

One federal court applied the minority view in a crashworthiness case and ruled that:

> Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. . . . Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.[28]

A federal district court in Ohio excluded evidence of a driver's intoxication at the time of the accident in a products liability action against the automobile manufacturer.[29] In addition to ruling that the probative value of the evidence of intoxication was outweighed by the danger that the jury could misuse the information, the court reasoned that it was foreseeable that front-end collisions occur and that an automobile manufacturer is under an obligation under Ohio law to use reasonable care in designing vehicles that do not expose a user to unreasonable risks.[30]

The rationale underlying the minority view may also flow from a public policy belief that allowing manufacturers to avoid or reduce their liability through application of comparative fault will reduce the manufacturer's incentive to design a safe automobile for consumer use.[31] One court opined that "[a] major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident."[32]



Crashworthiness in Florida

Prior to 2001, Florida courts generally applied comparative fault principles in crashworthiness cases where the injury was caused by the initial collision or was an enhanced injury caused by a subsequent

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[28] *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999), *reversed in part and vacated*, 269 F.3d 439 (4th Cir. 2001).
[29] *Mercurio v. Nissan Motor Corp.*, 81 F. Supp. 2d 859 (N.D. Ohio 2000).
[30] *Id.* at 861.
[31] Ricci, *supra* note 9, at 18-20.
[32] *Id.* at 20 (quoting *Andrews v. Harley Davidson, Inc.*, 769 P.2d 1092, 1095 (Nev. 1990)).

collision.[33] For example, in *Kidron, Inc. v. Carmona*,[34] a mother and child brought a wrongful death action for the death of the father in a collision with a truck that had stalled, as well as an action against the manufacturer of the truck alleging strict liability for the manufacturer's design of the rear under-ride guard.[35] The court held that "principles of comparative negligence should be applied in the same manner in a strict liability suit, regardless of whether the injury at issue has resulted from the primary or secondary collision."[36] The court further recognized that:

> . . . fairness and good reason require that the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause.[37]

As a result, the court concluded that the decedent's negligence in failing to avoid the collision should be considered along with the manufacturer's liability in the design of the truck, as well as any other entity or person who contributed to the accident regardless of whether that entity was joined as a party.[38]

In 2001, the Florida Supreme Court retreated from the application of comparative fault and the holding in *Kidron, Inc.*, and adopted the minority view in crashworthiness cases. The seminal decision in *D'Amario v. Ford Motor Company* precludes the jury[39] from apportioning fault to a party contributing to the cause of the initial collision when considering liability for enhanced injuries resulting from a second collision.[40]

In its examination of liability and admissibility of evidence in these cases, the Florida Supreme Court concluded that the "principles of comparative fault involving the causes of the first collision do not generally apply in crashworthiness cases."[41] In reaching its conclusion, the court compared crashworthiness cases to medical malpractice actions in which the cause of an initial injury that may require medical treatment is not ordinarily considered as a legal cause of enhanced injuries resulting from subsequent negligent treatment.[42] The court further noted that:

> . . . unlike automobile accidents involving damages solely arising from the collision itself, a defendant's liability in a crashworthiness case is predicated upon the existence of a distinct and second injury caused by a defective product, and assumes the plaintiff to be in the condition to which he is rendered after the first accident. No claim is asserted, however, to hold the defendant liable for that condition. Thus, crashworthiness cases involve separate and distinct injuries–those caused by the initial collision, and those subsequently caused by a second collision arising from a defective product.[43]

The court held that the focus in crashworthiness cases is the enhanced injury; therefore, consideration of the conduct that allegedly caused the enhanced and secondary injuries is pivotal, not the conduct that gave rise to the initial accident.[44] As a result, the court concluded that admission of evidence

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[33] Schwartz, *supra* note 1, at 6.
[34] *Kidron, Inc. v. Carmona*, 665 So.2d 289 (Fla. 3d DCA 1995).
[35] *Id.*
[36] *Id.* at 292.
[37] *Id.*
[38] *Id.* at 293.
[39] Most trials are in front of a jury, but the parties may opt to waive a jury trial and elect to try the case before a judge, but the legal standards are the same.
[40] *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001).
[41] *D'Amario*, 806 So.2d at 441.
[42] *Id.* at 435. In addition, the court recognized that in medical malpractice actions, an initial tortfeasor who causes an injury is not to be considered a joint tortfeasor. *Id.*
[43] *Id.* at 436-47.
[44] *Id.* at 437.

related to the intoxication of the non-party drivers, which caused the initial collisions, unduly confused the jury and shifted the focus away from determining causation of the enhanced injuries.[45]

Effect of Proposed Changes

The bill, in a crashworthiness case, requires the jury to determine if the injuries suffered by the plaintiff are distinguishable between the injuries directly caused by the initial accident and those directly caused by the alleged defect. If the jury can distinguish between the injuries then the jury may only consider the fault of the person or persons who directly caused the enhanced injury when apportioning fault. If the jury cannot distinguish between the injuries then the jury may consider the fault of all persons who contributed to the accident and the injuries and apportion fault.

The bill exempts first responders[46] from applicability of s. 768.81, F.S. The effect of this is that a first responder plaintiff may collect a judgment in a negligence case under the doctrine of joint and several liability.

The bill will take effect upon becoming law and applies to causes of actions accruing on or after that date.

B. SECTION DIRECTORY:

Section 1 amends s. 768.81, F.S., relating to comparative fault and an exemption from s. 768.81, F.S. for first responders.

Section 2 contains an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   This bill may have a minimal nonrecurring expense to the State court system in FY 2011-2012. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[45] The court also ruled that driving while intoxicated does not fall within the "intentional tort" exception to the comparative fault statute. *See* s. 768.81(4)(b), F.S.

[46] Law enforcement officers as defined in s. 943.10, F.S., Firefighter as defined in s. 633.30, F.S., and emergency medical technician or paramedic as defined in s. 401.23, F.S. whether the first responder is employed full-time, employed part-time or is a volunteer.

D. FISCAL COMMENTS:

The judiciary may experience a small increase in workload related to revising the Standard Jury Instructions in civil cases to reflect the changes in apportionment of fault as written in the bill.

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:

Certain provisions of this bill may be unclear in their application. It is possible that a trial court may need to hold a separate hearing to allow the jury to first determine if the injuries are distinguishable in order to decide if certain evidence would be allowed to be introduced. Alternatively, the jury may be required to decide the issue of separate injuries on a verdict form along with the other factual issues of the case.

It appears that the exemption to s. 768.81, F.S. will apply to a first responder whether or not they were injured while in the line of duty.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 9th, 2011, the House of Representatives Civil Justice Subcommittee adopted two amendments. The two amendments:

- Regarding crashworthiness, removed from the bill the requirement that the jury must consider the fault of all persons who contributed to the accident when apportioning fault in a crashworthiness case and instead requires a jury to distinguish between injuries directly caused by the original accident and those injuries directly caused by an alleged defect in the motor vehicle. If the jury can distinguish between the two injuries then the jury may only consider the fault of the person or persons responsible for the defective product for the injuries the defective product directly caused. If the jury cannot distinguish between the injuries then the jury must consider the fault of all persons who contributed to the accident and the injury.

- Regarding intent language, removed legislative intent language regarding the Supreme Court decision in *D'Amario v. Ford Motor Company* and whether the bill applies retroactively.

- Regarding first responders, exempts first responders from s. 768.81, F.S., allowing a first responder plaintiff to collect a judgment under the doctrine of joint and several liability.

This analysis is drafted to the committee substitute.

A bill to be entitled

An act relating to negligence; amending s. 768.81, F.S.; specifying how the trier of fact is to apportion damages in products liability actions alleging additional or enhanced injury resulting from the crash of a motor vehicle alleged to be defective; providing that the doctrine of joint and several liability applies to a tort action brought by a first responder; defining the term "first responder"; providing applicability; providing an effective date.

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

Section 1. Subsection (3) and paragraph (b) of subsection (4) of section 768.81, Florida Statutes, are amended to read:

768.81 Comparative fault.—

(3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

(a) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Florida Rules of Civil Procedure.

(b) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

(c) In a products liability action brought by the claimant alleging that because of a defective product the injuries received by the claimant in a motor vehicle accident were greater than the injuries the claimant would have received but for the defective product, the trier of fact shall consider only the fault of the persons responsible for the accident in regard to the injuries directly caused by the accident and shall consider only the fault of the persons responsible for the defective product in regard to the injuries directly caused by the defective product, unless the trier of fact cannot distinguish the injuries directly caused by the defective product, in which case the trier of fact shall consider the fault of all persons who contributed to the accident and the injuries and apportion liability between them.

(4) APPLICABILITY.—

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, to any action brought by a first responder, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895. For purposes of this paragraph, the term "first responder" means a law enforcement

officer as defined in s. 943.10, a firefighter as defined in s. 633.30, or an emergency medical technician or paramedic as defined in s. 401.23, whether such first responder is employed full time, employed part time, or is a volunteer.

Section 2. This act shall take effect upon becoming a law and shall apply to causes of action accruing on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 391 Expert Testimony
SPONSOR(S): Civil Justice Subcommittee; Metz and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 822

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 4 N, As CS	Woodburn	Bond
2) Judiciary Committee		Woodburn	Havlicak

SUMMARY ANALYSIS

An expert witness is a person who has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder. In evaluating whether testimony of a particular expert witness will be admitted in a Florida court, the court looks at whether the underlying basic principles of evidence are generally accepted within the scientific community. The standard is known as the *Frye* standard.

This bill rejects the *Frye* standard and provides a three-part test to determine whether expert testimony will be admitted in a particular case. This bill adopts a standard commonly referred to as the *Daubert* standard.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Expert Witness

An expert witness is a person, who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.[1] Previously, both Federal and Florida courts used the standard established in *Frye v. United States*[2] to determine whether scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding admitting expert testimony of new or novel theories. The court held that in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[3] Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

The Federal Rules of Evidence were formally promulgated in 1975. Federal courts still continued to use the *Frye* standard until 1993, though, when the United States Supreme Court held in *Daubert*[4] that the *Frye* standard had been superseded by the Federal Rules of Evidence which provides in relevant part that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[5]

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.[6]

Florida courts still use the *Frye* standard, however, for expert testimony.[7] The Florida Supreme court held in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert*... we have maintained the higher standard of reliability as dictated by *Frye*."[8]

In November 2007, the Florida Supreme Court decided *Marsh v. Valyou*.[9] In the case, the court addressed a conflict between the 1st and the 5th Florida District Courts of Appeal regarding expert

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[1] Bryan A. Garner, Black's Law Dictionary, 9th Edition (West Publishing Co. 2009), "expert."
[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[3] *Id.*at 1013.
[4] *Daubert v. Merrell Dow Pharmaceuticals*, 509 US. 579 (1993).
[5] Rule 702, Federal Rules of Evidence.
[6] Section 90.702, F.S.
[7] *Flanagan v. State*, 625 So.2d 827 (Fla. 1993); *Hadden v. State*, 690 So.2d 573 (Fla. 1997).
[8] *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997).
[9] *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

testimony on fibromyalgia.[10] The court held that the testimony should have come in under pure opinion testimony[11] and in the alternative should have also come in under *Frye*. In the concurring opinion, Justice Anstead questioned why Florida still uses the *Frye* standard, stating that "we have never explained how *Frye* has survived the adoption of the rules of evidence."[12] Both the concurring and dissenting opinions concluded that *Frye* was superseded by the adoption of Florida's Evidence Code.

Effect of the Bill

This bill provides a standard regarding witness testimony that is more closely related to *Daubert* and the Federal Code of Evidence than *Frye*. This bill provides a three-part test to be used in determining whether an expert may testify. The test provides that an expert may testify in the particular field in which he or she is qualified in the form of an opinion or otherwise if:

- The testimony is based on sufficient facts or data,
- The testimony is the product of reliable principles and methods, and
- The witness has applied the principles and methods reliably to the facts.

The bill requires the courts of this state to interpret and apply the above requirements and s. 90.704, F.S., in accordance with *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, and subsequent U.S. Supreme Court cases that reaffirm expert witness testimony under the *Daubert* standard. The bill also provides that *Frye v. United States* and subsequent Florida decisions applying and implementing *Frye* no longer apply to s. 90.702, F.S., or s. 90.704, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., regarding testimony by experts.

Section 2 amends s. 90.704, F.S., regarding the basis of opinion testimony by experts.

Section 3 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:

   The change in standard to admit expert opinions in Florida courts may have an impact on the number of pre-trial hearings needed, but it is difficult to estimate due to the unavailability of data needed to quantify any increase or decrease in judicial workload.

   In criminal proceedings, the state may incur costs, and it is difficult to affirmatively quantify, in that well-established evidentiary standards in areas involving mental health, substance abuse, cognitive dysfunction, dual diagnosis, psychosis, and other areas litigated in some criminal cases may be expanded beyond the already extensive body of testimony and evidence currently litigated.

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[10] Fibromyalgia is a chronic condition characterized by widespread pain in the muscles, ligaments and tendons, as well as fatigue and multiple tender points. *See* http://www.mayoclinic.com/health/fibromyalgia/DS00079 (last visited March 2, 2011).

[11] Pure opinion testimony is based on the expert's personal experience and training and does not have to meet the *Frye* standard. *See Flanagan*, 625 So. 2d at 828.

[12] *Marsh* at 551.

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:

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.[13]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 14, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment:

- Removed a reference to a United States Supreme Court Case.
- Corrected drafting errors.

This analysis is drafted to the committee substitute.

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[13] *See, e.g., In re Florida Evidence Code*, 782 So.2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court) and *compare with In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), *clarified, In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).

A bill to be entitled

An act relating to expert testimony; amending s. 90.702, F.S.; providing that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances; requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions; amending s. 90.704, F.S.; providing that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data; providing an effective date.

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

Section 1. Section 90.702, Florida Statutes, is amended to read:

90.702 Testimony by experts.—

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(a) The testimony is based upon sufficient facts or data;

(b) The testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case~~; however, the opinion is admissible only if it can be applied to evidence at trial~~.

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and s. 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or s. 90.704.

Section 2. Section 90.704, Florida Statutes, is amended to read:

90.704 Basis of opinion testimony by experts.—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Section 3. This act shall take effect July 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 405 Employment Liability for Persons with Disabilities
SPONSOR(S): Civil Justice Subcommittee; Baxley and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 926

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Woodburn	Bond
2) Health & Human Services Access Subcommittee	14 Y, 0 N	Prater	Schoolfield
3) Judiciary Committee		Woodburn	Havlicak

SUMMARY ANALYSIS

Supported employment services are offered to help an individual with a developmental disability gain or maintain employment. The bill provides that an employer who employs a person with a developmental disability who received supported employment services is not liable for a negligent or intentional act or omission of the employee provided that the employer did not have actual notice of an act or omission creating an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment service that has provided employment services to a person with a developmental disability is not liable for the actions or conduct of that person as an employee.

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

The bill provides an effective date of July 1, 2011, and applies only to causes of action that occur on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Developmental Disability

"Developmental Disability" is a term that is defined in s. 393.063, F.S., as:

> A disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.

The Agency for Persons with Disabilities (APD)[1] has been specifically tasked with serving the needs of Floridians with developmental disabilities. The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities.

Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain employment. Generally, services involve job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employments Services Program defines "supported employment services" as on-going support services provided by the designated state unit to achieve job stabilization.[2]

The Division of Vocational Rehabilitation (DVR) specifically defines "supported employment services" as "ongoing support services and other appropriate services needed to support and maintain a person who has a severe disability in supported employment."[3] The service provided is based upon the needs of the eligible individual as specified in the person's individualized written rehabilitation program. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.[4]

Both DVR and APD provide supported employment services. They also connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to such services. However, these entities do not share information about their customers with the employers that employ their customers as supported employment. This is due to various reasons, including confidentiality concerns and contract agreements between the employer and the organization.

Employer Liability, In General

Under common law principles, an employer is liable for an act of its employee that causes injury to another person if the wrongful act was done while the employee was acting within the apparent scope

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[1] For more information *see* http://apd.myflorida.com/ (last visited March 3, 2011).

[2] 34 C.F.R. s. 363.6(c)(2)(iii). "What is the State Supported Employment Services Program? Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment. (Authority: 29 U.S.C. 795j)." 34 C.F.R. s. 363.1. *See also*, Supported Employment State Grants, at http://www.ed.gov/programs/rsasupemp/index.html (last visited 3/11/2011).

[3] For DVR: "Supported employment" means competitive work in integrated working settings for persons who have severe disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of a severe disability. Persons who have severe disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work. Section 413.20(22), F.S. For APD: "Supported employment" means employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance. Section 393.063(37), F.S.

[4] Section 413.20(27), F.S.

of employment and serving the interests of his or her employer. An employee is not acting within the scope of his or her employment, and thereby the employer is not liable, if the employee is acting to accomplish his or her own purposes and not to serve the interests of the employer.[5] The test for determining if the conduct complained of occurred within the scope of employment is:

- Whether the employee was performing the kind of conduct he was employed to perform;
- The conduct occurred within the time and space limits of the employment; and
- The conduct was activated at least in part by a purpose to serve the employer.[6]

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer's business.[7] An employer may be held liable for a negligent act of an employee committed within the scope of his or her employment even if the employer is without fault.[8] An employer is liable for an employee's acts, intentional or negligent, if the employer had control over the employee at the time of the acts. "Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label 'employer' to impose strict liability under a theory of respondent superior[9] but instead look to the employer's control or right of control over the employee at the time of the negligent act."[10] Employer fault is not an element of vicarious liability claims.[11]

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as "an employer's lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person would be harmed."[12] An action for negligent hiring is based on the direct negligence of the employer. However, in order to be liable for an employee's act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury. "The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment."[13] In *Williams v. Feather Sound, Inc.*, the Florida 2nd District Court of Appeal, in a case regarding negligent hiring, discussed the responsibility of the employer to be aware of an employee's propensity to commit an act at issue:

> Many of these cases involve situations in which the employer was aware of the employee's propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee's character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee's

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[5] *Gowan v. Bay Count,* 744 So.2d 1136, 1138 (Fla. 1st DCA 1999).
[6] *Id.*
[7] *Garcy v. Broward Process Servers, Inc.* 583 So.2d 714, 716 (Fla. 4th DCA 1991). The term "intentional" means done with the aim of carrying out the act. Black's Law Dictionary (9th ed. 2010), intentional.
[8] "This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer." *Makris v. Williams.* 426 So.2d 1186, 1189 (Fla. 4th DCA 1983). The term "negligent" is characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. Black's Law Dictionary (9th ed. 2010), negligent. A negligent act is one that creates an unreasonable risk of harm to another. Black's Law Dictionary (9th ed. 2010), act.
[9] Respondeat superior" means the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. Black's Law Dictionary (9th ed. 2010), respondeat superior.
[10] *Vasquez v. United Enterprises of Southwest Florida, Inc.* 811 So.2d 759, 761 (Fla. 3d DCA 2002).
[11] *Makris v. Williams.* 426 So.2d 1186, 1189 (Fla. 4th DCA 1983).
[12] Black's Law Dictionary (9th ed. 2010), negligent hiring.
[13] *Anderson Trucking Service, Inc. v. Gibson.* 884 So.2d 1046, 1052 (Fla. 5th DCA 2004).

propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.[14]

Section 768.096, F.S., provides an employer presumption against negligent hiring, "if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general."[15]

Effect of the Bill

The bill creates s. 768.0965, F.S., entitled "Employees with Disabilities Opportunity Act," to provide that an employer is not liable, under certain conditions, for negligent or intentional acts or omissions by an employee with a developmental disability, as defined in s. 393.063, F.S. The employer is not liable if:

- The employee has received supported employment services through a public or private not-for-profit provider; and
- The employer does not have actual notice of an action or omission of the employee which creates an unsafe condition in the workplace.

The bill also provides that a not-for-profit supported employment services provider who provides supported employment services to an individual with a developmental disability is not liable for the actions or conduct of that individual that occurs within the scope of such individual's employment.

The bill provides an effective date of July 1, 2011. The act applies only to causes of action that occur on or after the effective date.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 creates s. 768.0965, F.S., regarding employer and not-for-profit supported employment service provider liability.

Section 3 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.

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[14] *Williams v. Feather Sound, Inc.*, 386 So.2d 1238, 1239 - 40 (Fla. 2d DCA 1980).

[15] Section 768.096, F.S., defines what a background investigation must include, like contacting references, interviewing the employee, and obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

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 March 14, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment amends the effective date to provide that the act applies to causes of action that occur on or after the effective date. The bill was then reported favorably.

This analysis is drafted to the committee substitute.

A bill to be entitled

An act relating to employment liability for persons with disabilities; providing a short title; creating s. 768.0965, F.S.; limiting the liability of employers of persons with developmental disabilities for acts or omissions of such employees in certain circumstances; providing that a not-for-profit supported employment service provider who has provided supported employment services to an individual with a developmental disability is not liable for the actions or conduct of that individual occurring within the scope of his or her employment; providing applicability; providing an effective date.

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

Section 1. This act may be cited as the "Employees with Disabilities Opportunity Act."

Section 2. Section 768.0965, Florida Statutes, is created to read:

768.0965 Limitation of employment liability for persons with disabilities.—

(1) An employer employing a person with a developmental disability as defined in s. 393.063 is not liable for the acts or omissions, negligent or intentional, of the employee, if:

(a) The employee has received supported employment services through a public or private not-for-profit provider; and

(b) The employer does not have actual notice of actions or omissions of the employee which create unsafe conditions in the workplace.

(2) A not-for-profit supported employment service provider who has provided supported employment services to an individual with a developmental disability as defined in s. 393.063 is not liable for the actions or conduct of the individual occurring within the scope of such individual's employment.

Section 3. This act shall take effect July 1, 2011, and shall apply to causes of action occurring on or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 815 Powers of Attorney
SPONSOR(S): Civil Justice Subcommittee; Harrison
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Woodburn	Bond
2) Judiciary Committee		Woodburn	Havlicak

SUMMARY ANALYSIS

A power of attorney is a legal document in which a principal authorizes a person or entity (the agent or attorney-in-fact) to act on his or her behalf. There are three basic types of power of attorney: general power of attorney, which ceases when the principal becomes incapacitated; durable power of attorney, which continues once the person becomes incapacitated; and springing or contingent power of attorney, which power of attorney becomes effective upon the occurrence of a specified event.

The bill is a comprehensive re-write of the statutes that regulate powers of attorney in the state of Florida based in large part on the Uniform Power of Attorney Act. The bill provides:

- All powers of attorney become effective upon execution, with the exception of powers of attorney based on military deployment.
- All powers of attorney must be signed by the principal and witnessed and signed by two people and also notarized.
- A power of attorney executed in another state is valid in Florida if the power of attorney complied with the laws of the state of execution.
- That it applies to all powers of attorney whether they were created on, before or after the effective date of October 1, 2011.
- When a power of attorney and the authority of an agent terminate.
- That only a qualified agent may receive compensation.
- When a third party may rely on power of attorney and the notice requirement for termination or suspension of power of attorney.
- What a third party may request from an agent in order to verify power of attorney.
- That a third person must accept or reject a power of attorney within a reasonable time.
- How a notice may be delivered to a third person regarding termination or suspension of the power of attorney.
- That a power of attorney must expressly provide what an agent can and cannot do and may not include a general provision granting the agent broad authority.
- That additional signatures or initials of the principal are required to exercise authority in certain areas.
- The duties and liabilities of an agent.
- That a principal may appoint two or more agents and that they may act independently and exercise full authority.
- That the principal may designate successor agents.
- Who may file a petition for judicial relief regarding a power of attorney.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Power of Attorney

A power of attorney is a legal document in which the client (the principal) authorizes a person or entity (the agent or attorney-in-fact)[1] to act on his or her behalf. What authority is granted depends on the specific language of the power of attorney. A person giving a power of attorney may provide very broad authority or may limit the authority to certain specific acts.

A power of attorney may be limited or general. A limited power of attorney may give the person acting on the power of attorney the ability to do only one function. An example would be a person giving power of attorney to another to sell a house or a car. The power of attorney would then terminate after the function was complete.

There are typically three general types of power of attorney:

- General power of attorney delegates to the agent the authority to act on behalf of the principal regarding specific acts on behalf of the principal. This power of attorney expires automatically upon the principal becoming mentally ill or otherwise incapacitated.[2]

- Durable power of attorney delegates specific types of powers, and is immediately effective and exercisable upon the date of execution. Durable power of attorney remains in effect if the principal subsequently becomes incapacitated, but expires immediately once the principal dies, is adjudicated legally incapacitated, or revokes the power of attorney.

- Contingent or springing power of attorney delegates specific types of powers but is not exercisable until the occurrence of a specified time or specified event. Until the specified time or event occurs, the contingent power of attorney is dormant and ineffective, and the principal retains sole control over his or her property and is able to exercise other rights.[3]

Uniform Power of Attorney Act

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform Laws completed a Uniform Power of Attorney Act (UPOAA). The catalyst for UPOAA was a national study which revealed a growing divergence in state power of attorney legislation. Since its completion, nine states and one territory have adopted the UPOAA.[4] The goal of the UPOAA is to promote uniformity and portability of power of attorney across state lines.

Durable Power of Attorney in Florida

Durable power of attorney is recognized and regulated in Florida pursuant to s. 709.08, F.S. The statutory requirements include that:

- The durable power of attorney must be in writing:
- Executed with same formalities required by Florida law;[5]

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[1] Chapter 709, F.S., uses the term "attorney-in-fact" to describe a person granted authority pursuant to a power of attorney. This bill uses the term "agent" to describe a person granted authority pursuant to a power of attorney.
[2] General power of attorney is the default power of attorney in the state.
[3] Section 709.08(1), F.S., provides that a durable power of attorney may be effective upon a principal's incapacity.
[4] See http://www.nccusl.org/Act.aspx?title=Power%20of%20Attorney for information regarding the UPOAA. Nine states have adopted the act and four states have proposed legislation to adopt the act this year. (Last visited March 11, 2011).
[5] Section 689.01, F.S., requires the document to be signed by the person conveying, two subscribing witnesses and signed by the person receiving.

- Must contain the words, 'This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in 709.08, Florida Statutes,' or similar words.[6]

The durable power of attorney is exercisable at the date of execution unless the power of attorney is conditioned on the principal's lack of capacity to mange property.[7]

Pursuant to s. 709.08(2), F.S., a natural person, 18 years or older and of sound mind may serve as an agent. A financial institution with trust powers, having a place of business in this state and authorized to conduct trust business in the state may also serve as an agent.[8] A not-for profit corporation may also serve as an agent.[9]

The agent may exercise the authority granted pursuant to the power of attorney until:

- The principal dies;
- Revokes the power; or
- A court determines that the principal is totally or partially incapacitated unless the court determines that certain authority granted by the power of attorney is to remain exercisable by the agent.[10]

If a person or entity initiates proceedings in any court to determine the principal's capacity, the power of attorney is suspended pending the outcome of the proceedings.[11]

Effect of the Bill: Scope

The bill repeals ss. 709.01, 709.015, 709.08, and 709.11, F.S., and divides ch. 709, F.S., into two parts; Part I entitled "Powers of Appointment," which consists of current ss. 709.02-709.07, F.S., and Part II entitled "Powers of Attorney," which consists of ss. 709.2101-709.2402, F.S., which are created by the bill.

The bill is substantially based on the UPOAA with some modifications.

The bill creates s. 709.2102, F.S., which provides definitions for the act.

The bill creates s. 709.2103, F.S., which provides that "this part applies to all powers of attorney" created by an individual unless the power is:

- A proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a government purpose; or
- A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction.

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[6] *See* s. 709.08(1), F.S.

[7] As defined in s. 744.102(12)(a). F.S., "To 'manage property' means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income." The durable power of attorney becomes exercisable upon the delivery of affidavits provided in 709.08(4)(c) and (d), F.S. This is referred to as springing power of attorney.

[8] As defined in ch. 655, F.S., and s. 655.005(1)(h), F.S., "financial institution" means a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, or credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.

[9] Provided that the charity has been organized for charitable or religious purposes and has been appointed a court guardian prior to January 1, 1996 and is tax exempt under 26 U.S.C. s. 501(c)(3).

[10] Section 709.08(3)(b), F.S.

[11] Section 709.08(3)(c)1., F.S.

The bill creates s. 709.2104, F.S., which provides that a power of attorney is durable only if the instrument contains the words "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in Chapter 709, Florida Statutes," or similar words. If the power of attorney does not contain this phrase or similar language the power of attorney will be presumed to be general. This section maintains that general power of attorney is the default power of attorney in the state of Florida.

The bill creates s. 709.2105, F.S., which provides the qualifications for an agent to be a natural person 18 years or older or a financial institution. The section also requires a power of attorney to be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public.

The bill creates s. 709.2106, F.S., which provides that a power of attorney executed on or after October 1, 2011, is valid if its execution complies with the requirements of s. 709.2105, F.S. The bill also provides that a power of attorney executed prior to October 1, 2011 is valid if the execution complied with the laws of this state at the time of execution. The bill provides that a power of attorney executed in another state is valid even if it does not comply with the execution requirements of Florida as long as the power of attorney complied with the laws of the state of execution.

The bill creates s. 709.2107, F.S., which provides that the meaning and effectiveness of the power of attorney is governed by this part if it is used in Florida or states that is to be governed by the laws of Florida.

The bill creates s. 709.2108, F.S., which provides that a power of attorney, with the exception of a springing power of attorney created prior to October 1, 2011, is exercisable when executed. The bill also provides that a power of attorney is not effective if it is conditioned on a future date or upon the occurrence of a future event or contingency. This section would not allow any springing or contingent powers of attorney after the effective date of the bill. The bill retains the exception for military deployment.

The bill creates s. 709.2402, F.S., which provides that this act applies to powers of attorney created before, on, or after October 1, 2011, and to the acts of an agent occurring on or after that date, but that this act does not apply to the acts of an agent that occurred prior to October 1, 2011.

The bill creates s. 709.2301, F.S., which provides that the common law of agency and principles of equity supplement these new provisions except as modified by the bill and other state law.

Effect of Bill: Acceptance of Appointment

The bill creates 709.2114, F.S., which provides the methods by which an agent may accept appointment. An agent may accept appointment by exercising authority as an agent or by any other assertion or conduct. The section provides that an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

Effect of Bill: Termination of Power of Attorney/Authority of Agent

The bill creates s. 709.2109, F.S., which provides when a power of attorney or agent's authority is suspended or terminated. The bill provides that the power of attorney is suspended or terminated when:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;

- The purpose of the power of the attorney is accomplished; or
- An agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority terminates when:

- The agent dies, becomes incapacitated, resigns, or is removed by a court;
- An action is filed for a dissolution or annulment of the agent's marriage to the principal for their legal separation, unless the power of attorney otherwise provides; or
- The power of attorney terminates.

The section also provides, consistent with current law ,that if any person initiates judicial proceedings to determine the principal's incapacity or for the appointment of a guardian, then the authority granted pursuant to the power of attorney is suspended. The section also provides that the termination or suspension of an agent's authority or of power of attorney is not effective as to an agent who without knowledge acts in good faith under the power of attorney.

The bill creates s. 709.2110, F.S., which provides that a revocation of attorney must be done by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal.

Effect of Bill: Qualified Agent

The bill creates s. 709.2112, F.S., which provides that a qualified agent is entitled to reimbursement of expenses unless the power of attorney provides otherwise. The section defines a qualified agent as:

> an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, an attorney or certified public accountant who is licensed in this state, or a natural person who has never been an agent for more than three principals at the same time.

The section provides that only a qualified agent may receive compensation.

Third Party- Liability and Notice

Pursuant to current Florida law, a third party may rely upon the durable power of attorney until the third party has received notice.[12] A third party may also require the agent to execute the affidavit that is provided in s. 709.08(4)(c), F.S.,[13] prior to accepting the agent's power of attorney.

Section 709.08(4)(g), F.S., provides that a third party who acts pursuant to the directions of the agent and relies on the authority granted in the power of attorney is to be held harmless by the principal, the principal's estate, beneficiaries or joint owners. This only applies if the acts happened prior to the third party receiving notice of the termination.

Section 709.08(5)(a), F.S., provides that notice is not effective until served upon the agent or any third persons relying upon a durable power of attorney. The notice must be in writing and served upon the person bound by the notice either through personal delivery or through a mail service that requires a signed receipt. In the case of a financial institution, a third party must be given 14 calendar days after service to act upon the notice.[14]

[12] Section 709.08(4)(a), F.S.
[13] Section 709.08(4)(a), F.S.
[14] Section 709.08(5)(b), F.S.

Effect of the Bill: Third Party Acceptance and Reliance

The bill creates s. 709.2119, F.S., which outlines third party acceptance and reliance on an agent's power of attorney. The section provides that:

A third person who in good faith accepts a power of attorney that appears to be executed in accordance with this part may rely upon the power of attorney and may enforce an authorized transaction against the principal's property as if:

1. The power of attorney were genuine, valid, and still in effect; and
2. The agent's authority were genuine, valid, and still in effect; and
3. The authority of the officer executing for or on behalf of a financial institution that has trust powers and acting as agent is genuine, valid, and still in effect.

The section also provides that a third person does not accept a power of attorney in good faith if the third person has notice that:

- The power of attorney is void, invalid, or terminated; or
- The purported agent's authority is void, invalid, suspended or terminated.

The section also provides that a third person may require an agent to execute an affidavit. The section provides a statutory form that may be used as the affidavit. The section provides that a third person may request and without further investigation rely on:

- A verified English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English;
- An opinion of counsel as to any matter of law concerning the power of attorney if the third party making the request provides in a writing or other record the reason for the request; or
- The form affidavit.

The section also provides that any third person is held harmless from any loss suffered before the receipt of written notice as provided in s. 709.2121, F.S.

The section also provides that a third person must accept or reject the power of attorney within a reasonable time and if they choose to reject the power of attorney they must state in writing the reason for the rejection. The section provides that a third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;
- The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;
- A timely request by the third person for an affidavit, English translation, or opinion of counsel is refused by the agent;
- The third person believes in good faith that the power is not valid or that the agent does not have the authority to perform the act requested; or
- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person for or with the agent.

The section provides that a third person who violates this section is subject to a court order mandating that the power of attorney be honored and is liable for damages including attorneys fees and costs.

Effect of the Bill: Notice

The bill creates s. 709.2121, F.S., regarding notice to the agent and to third parties. The section provides that a notice including:

- Notice of revocation;
- Notice of partial or complete termination by adjudication of incapacity;
- The occurrence of an event referenced in the power of attorney;
- Notice of death of the principal; or
- Notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian.

is not effective until written notice is provided to the agent or any third party persons relying upon a power of attorney. Permissible ways in which to deliver the notice include first-class mail, personal delivery, delivery to the person's last known address, or a properly delivered fax or other electronic message. The section also requires that a notice to a financial institution contain the name, address, and the last four digits of the principal's tax ID and be directed to a bank officer. The notice is effective when given, except the notice upon a financial institution, brokerage company, or title company is not effective until five days after it is received.

Powers and Limitations of the Agent

Section 709.08(7)(a), F.S., provides that an agent, except as limited by the power of attorney or by statute, has the authority to perform every act authorized and specifically enumerated in the durable power of attorney. These acts include, executing stock powers including delegating to a stock broker or a transfer agent the ability to register any stocks or bonds, and conveying and mortgaging homestead property.[15] An agent may not perform the following duties:

- Perform duties under a contract that requires the exercise of personal services of the principal;
- Make any affidavit as to the personal knowledge of the principal;
- Vote in any public election on behalf of the principal;
- Execute or revoke any will or codicil for the principal;
- Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the principal; or
- Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.[16]

If specifically granted in the power of attorney, the agent may make all health care decisions for the principal.[17]

Effect of Bill: Authority of Agent

The bill creates s. 709.2201, F.S., which outlines the authority of an agent. The section provides that an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that grant of specific authority. The section provides that:

> General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, is not an express grant of specific authority and does not grant authority to the agent.

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[15] Section 709.08(7)(a)2., F.S., requires the joinder of a spouse in order to convey or mortgage homestead property.
[16] Section 709.08(7)(b), F.S.
[17] Section 709.08(7)(c), F.S.

Pursuant to the bill, a power of attorney must specifically provide what the agent can and cannot do under the instrument. The requirement also prohibits incorporation by reference in the power of attorney.[18] The section also provides that an agent may convey or mortgage homestead property, but if the principal is married the agent would need the joinder of the spouse.

The bill also provides that an agent may not:

- Perform duties under a contract that requires the exercise of personal services of the principal;
- Make any affidavit as to the personal knowledge of the principal;
- Vote in any public election on behalf of the principal;
- Execute or revoke any will or codicil for the principal; or
- Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

The bill provides that the authority granted to the agent by the principal is exercisable with respect to property that the principal owned when the instrument was executed and property acquired afterward, whether or not the property is located in the state. The bill also provides that the actions performed by the agent, pursuant to the power of attorney, have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had performed the act.

The bill creates s. 709.2202, F.S, which outlines agent authority that requires an additional signature from the principal in order for the agent to act unless the exercise is prohibited by another agreement or instrument. These include:

- Creation of an inter vivos trust;
- With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;
- Make a gift (subject to further restrictions involving gifts to the agent's or agent's relatives, gifts over the IRS tax level);
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- Disclaim property and powers of appointment.

The bill provides that this section does not apply to a power of attorney executed prior to October 1, 2011.

Effect of Bill: Banking and Investment Activities

The bill creates s. 709.2208, F.S., which provides that a power of attorney that includes the statement that the has "authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes," or "authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes" grants general authority to the agent with respect to banking transactions and investment transactions as enumerated in the section without specific enumeration in the power of the attorney. The section also defines investment instruments for the purposes of this section.

The bill creates s. 709.2301, F.S., which provides that this part does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part.

[18] There are two exceptions to this in the bill involving banking and investment transactions which refer to specific authority located in statute.

Standard of Care of the Agent

Section 709.08(8), F.S., provides that an agent is a fiduciary who must observe the standards of care applicable to trustees.[19]

The agent is also not liable to third parties for any act pursuant to the durable power of attorney if the act was authorized at the time. If the exercise of the power is improper, the agent is liable to the interested person.

Effect of Bill: Duties and Liabilities of an Agent

The bill creates s. 709.2114, F.S., which provides an agent's duties including that the agent:

- May not act contrary to the principal's reasonable expectations actually known to the agent;
- Must act in good faith;
- May not act in a manner that is contrary to the principal's best interest, except as provided in paragraph (2)(d)[20] and s. 709.2202;[21]
- To the extent actually known by the agent, must attempt to preserve the principal's estate plan if preserving the plan is consistent with the principal's best interest based on all relevant factors;[22]
- May not delegate authority to a third person except as provided in s. 518.112, F.S.;[23]
- Must keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and
- Must create and maintain an accurate inventory each time the agent accesses the principal's safe-deposit box, if the power of attorney authorizes the agent to access the box.

The section also provides that unless otherwise provided in the power of attorney the agent must:

- Act loyally for the sole benefit of the principal;
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- Act with care, competence, and diligence ordinarily exercised by agents in similar circumstances; and
- Cooperate with a person who has authority to make health care decisions for the principal in order to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

The section also provides that an agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

The bill creates s. 709.2115, F.S., which provides that a power of attorney may provides that the agent is not liable for any acts or decisions made by the agent in good faith and under the power of attorney except to the extent the provision:

- Relieves the agent of liability for breach of a duty committed dishonestly, with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

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[19] Section 709.08(8), F.S, refers to the duties of a trustee as described in s. 736.0901, F.S.

[20] This paragraph relates to cooperating with the person who has authority to make health care decisions for the principal.

[21] This section refers to power of attorney that require separate signed enumeration including amending trusts, creating interests in the principal's property, and giving of gifts of the principal's property.

[22] Factors include the value and nature of the principal's property, the principal's foreseeable obligations and need for maintenance, minimization of taxes, eligibility of statutory or regulatory benefit, and the principal's personal history of making or the joining of making of gifts.

[23] This refers to the prudent investor rule.

Multiple Agents: Joint Action Required

If a principal authorizes more than one agent, unless the durable power of attorney provides otherwise, concurrence of both is required on all acts in the exercise of power.[24] If three or more agents are designated than a majority agreement is needed.[25] An agent is also not liable for the acts of the other agents if that agent does not concur with the actions or did join in the action but expressed dissent in writing.[26] An agent who accepts appointment is liable for failure to participate in the administration of assets or for the failure to attempt to prevent a breach of fiduciary duty.[27]

If one or more of the named agents dies, unless expressly provided otherwise in the durable power of attorney, the other agents may continue to exercise the authority.[28]

Effect of Bill: Designation of Two or more Agents

The bill creates s. 709.2111, F.S., which provides that a principal may designate two or more persons to act as co-agents or designate successor agents. The section provides that:

> Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

The section also provides that an agent is not liable for a co-agent who breaches his or her fiduciary duty if he or she did not participate or conceal the breach. The section also provides that if the agent has actual knowledge of the fiduciary breach he or she must act reasonably to safeguard the principal's best interest. Notice to the principal satisfies the reasonable requirement.

Effect of Bill: Judicial Relief

The bill creates s. 709.2116, F.S., which provides judicial relief and conflict of interest relief. Pursuant to this section, a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant appropriate relief. A petition for judicial relief may be made by:

- A principal;
- An agent;
- A guardian, conservator, trustee or other fiduciary acting for the principal or the principal's estate;
- A health care decision maker;
- A governmental agency having regulatory authority to protect the principal's welfare;
- A person who is asked to honor the power of attorney; or
- Any other interested person who demonstrates that they are interested in the principal's welfare and have a good faith belief that intervention by the court is necessary.

The bill provides that the court may award taxable costs and attorneys fees as in chancery actions.

B. SECTION DIRECTORY:

Section 1 gives direction to the Division of Statutory Revision.

Section 2 gives direction to the Division of Statutory Revision.

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[24] Section 709.08(9)(a), F.S.
[25] Section 709.08(9)(b), F.S.
[26] Section 709.08(9)(c), F.S.
[27] Section 709.08(9)(d), F.S.
[28] Section 709.08(10), F.S.

Section 3 creates s. 709.2101, F.S., regarding a short title.

Section 4 creates s. 709.2102, F.S., providing definitions.

Section 5 creates s. 709.2103, F.S., providing for applicability of Part Two of ch. 709, F.S.

Section 6 creates s. 709.2104, F.S., regarding durable power of attorney.

Section 7 creates s. 709.2105, F.S., regarding qualifications of an agent and execution of power of attorney.

Section 8 creates s. 709.2106, F.S., regarding validity of power of attorney.

Section 9 creates s. 709.2107, F.S., regarding meaning and effectiveness of power of attorney.

Section 10 creates s. 709.2108, F.S., regarding when power of attorney is effective.

Section 11 creates s. 709.2109, F.S., regarding termination of power of attorney and agent's authority.

Section 12 creates s. 709.2110, F.S., regarding revocation of power of attorney.

Section 13 creates s. 709.2111, F.S., regarding co-agents and successor agents.

Section 14 creates s. 709.2112, F.S., regarding reimbursement and compensation of an agent.

Section 15 creates s. 709.2113, F.S., regarding agent's acceptance of appointment.

Section 16 creates s. 709.2114, F.S., regarding agent's duties.

Section 17 creates s. 709.2115, F.S., regarding exoneration of an agent.

Section 18 creates s. 709.2116, F.S., regarding judicial relief and conflicts of interest.

Section 19 creates s. 709.2117, F.S., regarding agent's liability.

Section 20 creates s. 709.2118, F.S., regarding agent's resignation.

Section 21 creates s. 709.2119, F.S., regarding acceptance and reliance upon power of attorney.

Section 22 creates s. 709.2120, F.S., regarding refusal to accept power of attorney.

Section 23 creates s. 709.2121, F.S., regarding notice.

Section 24 creates s. 709.2201, F.S., regarding authority of an agent.

Section 25 creates s. 709.2202, F.S., regarding authority that requires separate singed enumeration.

Section 26 creates s. 709.2208, F.S., regarding banks and other financial institutions.

Section 27 creates s. 709.2301, F.S., regarding principles of law and equity.

Section 28 creates s. 709.2302, F.S., regarding laws applicable to financial institutions.

Section 29 creates s. 709.2303, F.S., regarding remedies under other laws.

Section 30 creates s. 709.2401, F.S., regarding electronic signatures.

Section 31 creates s. 709.2402, F.S., regarding effects on existing power of attorney.

Section 32 amends s. 736.0602, F.S., regarding a cross reference to power of attorney.

Section 33 repeals ss. 709.01, 709.015, 709.08, and 709.11, F.S.

Section 34 provides an effective date of October 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

On March 14, 2011, the Civil Justice Subcommittee adopted two amendments to correct cross-citation errors in the bill. The bill was then reported favorably.

A bill to be entitled

An act relating to powers of attorney; providing directives to the Division of Statutory Revision; creating s. 709.2101, F.S.; providing a short title; creating s. 709.2102, F.S.; providing definitions; creating s. 709.2103, F.S.; providing applicability; providing exceptions; creating s. 709.2104, F.S.; providing for a durable power of attorney; creating s. 709.2105, F.S.; specifying the qualifications for an agent; providing requirements for the execution of a power of attorney; creating s. 709.2106, F.S.; providing for the validity of powers of attorney created by a certain date or in another jurisdiction; providing for the validity of a military power of attorney; providing for the validity of a photocopy or electronic copy of a power of attorney; creating s. 709.2107, F.S.; providing for the meaning and effectiveness of a power of attorney; creating s. 709.2108, F.S.; specifying when a power of attorney is effective; providing limitations with respect to a future power of attorney; creating s. 709.2109, F.S.; providing for the termination or suspension of a power of attorney or an agent's authority; creating s. 709.2110, F.S.; providing for the revocation of a power of attorney; creating s. 709.2111, F.S.; providing for the designation of co-agents and successor agents; specifying the responsibility of a successor agent for a predecessor agent; authorizing a co-agent to delegate certain banking transaction to a co-agent; creating s. 709.2112, F.S.;

providing for the reimbursement and compensation of agents; creating s. 709.2113, F.S.; providing for the agent's acceptance of appointment; creating s. 709.2114, F.S.; providing for an agent's duties; limiting an agent's liability, absent a breach of duty; requiring that an agent make certain disclosures upon order of a court, upon the death of the principal, or under certain other circumstances; creating s. 709.2115, F.S.; providing for the exoneration of an agent; providing exceptions; creating s. 709.2116, F.S.; providing for judicial relief; authorizing the award of attorney's fees and costs; providing for a judicial challenge to an agent's exercise of power based on a conflict of interest; specifying the burden of proof required to overcome that challenge; creating s. 709.2117, F.S.; providing for an agent's liability; creating s. 709.2118, F.S.; providing for an agent's resignation; creating s. 709.2119, F.S.; providing for the acceptance of and reliance upon a power of attorney; authorizing a third party to require an affidavit; providing for the validity of acts taken on behalf of a principal who is reported as missing by a branch of the United States Armed Forces; providing a restriction on the conveyance of homestead property held by such a principal; creating s. 709.2120, F.S.; providing for liability if a third person refuses to accept a power of attorney under certain circumstances; providing for an award of damages and attorney's fees and costs; creating s. 709.2121, F.S.; requiring that notice of certain events

be provided to an agent or other third person; specifying the form of the notice and when it is effective; creating s. 709.2201, F.S.; providing for the authority of an agent; providing limitations; providing that an agent's authority extends to property later acquired by the principal; creating s. 709.2202, F.S.; specifying that certain authority requires separate signed enumeration; restricting the amount of certain gifts made by an agent; specifying certain acts that do not require specific authority if the agent is authorized to conduct banking transactions; limiting the application of such provision; creating s. 709.2208, F.S.; providing for authority to conduct banking and security transactions; creating s. 709.2301, F.S.; specifying the role of common law; creating s. 709.2302, F.S.; providing for the preemption of laws relating to financial institutions; creating s. 709.2303, F.S.; providing for the recognition of other remedies; creating s. 709.2401, F.S.; specifying the relationship of the act to federal law regulating electronic signatures; creating s. 709.2402, F.S.; providing for powers of attorney executed before the effective date of the act; amending s. 736.0602, F.S.; conforming a cross-reference; repealing s. 709.01, F.S., relating to the authority of an agent when the principal is dead; repealing s. 709.015, F.S., relating to the authority of an agent when the principal is missing; repealing s. 709.08, F.S., relating to durable powers of attorney; repealing s. 709.11, F.S., relating to a

deployment-contingent power of attorney; providing an effective date.

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

Section 1. The Division of Statutory Revision is requested to create part I of chapter 709, Florida Statutes, consisting of ss. 709.02-709.07, entitled "POWERS OF APPOINTMENT."

Section 2. The Division of Statutory Revision is requested to create part II of chapter 709, Florida Statutes, consisting of ss. 709.2101-709.2402, entitled "POWERS OF ATTORNEY."

Section 3. Section 709.2101, Florida Statutes, is created to read:

709.2101 Short title.—This part may be cited as the "Florida Power of Attorney Act."

Section 4. Section 709.2102, Florida Statutes, is created to read:

709.2102 Definitions.—As used in this part, the term:

(1) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise. The term includes an original agent, co-agent, and successor agent.

(2) "Durable" means, with respect to a power of attorney, not terminated by the principal's incapacity.

(3) "Electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Financial institution" has the same meaning as in s.

655.005.

(5) "Incapacity" means the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.

(6) "Knowledge" means a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in question. An organization that conducts activities through employees has notice or knowledge of a fact involving a power of attorney only from the time information was received by an employee having responsibility to act on matters involving the power of attorney, or would have had if brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if the organization maintains reasonable routines for communicating significant information to the employee having responsibility to act on matters involving the power of attorney and there is reasonable compliance with the routines. Reasonable diligence does not require an employee to communicate information unless the communication is part of the individual's regular duties or the individual knows that a matter involving the power of attorney would be materially affected by the information.

(7) "Power of attorney" means a writing that grants authority to an agent to act in the place of the principal, whether or not the term is used in that writing.

(8) "Presently exercisable general power of appointment"

means, with respect to property or a property interest subject to a power of appointment, power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors, or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will.

(9) "Principal" means an individual who grants authority to an agent in a power of attorney.

(10) "Property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein.

(11) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(12) "Sign" means having present intent to authenticate or adopt a record to:

(a) Execute or adopt a tangible symbol; or

(b) Attach to, or logically associate with the record an electronic sound, symbol, or process.

(13) "Third person" means any person other than the principal, or the agent in the agent's capacity as agent.

Section 5. Section 709.2103, Florida Statutes, is created

to read:

709.2103 Applicability.—This part applies to all powers of attorney except:

(1) A proxy or other delegation to exercise voting rights or management rights with respect to an entity;

(2) A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose;

(3) A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; and

(4) A power created by a person other than an individual.

Section 6. Section 709.2104, Florida Statutes, is created to read:

709.2104 Durable power of attorney.—Except as otherwise provided under this part, a power of attorney is durable if it contains the words: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes," or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.

Section 7. Section 709.2105, Florida Statutes, is created to read:

709.2105 Qualifications of agent; execution of power of attorney.—

(1) The agent must be a natural person who is 18 years of

age or older or a financial institution that has trust powers, has a place of business in this state, and is authorized to conduct trust business in this state.

(2) A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in s. 695.03.

Section 8. Section 709.2106, Florida Statutes, is created to read:

709.2106 Validity of power of attorney.—

(1) A power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2105.

(2) A power of attorney executed before October 1, 2011, is valid if its execution complied with the law of this state at the time of execution.

(3) A power of attorney executed in another state which does not comply with the execution requirements of this part is valid in this state if, when the power of attorney was executed, the power of attorney and its execution complied with the law of the state of execution. A third person who is requested to accept a power of attorney that is valid in this state solely because of this subsection may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under this subsection must be provided at the principal's expense. A third person may accept a power of attorney that is valid in this state solely because of

this subsection if the agent does not provide the requested opinion of counsel, and in such case, a third person has no liability for refusing to accept the power of attorney. This subsection does not affect any other rights of a third person who is requested to accept the power of attorney under this part, or any other provisions of applicable law.

(4) A military power of attorney is valid if it is executed in accordance with 10 U.S.C. s. 1044b, as amended. A deployment-contingent power of attorney may be signed in advance, is effective upon the deployment of the principal, and shall be afforded full force and effect by the courts of this state.

(5) Except as otherwise provided in the power of attorney, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

Section 9. Section 709.2107, Florida Statutes, is created to read:

709.2107 Meaning and effectiveness of power of attorney.—The meaning and effectiveness of a power of attorney is governed by this part if the power of attorney:

(1) Is used in this state; or

(2) States that it is to be governed by the laws of this state.

Section 10. Section 709.2108, Florida Statutes, is created to read:

709.2108 When power of attorney is effective.—

(1) Except as provided in this section, a power of attorney is exercisable when executed.

(2) If a power of attorney executed before October 1, 2011, is conditioned on the principal's lack of capacity to manage property as defined in s. 744.102(12)(a), and the power of attorney has not become exercisable before that date, the power of attorney is exercisable upon the delivery of the affidavit of a physician who has primary responsibility for the treatment and care of the principal and who is licensed to practice medicine pursuant to chapter 458 or chapter 459 as of the date of the affidavit. The affidavit must state where the physician is licensed to practice medicine, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property.

(3) Except as provided in subsection (2) and section 709.2106(4), a power of attorney is ineffective if the power of attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency.

Section 11. Section 709.2109, Florida Statutes, is created to read:

709.2109 Termination or suspension of power of attorney or agent's authority.—

(1) A power of attorney terminates when:

(a) The principal dies;

(b) The principal becomes incapacitated, if the power of attorney is not durable;

(c) The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that

certain authority granted by the power of attorney is to be exercisable by the agent;

(d) The principal revokes the power of attorney;

(e) The power of attorney provides that it terminates;

(f) The purpose of the power of attorney is accomplished; or

(g) The agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

(2) An agent's authority is exercisable until the authority terminates. An agent's authority terminates when:

(a) The agent dies, becomes incapacitated, resigns, or is removed by a court;

(b) An action is filed for the dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney otherwise provides; or

(c) The power of attorney terminates.

(3) If any person initiates judicial proceedings to determine the principal's incapacity or for the appointment of a guardian advocate, the authority granted under the power of attorney is suspended until the petition is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney.

(a) If an emergency arises after initiation of proceedings to determine incapacity and before adjudication regarding the principal's capacity, the agent may petition the court in which the proceeding is pending for authorization to exercise a power granted under the power of attorney. The petition must set forth

the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

(b) Notwithstanding the provisions of this section, unless otherwise ordered by the court, a proceeding to determine incapacity does not affect the authority of the agent to make health care decisions for the principal, including, but not limited to, those provided in chapter 765. If the principal has executed a health care advance directive designating a health care surrogate, the terms of the directive control if the directive and the power of attorney are in conflict unless the power of attorney is later executed and expressly states otherwise.

(4) Termination or suspension of an agent's authority or of a power of attorney is not effective as to an agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Section 12. Section 709.2110, Florida Statutes, is created to read:

709.2110 Revocation of power of attorney.—

(1) A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney.

(2) Except as provided in subsection (1), the execution of a power of attorney does not revoke a power of attorney

previously executed by the principal.

Section 13. Section 709.2111, Florida Statutes, is created to read:

709.2111 Co-agents and successor agents.—

(1) A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

(2) A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. Unless the power of attorney otherwise provides, a successor agent:

(a) Has the same authority as that granted to the original agent; and

(b) May not act until the predecessor agents have resigned, have died, have become incapacitated, are no longer qualified to serve, or have declined to serve.

(3) Except as otherwise provided in the power of attorney and subsection (4), an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent.

(4) An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, including a predecessor agent, must take any action reasonably appropriate in the circumstances to safeguard the principal's best interests. If the agent in good faith believes that the principal is not incapacitated, giving notice to the principal is a sufficient action. An agent who fails to take action as

required by this subsection is liable to the principal for the principal's reasonably foreseeable damages that could have been avoided if the agent had taken such action.

(5) A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in subsection (4), a successor agent does not have a duty to institute any proceeding against a predecessor agent, or to file any claim against a predecessor agent's estate, for any of the predecessor agent's actions or omissions as agent.

(6) If a power of attorney requires that two or more persons act together as co-agents, notwithstanding the requirement that they act together, one or more of the agents may delegate to a co-agent the authority to conduct banking transactions as provided in s. 709.2208(1), whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to that section in the power of attorney.

Section 14. Section 709.2112, Florida Statutes, is created to read:

709.2112 Reimbursement and compensation of agent.—

(1) Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal.

(2) Unless the power of attorney otherwise provides, a qualified agent is entitled to compensation that is reasonable under the circumstances.

(3) Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent

is a qualified agent.

(4) For purposes of this section, the term "qualified agent" means an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, an attorney or certified public accountant who is licensed in this state, or a natural person who is a resident of this state and who has never been an agent for more than three principals at the same time.

Section 15. Section 709.2113, Florida Statutes, is created to read:

709.2113 Agent's acceptance of appointment.—Except as otherwise provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. The scope of an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

Section 16. Section 709.2114, Florida Statutes, is created to read:

709.2114 Agent's duties.—

(1) An agent is a fiduciary. Notwithstanding the provisions in the power of attorney, an agent who has accepted appointment:

(a) Must act only within the scope of authority granted in the power of attorney. In exercising that authority, the agent:

1. May not act contrary to the principal's reasonable expectations actually known by the agent;

2. Must act in good faith;

3. May not act in a manner that is contrary to the principal's best interest, except as provided in paragraph (2)(d) and s. 709.2202; and

4. To the extent actually known by the agent, must attempt to preserve the principal's estate plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

a. The value and nature of the principal's property;

b. The principal's foreseeable obligations and need for maintenance;

c. Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;

d. Eligibility for a benefit, a program, or assistance under a statute or rule; and

e. The principal's personal history of making or joining in making gifts;

(b) May not delegate authority to a third person except as provided in s. 518.112;

(c) Must keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and

(d) Must create and maintain an accurate inventory each time the agent accesses the principal's safe-deposit box, if the power of attorney authorizes the agent to access the box.

(2) Except as otherwise provided in the power of attorney, an agent who has accepted appointment shall:

(a) Act loyally for the sole benefit of the principal;

(b) Act so as not to create a conflict of interest that

impairs the agent's ability to act impartially in the principal's best interest;

(c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; and

(d) Cooperate with a person who has authority to make health care decisions for the principal in order to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

(3) An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

(4) If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

(5) Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

(6) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, transactions conducted on behalf of the principal, or safe-deposit box inventories, unless ordered by a court or requested by the principal, a court-appointed guardian, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in

interest of the principal's estate. If requested, the agent must comply with the request within 60 days or provide a writing or other record substantiating why additional time is needed and comply with the request within an additional 60 days.

Section 17. Section 709.2115, Florida Statutes, is created to read:

709.2115 Exoneration of agent.—A power of attorney may provide that the agent is not liable for any acts or decisions made by the agent in good faith and under the power of attorney, except to the extent the provision:

(1) Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Section 18. Section 709.2116, Florida Statutes, is created to read:

709.2116 Judicial relief; conflicts of interests.—

(1) A court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief.

(2) The following persons may petition the court:

(a) The principal or the agent, including any nominated successor agent.

(b) A guardian, conservator, trustee, or other fiduciary acting for the principal or the principal's estate.

(c) A person authorized to make health care decisions for

the principal if the health care of the principal is affected by the actions of the agent.

(d) Any other interested person if the person demonstrates to the court's satisfaction that the person is interested in the welfare of the principal and has a good faith belief that the court's intervention is necessary.

(e) A governmental agency having regulatory authority to protect the welfare of the principal.

(f) A person asked to honor the power of attorney.

(3) In any proceeding commenced by filing a petition under this section, including, but not limited to, the unreasonable refusal of a third person to allow an agent to act pursuant to the power of attorney, and in challenges to the proper exercise of authority by the agent, the court shall award reasonable attorney's fees and costs.

(4) If an agent's exercise of a power is challenged in a judicial proceeding brought by or on behalf of the principal on the grounds that the exercise of the power was affected by a conflict of interest, and evidence is presented that the agent or an affiliate of the agent had a personal interest in the exercise of the power, the agent or affiliate has the burden of proving, by clear and convincing evidence that the agent acted:

(a) Solely in the interest of the principal; or

(b) In good faith in the principal's best interest, and the conflict of interest was expressly authorized in the power of attorney.

(5) For purposes of subsection (4):

(a) A provision authorizing an agent to engage in a

transaction affected by a conflict of interest which is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

(b) Affiliates of an agent include:

1. The agent's spouse;

2. The agent's descendants, siblings, parents, or their spouses;

3. A corporation or other entity in which the agent, or a person who owns a significant interest in the agent, has an interest that might affect the agent's best judgment;

4. A person or entity that owns a significant interest in the agent; or

5. The agent acting in a fiduciary capacity for someone other than the principal.

Section 19. Section 709.2117, Florida Statutes, is created to read:

709.2117 Agent's liability.—An agent who violates this part is liable to the principal or the principal's successors in interest for the amount required to:

(1) Restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.

Section 20. Section 709.2118, Florida Statutes, is created to read:

709.2118 Agent's resignation.—Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal, to the guardian if the principal is incapacitated and one has been appointed for the principal, and to any co-agent, or if none, the next successor agent.

Section 21. Section 709.2119, Florida Statutes, is created to read:

709.2119 Acceptance of and reliance upon power of attorney.—

(1)(a) A third person who in good faith accepts a power of attorney that appears to be executed in accordance with this part may rely upon the power of attorney and may enforce an authorized transaction against the principal's property as if:

1. The power of attorney were genuine, valid, and still in effect;

2. The agent's authority were genuine, valid, and still in effect; and

3. The authority of the officer executing for or on behalf of a financial institution that has trust powers and acting as agent is genuine, valid, and still in effect.

(b) For purposes of this subsection, and without limiting what constitutes good faith, a third person does not accept a power of attorney in good faith if the third person has notice that:

1. The power of attorney is void, invalid, or terminated; or

2. The purported agent's authority is void, invalid,

suspended, or terminated.

(2) A third person may require:

(a) An agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased; that there has been no revocation, or partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney; that there has been no suspension by initiation of proceedings to determine incapacity, or to appoint a guardian, of the principal; and, if the affiant is a successor agent, the reasons for the unavailability of the predecessor agents, if any, at the time the authority is exercised.

(b) An officer of a financial institution acting as agent to execute a separate affidavit, or include in the form of the affidavit, the officer's title and a statement that the officer has full authority to perform all acts and enter into all transactions authorized by the power of attorney for and on behalf of the financial institution in its capacity as agent. A written affidavit executed by the agent under this subsection may, but need not, be in the following form:

STATE OF.....

COUNTY OF.....

Before me, the undersigned authority, personally appeared ...(attorney in fact)... ("Affiant"), who swore or affirmed that:

1. Affiant is the attorney in fact named in the Durable

Power of Attorney executed by ...(principal)... ("Principal") on ...(date)....

2. This Power of Attorney is currently exercisable by Affiant. The principal is domiciled in ...(insert name of state, territory, or foreign country)....

3. To the best of the Affiant's knowledge after diligent search and inquiry:

a. The Principal is not deceased;

b. Affiant's authority has not been suspended by initiation of proceedings to determine incapacity or to appoint a guardian or a guardian advocate; and

c. There has been no revocation, or partial or complete termination, of the power of attorney or of the Affiant's authority.

4. The Affiant is acting within the scope of authority granted in the power of attorney.

5. The Affiant is the successor to ...(insert name of predecessor agent)..., who has resigned, died, become incapacitated, is no longer qualified to serve, has declined to serve as agent, or is otherwise unable to act, if applicable.

6. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, has been partially or completely terminated or suspended, or is no longer valid because of the death or adjudication of incapacity of the Principal.

.....

...(Affiant)...

Sworn to (or affirmed) and subscribed before me this .... day of ...(month)..., ...(year)..., by ...(name of person making statement)...

...(Signature of Notary Public-State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known OR Produced Identification

...(Type of Identification Produced)...

(3) A third person who is asked to accept a power of attorney that appears to be executed in accordance with s. 709.2103 may in good faith request, and rely upon, without further investigation:

(a) A verified English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English;

(b) An opinion of counsel as to any matter of law concerning the power of attorney if the third person making the request provides in a writing or other record the reason for the request; or

(c) The affidavit described in subsection (2).

(4) An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made after the time specified in s. 709.2120(1) for acceptance or rejection of the power of

attorney.

(5) Third persons who act in reliance upon the authority granted to an agent and in accordance with the instructions of the agent shall be held harmless by the principal from any loss suffered or liability incurred as a result of actions taken before the receipt of written notice as provided in s. 709.2121. A third person who acts in good faith upon any representation, direction, decision, or act of the agent is not liable to the principal or the principal's estate, beneficiaries, or joint owners for those acts.

(6) The acts of an agent under a power of attorney are as valid and binding on the principal or the principal's estate as if the principal were alive and competent if, in connection with any activity pertaining to hostilities in which the United States is then engaged, the principal is officially listed or reported by a branch of the United States Armed Forces in a missing status as defined in 37 U.S.C. s. 551 or 5 U.S.C. s. 5561, regardless of whether the principal is dead, alive, or incompetent. Homestead property held as tenants by the entireties may not be conveyed by a power of attorney regulated under this provision until 1 year after the first official report or listing of the principal as missing or missing in action. An affidavit of an officer of the Armed Forces having maintenance and control of the records pertaining to those missing or missing in action that the principal has been in that status for a given period is conclusive presumption of the fact.

Section 22. Section 709.2120, Florida Statutes, is created to read:

709.2120 Refusal to accept power of attorney.—

(1) Except as provided in subsection (2):

(a) A third person must accept or reject a power of attorney within a reasonable time. A third person who rejects a power of attorney must state in writing the reason for the rejection.

(b) Four days, excluding Saturdays, Sundays, and legal holidays, are presumed to be a reasonable time for a financial institution to accept or reject a power of attorney with respect to:

1. A banking transaction, if the power of attorney expressly contains authority to conduct banking transactions pursuant to s. 709.2208(1); or

2. A security transaction, if the power of attorney expressly contains authority to conduct security transactions pursuant to s. 709.2208(2).

(c) A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

(2) A third person is not required to accept a power of attorney if:

(a) The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(b) The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;

(c) A timely request by the third person for an affidavit, English translation, or opinion of counsel under s. 709.2119(4)

is refused by the agent;

(d) Except as provided in paragraph (b), the third person believes in good faith that the power is not valid or that the agent does not have authority to perform the act requested; or

(e) The third person makes, or has knowledge that another person has made, a report to the local adult protective services office stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

(3) A third person who, in violation of this section, refuses to accept a power of attorney is subject to:

(a) A court order mandating acceptance of the power of attorney; and

(b) Liability for damages, including reasonable attorney's fees and costs, incurred in any action or proceeding that confirms, for the purpose tendered, the validity of the power of attorney or mandates acceptance of the power of attorney.

Section 23. Section 709.2121, Florida Statutes, is created to read:

709.2121 Notice.—

(1) A notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until written notice is provided to the agent or any third persons

relying upon a power of attorney.

(2) Notice must be in writing and must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message.

(3) Notice to a financial institution must contain the name, address, and the last four digits of the principal's taxpayer identification number and be directed to an officer or a manager of the financial institution in this state.

(4) Notice is effective when given, except that notice upon a financial institution, brokerage company, or title insurance company is not effective until 5 days, excluding Saturdays, Sundays, and legal holidays, after it is received.

Section 24. Section 709.2201, Florida Statutes, is created to read:

709.2201 Authority of agent.—

(1) Except as provided in this section or other applicable law, an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, is not an express grant of specific authority and does not grant any authority to the agent. Court

approval is not required for any action of the agent in furtherance of an express grant of specific authority.

(2) As a confirmation of the law in effect in this state when this part became effective, such authorization may include, without limitation, authority to:

(a) Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities into or out of the principal's or nominee's name.

(b) Convey or mortgage homestead property. However, if the principal is married, the agent may not mortgage or convey homestead property without joinder of the principal's spouse or the spouse's guardian. Joinder by a spouse may be accomplished by the exercise of authority in a power of attorney executed by the joining spouse, and either spouse may appoint the other as his or her agent.

(c) If such authority is specifically granted in a durable power of attorney, make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.

(3) Notwithstanding the provisions of this section, an agent may not:

(a) Perform duties under a contract that requires the exercise of personal services of the principal;

(b) Make any affidavit as to the personal knowledge of the principal;

(c) Vote in any public election on behalf of the principal;

(d) Execute or revoke any will or codicil for the principal; or

(e) Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

(4) Subject to s. 709.2202, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(5) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed and to property that the principal acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(6) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

Section 25. Section 709.2202, Florida Statutes, is created to read:

709.2202 Authority that requires separate signed enumeration.—

(1) Notwithstanding s. 709.2201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, and the exercise is not otherwise prohibited by another agreement or instrument:

(a) Create an inter vivos trust;

(b) With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;

(c) Make a gift, subject to subsection (3);

(d) Create or change rights of survivorship;

(e) Create or change a beneficiary designation;

(f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

(g) Disclaim property and powers of appointment.

(2) Notwithstanding a grant of authority to do an act described in subsection (1), unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

(3) Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gifts authorizes the agent to only:

(a) Make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under 26 U.S.C. s. 2503(b), as amended, without regard to whether the

federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to 26 U.S.C. s. 2513, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(b) Consent, pursuant to 26 U.S.C. s. 2513, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

(4) Notwithstanding subsection (1), if a power of attorney is otherwise sufficient to grant an agent authority to conduct banking transactions, as provided in s. 709.2208(1), conduct investment transactions as provided in s. 709.2208(2), or otherwise make additions to or withdrawals from an account of the principal, making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account, or any other account held jointly or otherwise held in survivorship or payable on death, is not considered to be a change to the survivorship feature or beneficiary designation, and no further specific authority is required for the agent to exercise such authority. A bank or other financial institution does not have a duty to inquire as to the appropriateness of the agent's exercise of that authority and is not liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. This subsection does not eliminate the agent's fiduciary duties to the principal with respect to any exercise of the power of attorney.

(5) This section does not apply to a power of attorney

executed before October 1, 2011.

Section 26. Section 709.2208, Florida Statutes, is created to read:

709.2208 Banks and other financial institutions.—

(1) A power of attorney that includes the statement that the agent has "authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes" grants general authority to the agent to engage in the following transactions with financial institutions without additional specific enumeration in the power of attorney:

(a) Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution.

(b) Contract for services available from a financial institution, including renting a safe-deposit box or space in a vault.

(c) Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution.

(d) Receive statements of account, vouchers, notices, and similar documents from a financial institution and act with respect to them.

(e) Purchase cashier's checks, official checks, counter checks, bank drafts, money orders, and similar instruments.

(f) Endorse and negotiate checks, cashier's checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the

principal and pay it when due.

(g) Apply for, receive, and use debit cards, electronic transaction authorizations, and traveler's checks from a financial institution.

(h) Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution.

(i) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

(2) A power of attorney that specifically includes the statement that the agent has "authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes" grants general authority to the agent with respect to securities held by financial institutions to take the following actions without additional specific enumeration in the power of attorney:

(a) Buy, sell, and exchange investment instruments.

(b) Establish, continue, modify, or terminate an account with respect to investment instruments.

(c) Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal.

(d) Receive certificates and other evidences of ownership with respect to investment instruments.

(e) Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

(f) Sell commodity futures contracts and call and put options on stocks and stock indexes.

For purposes of this subsection, the term "investment instruments" means stocks, bonds, mutual funds, and all other types of securities and financial instruments, whether held directly, indirectly, or in any other manner, including shares or interests in a private investment fund, including, but not limited to, a private investment fund organized as a limited partnership, a limited liability company, a statutory or common law business trust, a statutory trust, or a real estate investment trust, joint venture, or any other general or limited partnership; derivatives or other interests of any nature in securities such as options, options on futures, and variable forward contracts; mutual funds; common trust funds; money market funds; hedge funds; private equity or venture capital funds; insurance contracts; and other entities or vehicles investing in securities or interests in securities whether registered or otherwise, except commodity futures contracts and call and put options on stocks and stock indexes.

Section 27. Section 709.2301, Florida Statutes, is created to read:

709.2301 Principles of law and equity.—The common law of agency and principles of equity supplement this part, except as modified by this part or other state law.

Section 28. Section 709.2302, Florida Statutes, is created to read:

709.2302 Laws applicable to financial institutions and

entities.—This part does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part.

Section 29. Section 709.2303, Florida Statutes, is created to read:

709.2303 Remedies under other law.—The remedies under this part are not exclusive and do not abrogate any right or remedy under any other law other than this part.

Section 30. Section 709.2401, Florida Statutes, is created to read:

709.2401 Relation to electronic signatures in federal law.—This part modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. s. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, or authorize electronic delivery of any of the notices described in s. 103(b) of that act.

Section 31. Section 709.2402, Florida Statutes, is created to read:

709.2402 Effect on existing powers of attorney.—Except as otherwise provided in this part:

(1) This part applies to a power of attorney created before, on, or after October 1, 2011, and to acts of the agent occurring on or after that date.

(2) An act of the agent occurring before October 1, 2011, is not affected by this part.

Section 32. Subsection (5) of section 736.0602, Florida Statutes, is amended to read:

736.0602 Revocation or amendment of revocable trust.—

(5) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only as authorized by s. 709.2202 ~~709.08~~.

Section 33. Sections 709.01, 709.015, 709.08, and 709.11 Florida Statutes, are repealed.

Section 34. This act shall take effect October 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 821 Eyewitness Identification
SPONSOR(S): Criminal Justice Subcommittee; Thurston
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 1206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 2 N, As CS	Williams	Cunningham
2) Judiciary Committee		Williams	Havlicak
3) Appropriations Committee			

SUMMARY ANALYSIS

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting photographic and live lineups with eyewitnesses to crimes during criminal investigations.

CS/HB 821 creates a procedure that law enforcement officers must follow when they are conducting photographic and live lineups with eyewitnesses to crimes. The bill provides:

- Eyewitness identification procedures that must be utilized when conducting a photographic or live eyewitness lineup.
- Authorization to use alternative methods for eyewitness identification that have been approved by the Criminal Justice Standards and Training Commission (Commission).
- Remedies for a defendant when eyewitness identification procedures are not followed.
- A requirement that the Commission, in consultation with the Florida Department of Law Enforcement, develop training materials and conduct training programs on eyewitness identification procedures.

The bill may have a fiscal impact on law enforcement agencies. See Fiscal Section.

This bill is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Eyewitness misidentification has been a factor in 75 percent of the 267 cases nationwide in which DNA evidence has helped prove wrongful convictions. According to Gary Wells, an Iowa State University psychologist who has studied the problems with eyewitness identification for more than 20 years, it is the number one reason innocent people are wrongfully convicted.[1] According to the Innocence Project of Florida, the same percentage applies in the 12 Florida cases, nine of which involved issues of eyewitness misidentification.[2]

Eyewitness Identification Procedure

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting photographic and live lineups with eyewitnesses to crimes during criminal investigations. At least three other states, including North Carolina, Maryland, and Ohio have enacted statutes regarding eyewitness identification procedures.

There are many variables in eyewitness identification procedures. First, there are different ways to conduct them. For example, in the presentation of photo lineups, there are two main methods: sequential (one photo is shown at the time) and simultaneous (photo array shows all photos at once). Then there are the variables such as what an officer should or shouldn't say to an eyewitness about the procedure, whether the procedure should be videotaped or otherwise recorded, and whether officers have been trained to control body language or other suggestive actions during the procedure.

Some law enforcement agencies, although not statutorily required to follow a particular procedure, have included eyewitness identification procedures in their agency's Standard Operating Procedures. A survey of 230 Florida agencies, conducted by the Innocence Project of Florida, indicated that 37 of those agencies had written eyewitness identification policies while 193 did not.[3]

As Dr. Roy Malpass, a professor in Legal Psychology at the University of Texas at El Paso, and an expert in the field of eyewitness identification, explained during his presentation to the Florida Innocence Commission (Innocence Commission)[4] during its January 2011 meeting, it is important to have protocol compliance.[5] Dr. Malpass also recommended videotaping the identification procedure.[6]

Dr. Malpass made further recommendations and offered certain opinions during his presentation to the Innocence Commission in January. These included:

- There is no definitive study showing that sequential or simultaneous photo lineups is the superior method of presentation, although he believes that sequential photo lineups suppresses all identifications.
- A "confidence statement" from the witness is not a good predictor of accuracy.

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[1] Presentation to Innocence Commission, November 22, 2010. Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, Wells, Quinlivan, *Law Hum Behav* (2009) 33:1-24. See also, (http://articles.orlandosentinel.com/2011-03-21/news/os-innocence-commission-vote-20110321-19_1_lineups-florida-s-innocence-commission-florida-innocence-commisssion) (last accessed March 25, 2011).

[2] E-mail correspondence with Seth Miller, Executive Director, Innocence Project of Florida, March 23, 2011 (on file with House Criminal Justice Subcommittee staff).

[3] Survey on file with House Criminal Justice Subcommittee staff.

[4] On July 2, 2010, Chief Justice Charles T. Canady established, by Administrative Order AOSC10-39, the Florida Innocence Commission. The primary objective of the Florida Innocence Commission is to make recommendations to the Supreme Court which reduce or eliminate the possibility of the wrongful conviction of an innocent person. *See* Florida State Courts, Florida Innocence Commission: Mission and Objectives. (http://www.flcourts.org/gen_public/innocence.shtml) (last accessed March 25, 2011).

[5] Innocence Commission meeting Minutes, January 2011 meeting (on file with House Criminal Justice Subcommittee staff).

[6] *Id.*

- With regard to training on eyewitness identification, much depends upon the "buy-in" of the people being trained.
- Appropriate instructions regarding the procedure should be developed and given to witnesses. For example: the suspect may or may not be in the lineup; there is no requirement to identify a particular person; and if an identification is not made, the investigation will continue.
- There should be no extraneous comments made by law enforcement officers because informal interaction has the potential to create bias.
- The quality of the photo spread is very important.
- "Blind" administration, where the officer conducting the procedure is unaware of the identity of the suspect, is a good method for use in both sequential and simultaneous photo lineups.[7]

If an agency has a particular eyewitness identification protocol in place and the protocol is not followed, the issue becomes ripe for a challenge on the issue of reliability and therefore, admissibility, of the identification evidence at trial. This possibility provides an incentive for eyewitness identification protocol compliance. Conversely, if the eyewitness identification protocol is followed, motions to suppress should rarely be filed as there is likely no good-faith basis for filing them.

The Florida Supreme Court has ruled on the admissibility of eyewitness identifications at trial as follows:

> The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.[8] The factors to be considered in evaluating the likelihood of misidentification include:
>
> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[9] If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part of the test.[10,11]

Effect of the Bill

CS/HB 821 creates a new section of Florida Statutes relating to eyewitness identifications in criminal cases. It is a comprehensive bill that sets forth specific procedures that state, county, municipal, and other law enforcement agencies must implement when conducting lineups. This section is cited as the "Eyewitness Identification Reform Act."

Definitions

The bill provides definitions for the following terms relating to eyewitness identification procedures:

- "Eyewitness" means a person whose identification by sight of another person may be relevant in a criminal proceeding.
- "Filler" means a person or a photograph of a person who is not suspected of an offense but is included in a lineup.
- "Independent administrator" means a person who is not participating in the investigation of a criminal offense and is unaware of which person in the lineup is the suspect.
- "Lineup" means a photo lineup or live lineup.

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[7] *Id.*

[8] *See Thomas v. State*, 748 So.2d 970, 981 (Fla.1999); Green v. State, 641 So.2d 391, 394 (Fla.1994); *Grant v. State*, 390 So.2d 341, 343 (Fla.1980).

[9] *See Grant*, 390 So.2d at 343 (quoting Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[10] *See Thomas*, 748 So.2d at 981; *Green*, 641 So.2d at 394; *Grant*, 390 So.2d at 344.

[11] *Rimmer v. State,* 825 So.2d 304 (Fla. 2002).

- "Lineup administrator" means the person who conducts a lineup.
- "Live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
- "Photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

Procedures to be Followed
An independent administrator must conduct the lineup. This is sometimes referred to as a "blind" administrator. The independent administrator is not participating in the investigation and does not know the identity of the suspect. This is one element of the scientific studies on eyewitness identification that is most agreed upon by the scholars in the area of study as being critical to untainted suspect identification.

Prior to the lineup, officers are required to instruct the eyewitness that:

1) The perpetrator might or might not be in the lineup;
2) The lineup administrator does not know the suspect's identity;
3) The eyewitness should not feel compelled to make an identification;
4) It is as important to exclude innocent persons as it is to identify the perpetrator; and
5) The investigation will continue with or without an identification.

The eyewitness must also be given a copy of these instructions. If he or she refuses to sign a document acknowledging receipt of the instructions, the lineup administrator is directed to sign it and make a notation of the eyewitness's refusal.

Alternative Methods for Identification Procedures
The bill provides that in lieu of using an independent administrator, a photo lineup procedure may be conducted using an alternative method specified and approved by the Criminal Justice Standards and Training Commission (Commission).[12] Any alternative method must be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

- Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the lineup administrator from seeing which photo the witness is viewing until after the procedure is completed.
- A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.
- Any other procedures that achieve neutral administration.

Remedies as Consequence of not Following Statutory Procedures
The court must consider noncompliance with the statutory suspect identification procedures when deciding a motion to suppress the identification from being presented as evidence at trial. A failure on the part of a person to comply with eyewitness identification procedures is admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

[12] In Florida, the Criminal Justice Standards and Training Commission (CJSTC), housed within the Florida Department of Law Enforcement, establishes uniform minimum standards for the employment and training of full-time, part-time, and auxiliary law enforcement, correctional, and correctional probation officers. Every prospective law enforcement officer, correctional officer, and correctional probation officer must successfully complete a CJSTC-developed Basic Recruit Training Program in order to receive their certification. (http://www.fdle.state.fl.us/Content/getdoc/91a75023-5a74-40ef-814d-8e7e5b622d4d/CJSTC-Home-Page.aspx) (last accessed March 28, 2011).

When evidence of compliance or non-compliance has been presented at trial, the bill requires the jury to be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Education and Training
The Commission, in consultation with the Florida Department of Law Enforcement, is required to develop educational materials and conduct training programs for law enforcement on the eyewitness identification procedures set forth in the bill.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of the Florida Statutes related to eyewitness identification.

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:

   The bill requires the Commission, in consultation with the Florida Department of Law Enforcement, to create educational materials and conduct training programs for law enforcement on the eyewitness identification procedures. This may have a fiscal impact on the Commission.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The use of photo lineups with eyewitnesses to crimes occurs often in most law enforcement organizations. County Sheriff's Offices alone do hundreds every year.[13] Nonetheless, smaller law enforcement agencies, in particular, may experience some fiscal impact from the implementation of the requirements of this bill.

   Agencies that have few officers on a shift at any given time may have to call in additional officers anytime a lineup that requires an independent administrator is conducted due to the fact that all or most officers on the shift are a part of the investigation. An officer who has knowledge of the identification of a suspect would not be eligible to conduct the lineup under the provisions of the bill. It should be noted, however, that alternative methods of conducting eyewitness identification procedures are provided in the bill. The alternative methods should allow the smaller agencies flexibility since an independent administrator is not required.

   The Florida Sheriffs Association reports that the bill will force significant increased costs upon law enforcement agencies, not only in overtime costs, but in training and court costs.[14]

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[13] Email from Frank Messersmith, Florida Sheriff's Association. March 25, 2011 (on file with House Criminal Justice Subcommittee staff).
[14] *Id.*

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

To the extent that counties (local law enforcement agencies) are obligated to expend funds in order to meet the requirements of the eyewitness identification procedures provided by the bill, the bill could constitute a mandate as defined in Article VII, Section 18 of the Florida Constitution for which no funding source is provided.

Laws that have an insignificant fiscal impact are exempt from the requirements of Article VII, Section 18 of the Florida Constitution. For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on Florida's 2010 census report,[14] a bill that has a statewide fiscal impact on counties and municipalities in aggregate or in excess of $1.8 million would be characterized as a mandate. It is unknown at this time how much law enforcement agencies would be required to spend in order to meet the requirements of the eyewitness identification procedures provided by the bill. If the fiscal impact is less than $1.8 million, the impact is insignificant, and an exemption to the mandates provision exists.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires the jury to be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. Jury instructions must be adopted by the Florida Supreme Court, therefore, this part of the bill will require action by the court after it is presented with a proposed instruction for consideration. Standard Jury Instructions for criminal cases are often proposed and adopted based upon the Legislature's revision of the criminal statutes, soon after the end of each legislative session. However, in the meantime, an attorney could present his or her own proposed instruction to the trial court and it could be given to the jury. The trial court has the prerogative to give instructions outside the Standard Jury Instructions, however the court runs the risk of that issue being raised on appeal.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 29, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment removes the following eyewitness identification procedure requirements from the bill:

[14] http://www.edr.state.fl.us/Content/population-demographics/2010-census/index.cfm (last accessed March 28, 2011).

- That sequential presentation of individuals or photos be presented to witnesses when conducting a lineup.
- That six photos or people be included in a lineup.
- That a witness's confidence level of the identification be sought and documented.
- That the suspect be placed in a different position in the lineup for each witness and the eyewitness not be told anything regarding the suspect's position in the lineup nor anything else that might influence the identification procedure.
- That a video recording of a live lineup be made.

This analysis is drafted to the Committee Substitute.

A bill to be entitled

An act relating to eyewitness identification; providing a short title; defining terms; requiring lineups conducted by state, county, municipal, and other law enforcement agencies to meet specified requirements; requiring an eyewitness to sign an acknowledgement that he or she received lineup instructions; specifying remedies for failing to adhere to eyewitness identification procedures; requiring the Criminal Justice Standards and Training Commission to create educational materials and conduct training programs on how to conduct lineups in compliance with the act; providing an effective date.

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

Section 1. Eyewitness identification.—

(1) SHORT TITLE.—This section may be cited as the "Eyewitness Identification Reform Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Eyewitness" means a person whose identification by sight of another person may be relevant in a criminal proceeding.

(b) "Filler" means a person or a photograph of a person who is not suspected of an offense but is included in a lineup.

(c) "Independent administrator" means a person who is not participating in the investigation of a criminal offense and is unaware of which person in the lineup is the suspect.

(d) "Lineup" means a photo lineup or live lineup.

(e) "Lineup administrator" means the person who conducts a lineup.

(f) "Live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime.

(g) "Photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime.

(3) EYEWITNESS IDENTIFICATION PROCEDURES.—Lineups conducted in this state by state, county, municipal, and other law enforcement agencies must meet all of the following requirements:

(a) A lineup must be conducted by an independent administrator. In lieu of using an independent administrator, a photo lineup eyewitness identification procedure may be conducted using an alternative method specified and approved by the Criminal Justice Standards and Training Commission. Any alternative method must be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

1. An automated computer program that can automatically administer the photo lineup directly to an eyewitness and prevent the lineup administrator from seeing which photo the witness is viewing until after the procedure is completed.

2. A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the lineup administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.

3. Any other procedure that achieves neutral administration.

(b) Before a lineup, the eyewitness shall be instructed that:

1. The perpetrator may or may not be in the lineup;

2. The lineup administrator is unaware of which person in the lineup is the suspect;

3. The eyewitness should not feel compelled to make an identification;

4. It is as important to exclude innocent persons as it is to identify the perpetrator; and

5. The investigation will continue with or without an identification.

The eyewitness shall acknowledge, in writing, having received a copy of the lineup instructions. If the eyewitness refuses to sign a document acknowledging receipt of the instructions, the lineup administrator shall indicate on the acknowledgement the refusal of the eyewitness to sign the acknowledgement and then sign the acknowledgement himself or herself.

(4) REMEDIES.—All of the following remedies are available when a person does not comply with the requirements of this section:

(a) A person's failure to comply with any requirement of this section shall be:

1. Considered by the court when adjudicating motions to suppress eyewitness identification.

2. Admissible in support of claims of eyewitness misidentification as long as such evidence is otherwise admissible.

(b) When evidence of compliance or noncompliance with any requirement of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

(5) EDUCATION AND TRAINING.—The Criminal Justice Standards and Training Commission, in consultation with the Department of Law Enforcement, shall create educational materials and conduct training programs on how to conduct lineups in compliance with this section.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 927 Adverse Possession
SPONSOR(S): Roberson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Billmeier	Bond
2) Finance & Tax Committee	22 Y, 0 N	Flieger	Langston
3) Judiciary Committee		Billmeier LMB	Havlicak RH

SUMMARY ANALYSIS

This bill amends the current statutory process for gaining title to real property via an adverse possession claim without color of title. Specifically, this bill includes occupation and maintenance as one of the forms of proof of possession of property subject to an adverse possession claim, requires the property appraiser to provide notice to the owner of record that an adverse possession claim was made, and provides for priority of property tax payments made by owners of record by requiring refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record. The change in tax priority could effectively preclude an adverse possessor from obtaining title in some situations, as current law requires tax payment as an element of an adverse possession claim.

The bill provides that the Department of Revenue develop a uniform statewide adverse possession return. In addition to the information on the sample return the Department of Revenue currently uses, the uniform return must include a "full and complete" legal description of the property being possessed and a description of how he or she is using the property subject to the adverse possession claim. The adverse possessor must attest to the truthfulness of the information provided in the return under penalty of perjury. The bill grants emergency rulemaking authority to the Department of Revenue for the purposes of creating this return.

The bill also prescribes procedures governing an adverse possession claim against a portion of an identified parcel of property and against property that does not currently have a unique parcel identification number. It specifies when the property appraiser may add and remove the adverse possessor to and from the parcel information on the tax roll and requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser.

In addition to the tax priority change mentioned above, the bill provides that tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

This bill has an effective date of July 1, 2011, and applies to adverse possession claims in which the return was submitted on or after that date, except for certain procedural provisions governing the property appraiser's administration of the adverse possession claims. These provisions will apply to adverse possession claims in which the return was submitted before, on, or after July 1, 2011.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Adverse Possession

"Adverse possession" is an "actual and visible appropriation of property commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another."[1] It has also been defined as "the open and notorious possession and occupation of real property under an evident claim or color of right, or, in other words, a possession in opposition to the true title and record owner, commenced in wrong and maintained in right."[2]

In Florida, there are two ways to acquire land by adverse possession, which are prescribed by statute.[3] First, an individual adversely occupying property may claim property under color of title if he or she can demonstrate that the claim to title is the derivative of a recorded written document and that he or she has been in possession of the property for at least seven years.[4] It is irrelevant whether the recorded document is legally valid or is fraudulent or faulty. To demonstrate possession, the adverse possessor must prove that he or she cultivated or improved the land, or protected the land by a substantial enclosure.[5] Alternatively, in the event a person occupies land continuously without any legal document to support a claim for title, the person may seek title to the property by filing a return with the county property appraiser's office within one year of entry onto the property, and paying all property taxes and any assessed liens during the possession of the property for seven consecutive years.[6] Similar to claims made with color of title, the adverse possessor may demonstrate possession of the property by showing that he or she:

- Protected the property by a substantial enclosure (typically a fence); or
- Cultivated or improved the property.[7]

Florida courts have noted that "[p]ublic policy and stability of our society . . . requires strict compliance with the appropriate statutes by those seeking ownership through adverse possession."[8] Adverse possession is not favored, and all doubts relating to the adverse possession claim must be resolved in favor of the property owner of record.[9] The adverse possessor must prove each essential element of an adverse possession claim by clear and convincing evidence.[10] Therefore, the adverse possession claim cannot be "'established by loose, uncertain testimony which necessitates resort to mere conjecture.'"[11]

Effect of Proposed Changes

Possession of the Property

This bill makes several changes to the current language included in the adverse possession (without color of title) statute for clarity, including a change designed to account for the establishment of "possession" in urban areas, and to make clear that property will be deemed to be possessed by the adverse possessor when:

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[1] 2 Fla. Jur 2d Adverse Possession s. 2
[2] *Id.*
[3] *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So.2d 1231, 1234 (Fla. 1st DCA 2007).
[4] Section 95.16, F.S.
[5] *Id.*
[6] Section 95.18(1), F.S.
[7] Section 95.18(2), F.S.
[8] *Candler Holdings Ltd. I,* 947 So.2d at 1234.
[9] *Id.*
[10] *Id.*
[11] *Id.* (quoting *Grant v. Strickland*, 385 So. 2d 1123, 1125 (Fla. 1st DCA 1980)).

- It is protected by a substantial enclosure;
- It has been usually cultivated or improved; or
- It has been occupied and maintained.

In effect, a person claiming adverse possession may establish possession pursuant to the statute by satisfying any of these three criteria. Because properties subject to adverse possession claims in urban areas may not, in some instances, be amenable to protection by a substantial enclosure, or cultivation or improvement, this bill allows the adverse possessor to establish possession by occupying and maintaining the property.

Adverse Possession Return

This bill makes several changes to the information contained in the adverse possession return submitted by an adverse possessor to initiate the adverse possession claim. This bill requires the Department of Revenue (DOR) to develop a uniform adverse possession return to be used throughout the state. In addition to the information contained on the current form developed by DOR, this bill requires the adverse possessor to provide a "full and complete legal description of the property" on the return.[12] The adverse possessor must also attest to the truthfulness of the information contained on the form under penalty of perjury.[13] Finally, this bill requires the adverse possessor to provide a description of his or her use of the property in the return.

Emergency Rulemaking Authority

This bill grants the DOR the authority to adopt emergency rules related to the changes to the adverse possession return. This bill provides that the executive director of DOR is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

Notice to Owner of Record

This bill requires the property appraiser to provide notice to the owner of record that an adverse possession return was submitted. The property appraiser must send to the owner of record a copy of the return, via regular mail. The property appraiser is also required to inform the owner of record that any tax payment made by the owner of record prior to April 1 following the year in which the tax is assessed will have priority over any tax payment made by the adverse possessor.

Property Appraiser's Administration of the Return

Upon submission of the return, the property appraiser must complete a receipt acknowledging submission of the return. This bill authorizes the property appraiser to refuse to accept a return if it fails to comply with the requirements prescribed in this bill. This bill requires the property appraiser to add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been initiated upon receipt of the adverse possession return.[14] The property

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[12] DOR created a sample form return for use by property appraisers, which includes the following information: date of filing; date of entering into possession of the property; name and address of the claimant; legal description of the property; notarization clause; and receipt (to be completed by the property appraiser or a designated representative upon submission of the return). *See* Florida Dep't of Revenue, Form DR-452, *Form for Return of Real Property in Attempt to Establish Adverse Possession without Color of Title* (rev. Aug. 1993).

[13] A person who knowingly made a false declaration on the return would be guilty of the crime of perjury by false written declaration, which is a third-degree felony, punishable by imprisonment not to exceed five years and a fine not to exceed $5,000. Section 92.525(3), F.S.

[14] Until a bulletin by DOR advised otherwise, some property appraisers were adding the adverse possessor as an additional "owner" on the tax roll. Florida Dep't of Revenue, *Florida Department of Revenue Property Tax Information Bulletin: Return of Real Property in Attempt to Establish Adverse Possession without Color of Title, Form DR-452* (Jan. 25, 2010).

appraiser is also required to maintain the adverse possession return in the property appraiser's records.

Claim Against a Portion of a Parcel or Against Property Without a Parcel Number

This bill prescribes procedures when an adverse possession claim is made against a *portion* of property with a unique parcel identification number. The person claiming adverse possession must provide a legal description of the portion sufficient for the property appraiser to identify the portion. If the property appraiser cannot identify the portion of property from the description, the person must obtain a survey of the portion of property. If the whole property already has been assigned a parcel identification number, the property appraiser may not assign a new parcel number to the portion of the property subject to the claim. The property appraiser shall assign a fair and just value to the portion of the property subject to the claim.

This bill also prescribes procedures when an adverse possession claim is made against property that does not yet have a parcel identification number. The person claiming adverse possession shall provide a legal description of the property sufficient for the property appraiser to identify it. If the property appraiser cannot identify the property from the description, the person must obtain a survey of the property. The property appraiser shall assign a parcel identification number to the property and assign a fair and just value to the property.

Removal of Notation from Parcel Information

This bill also delineates when the property appraiser may remove the adverse possessor from the parcel information contained in the tax roll. This bill requires the property appraiser to remove the notation to the legal description on the tax roll that an adverse possession return has been submitted if:

- The adverse possessor notifies the property appraiser in writing that he or she is withdrawing the claim;
- The owner of record provides a certified copy of a court order, entered after the date of the submission of the return, establishing title in the owner of record;
- The property appraiser receives a recorded deed, filed after the date of the submission of the return, transferring title of the same property subject to the claim from the adverse possessor to the owner of record; or
- The tax collector or owner of record submits to the property appraiser a receipt demonstrating that the owner of record has made an annual tax payment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

If any one of these events occurs, the property appraiser must also remove the adverse possession return from the property appraiser's records.

Adverse Possession Filing Notation

This bill requires every property appraiser who maintains a public searchable database to provide a clear and obvious notation in the parcel information of the database maintained by the property appraiser that an adverse possession return has been submitted for the particular parcel. Those property appraisers who do not currently offer a searchable database to the public are not subject to this requirement, unless they offer a searchable database to the public in the future.

Tax Payments

This bill provides for priority of property tax payments made by owners of record whose property is subject to an adverse possession claim. Current law provides that if an adverse possessor makes a tax payment prior to the owner of record, the tax collector is not authorized to accept a subsequent payment by the owner of record. This bill provides that if an adverse possessor makes an annual tax payment on property subject to the adverse possession claim, and the owner of record subsequently makes a tax payment prior to April 1 of the year following the year the tax was assessed, the tax

collector is required to accept the owner of record's payment. Within 60 days of receipt of the owner of record's payment, the tax collector must then refund the adverse possessor's tax payment. This bill specifies that the refund to the adverse possessor is not subject to approval from the DOR.[15]

This bill also specifies that, upon receipt of a subsequent payment for the same annual tax assessment for a particular parcel, the tax collector must determine if an adverse possession return has been submitted on the particular parcel. If a return has been submitted, the tax collector must refund the payment made by the adverse possessor and afford the owner of record priority of payment as specified in this bill.

In addition, this bill sets forth the tax payment and refund procedures when only a portion of an identified parcel of property is subject to an adverse possession claim.

This bill excludes properties subject to adverse possession claims from the minimum tax bill provision. Therefore, tax notices must be sent to the owner of property subject to an adverse possession claim even if the county commission has authorized the tax collector to not send out tax notices for bills under a certain amount.

Effective Date

This bill has an effective date of July 1, 2011, and applies to adverse possession claims in which the return was submitted on or after that date, except for the procedural provisions governing the property appraiser's administration of the adverse possession claims included in proposed s. 95.18(4)(c) and (d) (requiring the property appraiser to add a notation of the adverse possession filing and maintain a copy of the return) and s. 95.18(7), F.S. (delineating when the property appraiser may remove the adverse possession notation). These provisions will apply to adverse possession claims in which the return was submitted before, on, or after July 1, 2011.

Other Issues

Establishment of priority of tax payments made by owners of record whose properties are subject to an adverse possession claim would represent a policy shift that could effectively preclude an adverse possessor from obtaining title to property because the adverse possessor may be unable to satisfy the tax payment element of the adverse possession statute. The current statutory framework contemplates that the tax payment is a necessary step for the person claiming adverse possession to gain title to the property. Therefore, current practice by tax collectors is to accept a payment made by an adverse possessor if made prior to a payment by the owner of record.

B. SECTION DIRECTORY:

Section 1 amends s. 95.18, F.S., relating to adverse possession without color of title.

Section 2 amends s. 197.212, F.S., relating to minimum tax bill.

Section 3 creates s. 197.3335, F.S., relating to tax payments when property is subject to adverse possession.

Section 4 provides an effective date of July 1, 2011, and providing for retroactive application of procedural provisions.

[15] Currently, certain refunds of $400 or more must be approved by the Department of Revenue prior to the tax collector's remittance of the refund. *See* s. 197.182(1)(i), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of Revenue does not anticipate significant additional costs to implement this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Property appraisers will incur costs to comply with the notice requirements and to comply with the requirement that searchable databases be updated. The amount is unknown but is not expected to be significant. Only a small number of adverse possession returns are filed each year.

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:

This bill grants the Department of Revenue the authority to adopt emergency rules related to the changes to the adverse possession return. This bill provides that the executive director of the Department of Revenue is authorized to adopt emergency rules for the purpose of implementing the additions and changes to the adverse possession return form created by the Department. These emergency rules may remain in effect for six months after the rules are adopted and may be renewed during the pendency of procedures to adopt final rules addressing the adverse possession return.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to adverse possession; amending s. 95.18, F.S.; specifying that occupation and maintenance of property satisfies the requirements for possession for purposes of gaining title to property via adverse possession without color of title; requiring a person seeking property by adverse possession to use a uniform adverse possession return provided by the Department of Revenue; requiring the property appraiser to notify the owner of record of an adverse possession claim; requiring that a person claiming adverse possession attest to the truthfulness of the information provided in the return under penalty of perjury; authorizing the Department of Revenue to adopt emergency rules; requiring that the property appraiser add certain information related to the adverse possession claim to the parcel information on the tax roll and prescribing conditions for removal of that information; prescribing procedures and requirements for adverse possession claims against a portion of an identified parcel or against property to which the property appraiser has not assigned a parcel number; requiring the property appraiser to include a notation of an adverse possession filing in any searchable property database maintained by the property appraiser; amending s. 197.212, F.S.; excluding property subject to adverse possession claims without color of title from provisions authorizing the tax collector not to send a tax notice for minimum tax bills; creating s. 197.3335, F.S.; requiring

the tax collector to determine whether a duplicate tax payment is made by an adverse possessor; providing for priority of tax payments made by an owner of record who is subject to an adverse possession claim; providing for a refund of tax payments under certain conditions; providing for retroactive application of certain provisions governing procedures for administering a claim of adverse possession and establishing tax priority for owners of record; providing an effective date.

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

Section 1. Section 95.18, Florida Statutes, is amended to read:

95.18 Real property actions; adverse possession without color of title.—

(1) When the occupant has, or those under whom the occupant claims have, been in actual continued occupation of real property for 7 years under a claim of title exclusive of any other right, but not founded on a written instrument, judgment, or decree, the property actually occupied is ~~shall be~~ held adversely if the person claiming adverse possession made a return, as required under subsection (3), of the property by proper legal description to the property appraiser of the county where it is located within 1 year after entering into possession and has subsequently paid, subject to s. 197.3335, all taxes and matured installments of special improvement liens levied against the property by the state, county, and municipality.

(2) For the purpose of this section, property is ~~shall be~~ deemed to be possessed if the property has been ~~in the following cases only~~:

(a) ~~When it has been~~ Protected by substantial enclosure;~~.~~

(b) ~~When it has been usually~~ Cultivated or improved in a usual manner; or~~.~~

(c) Occupied and maintained.

(3) A person claiming adverse possession under this section must make a return of the property by providing to the property appraiser a uniform return on a form provided by the Department of Revenue. The return must include all of the following:

(a) The name and address of the person claiming adverse possession.

(b) The date that the person claiming adverse possession entered into possession of the property.

(c) A full and complete legal description of the property that is subject to the adverse possession claim.

(d) A notarized attestation clause that states:

UNDER PENALTY OF PERJURY, I DECLARE THAT I HAVE READ THE FOREGOING RETURN AND THAT THE FACTS STATED IN IT ARE TRUE AND CORRECT.

(e) A description of the use of the property by the person claiming adverse possession.

(f) A receipt to be completed by the property appraiser.

The property appraiser shall refuse to accept a return if it does not comply with this subsection. The executive director of

the Department of Revenue is authorized, and all conditions are deemed met, to adopt emergency rules under ss. 120.536(1) and 120.54(4) for the purpose of implementing this subsection. The emergency rules shall remain in effect for 6 months after adoption and may be renewed during the pendency of procedures to adopt rules addressing the subject of the emergency rules.

(4) Upon the submission of a return, the property appraiser shall:

(a) Send, via regular mail, a copy of the return to the owner of record of the property that is subject to the adverse possession claim, as identified by the property appraiser's records.

(b) Inform the owner of record that, under s. 197.3335, any tax payment made by the owner of record before April 1 following the year in which the tax is assessed will have priority over any tax payment made by an adverse possessor.

(c) Add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been submitted.

(d) Maintain the return in the property appraiser's records.

(5)(a) If a person makes a claim of adverse possession under this section against a portion of a parcel of property identified by a unique parcel identification number in the property appraiser's records:

1. The person claiming adverse possession shall include in the return submitted under subsection (3) a full and complete legal description of the property sufficient to enable the

property appraiser to identify the portion of the property subject to the adverse possession claim.

2. The property appraiser may refuse to accept the return if the portion of the property subject to the claim cannot be identified by the legal description provided in the return, and the person claiming adverse possession must obtain a survey of the portion of the property subject to the claim in order to submit the return.

(b) Upon submission of the return, the property appraiser shall follow the procedures under subsection (4), and may not create a unique parcel identification number for the portion of property subject to the claim.

(c) The property appraiser shall assign a fair and just value to the portion of the property, as provided in s. 193.011, and provide this value to the tax collector to facilitate tax payment under s. 197.3335(3).

(6)(a) If a person makes a claim of adverse possession under this section against property to which the property appraiser has not assigned a parcel identification number:

1. The person claiming adverse possession must include in the return submitted under subsection (3) a full and complete legal description of the property which is sufficient to enable the property appraiser to identify the property subject to the adverse possession claim.

2. The property appraiser may refuse to accept a return if the property subject to the claim cannot be identified by the legal description provided in the return, and the person claiming adverse possession must obtain a survey of the property

subject to the claim in order to submit the return.

(b) Upon submission of the return, the property appraiser shall:

1. Assign a parcel identification number to the property and assign a fair and just value to the property as provided in s. 193.011;

2. Add a notation at the beginning of the first line of the legal description on the tax roll that an adverse possession claim has been submitted; and

3. Maintain the return in the property appraiser's records.

(7) A property appraiser must remove the notation to the legal description on the tax roll that an adverse possession claim has been submitted and shall remove the return from the property appraiser's records if:

(a) The person claiming adverse possession notifies the property appraiser in writing that the adverse possession claim is withdrawn;

(b) The owner of record provides a certified copy of a court order, entered after the date the return was submitted to the property appraiser, establishing title in the owner of record;

(c) The property appraiser receives a certified copy of a recorded deed, filed after the date of the submission of the return, from the person claiming adverse possession to the owner of record transferring title of property along with a legal description describing the same property subject to the adverse possession claim; or

(d) The owner of record or the tax collector provides to the property appraiser a receipt demonstrating that the owner of record has paid the annual tax assessment for the property subject to the adverse possession claim during the period that the person is claiming adverse possession.

(8) The property appraiser shall include a clear and obvious notation in the legal description of the parcel information of any public searchable property database maintained by the property appraiser that an adverse possession return has been submitted to the property appraiser for a particular parcel.

Section 2. Section 197.212, Florida Statutes, is amended to read:

197.212 Minimum tax bill.—On the recommendation of the county tax collector, the board of county commissioners may adopt a resolution instructing the collector not to mail tax notices to a taxpayer if ~~when~~ the amount of taxes shown on the tax notice is less than an amount up to $30. The resolution shall also instruct the property appraiser that he or she may ~~shall~~ not make an extension on the tax roll for any parcel for which the tax would amount to less than an amount up to $30. The minimum tax bill so established may not exceed an amount up to $30. This section does not apply to a parcel of property that is subject to an adverse possession claim pursuant to s. 95.18.

Section 3. Section 197.3335, Florida Statutes, is created to read:

197.3335 Tax payments when property is subject to adverse possession; refunds.—

(1) Upon the receipt of a subsequent payment for the same annual tax assessment for a particular parcel of property, the tax collector must determine whether an adverse possession return has been submitted on the particular parcel. If an adverse possession return has been submitted, the tax collector must comply with subsection (2).

(2) If a person claiming adverse possession under s. 95.18 pays an annual tax assessment on a parcel of property before the assessment is paid by the owner of record, and the owner of record subsequently makes a payment of that same annual tax assessment before April 1 following the year in which the tax is assessed, the tax collector shall accept the payment made by the owner of record and refund within 60 days any payment made by the person claiming adverse possession. Such refunds do not require approval from the department.

(3) For claims of adverse possession for a portion of a parcel of property as provided in s. 95.18(5), the tax collector may accept a tax payment, based upon the value of the property assigned by the property appraiser under s. 95.18(5)(c), from a person claiming adverse possession for the portion of the property subject to the claim. If the owner of record makes a payment of the annual tax assessment for the whole parcel before April 1 following the year in which the tax is assessed, the tax collector shall refund within 60 days any payment previously made for the portion of the parcel subject to the claim by the person claiming adverse possession.

Section 4. This act shall take effect July 1, 2011, and applies to adverse possession claims in which the return was

submitted on or after that date, except for the procedural provisions governing the property appraiser's administration of adverse possession claims included in s. 95.18(4)(c) and (d) and (7), Florida Statutes, and the provisions governing the payment of taxes included in s. 197.3335, Florida Statutes, as created by this act, which apply to adverse possession claims for which the return was submitted before, on, or after that date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 941 Construction Liens
SPONSOR(S): Civil Justice Subcommittee; Moraitis
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1196

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

SUMMARY ANALYSIS

The construction lien law allows persons who are enhancing an owner's property to file a lien for the value of the improvement. In certain circumstances, a construction lien may be placed against a lessor's property for work done on behalf of a lessee. However, a lessor may limit or prohibit such liens provided the lessor includes a prohibition in the lease and records notice thereof in the public records.

Related to construction liens against leased property, this bill:

- Adds an additional means by which the lessor may record notice in the public records, namely by recording a memorandum of a lease.
- Provides that a blanket limitation on liens need not apply to all leaseholds within the property.
- Requires a lessor claiming that leases prohibit liens to provide a copy of the relevant portions of the lease within 30 days, upon demand of a potential lienor.
- Amends the notice of commencement form to require adding the name of a lessee when the lessee is making improvements.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Construction Liens

Chapter 965, F.S., provides that a record of a conveyance of real property, a mortgage of real property, or any other related document affecting title to real property, is valid when recorded with the clerk of the court (or county recorder) in the county in which the real property lies. These documents are recorded with the clerk in order to provide actual[1] or constructive notice[2] to the public regarding the status real property. These documents may include various liens and mortgages that are placed on the real property. One form of a lien is a construction lien.

A construction lien is an equitable device designed to protect the persons who are enhancing an owner's property. There are different statutory requirements for lienors that are in privity and those that are not in direct privity[3] with the owner[4] (such as subcontractors, sub-subcontractors, laborers and suppliers of material who remain unpaid after the owner has paid the contractor directly).[5] The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien on the property receiving their services to ensure payment. Another purpose of construction liens is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

The construction lien statutes set forth a right of action that did not exist at common law,[6] and thus construction liens are purely statutory.[7] Florida's Construction Lien Law is found in ch. 713, pt. I, F.S.

Chapter 713, pt. I, F.S., requires various notices, demands and requests to be provided in writing to the owner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and requests be in a statutory form. Notices include: Notice of Commencement, Notice to Owner, Claim of Lien, Notice of Termination, Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that an owner follows in paying for improvements under part I of ch. 713, F.S., determines whether a payment is proper or improper. Making a payment that is improper may result in the owner paying twice for the same improvement.[8]

Construction Liens and Leased Property

If a lessee contracts for renovations or improvements to the property he or she leased and does not pay, the lessor may be liable for construction liens placed on the property by subcontractors.[9] A court will look to the lease to see if the improvement was made by the lessee in accordance with the agreement with the lessor. If, "the renovations and improvements contemplated by the parties at the

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[1] Actual notice, "or 'express' notice is based on 'direct information' leading to 'actual knowledge of the fact in question.'" *Winn Dixie Stores, Inc., v. DolgenCorp, Inc.*, 964 So.2d 261, 265 (Fla. 4th DCA 2007)(quoting *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932)). A third type of notice is also recognized called "implied actual notice," which is defined "as notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use." *DolgenCorp, Inc.*, at 265-66.

[2] Constructive notice has been defined as, "notice imputed to a person not having actual notice; for example, such as would be imputed under the recording statutes to persons dealing with property subject to those statutes." *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932).

[3] Privity of contract is the relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so. *Black's Law Dictionary* (9th Edition 2009), "privity."

[4] *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2d DCA 1984).

[5] *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So.2d 623 (Fla. 1995).

[6] *Fleitas v. Julson, Inc.* 580 So.2d 636 (Fla. 3d DCA 1991).

[7] *Home Elec. of Dade County, Inc. v. Gonas*, 547 So.2d 109 (Fla. 1989).

[8] *See* Fred R. Dudley, *Florida Construction Liens: Representing the Residential Owner,* 79 Fla. Bar J. 34 (Dec. 2005).

[9] *See* Section 713.10, F.S.; for purposes of this analysis, "subcontractor" includes sub-subcontractors, laborers and suppliers of material.

inception of the lease constituted the pith of the lease,"[10] then the lessor is liable and a subcontractor may place a valid construction lien against the lessor's property. Section 713.10, F.S., provides two procedures that a lessor may follow to be exempt from a subcontractor's ability to place a lien on the lessor's property. These procedures include:

1. Recording the lease or a short form of the lease at the clerk's office;[11] if the lease terms expressly provide that the interest of the lessor is not subject to liens made for improvements that were authorized by lessee;[12] or

2. All of the leases entered into by a lessor for the rental of premises on a parcel of land prohibit such liability and a notice which sets forth the following is recorded by the lessor in the public records of the county in which the parcel of land is located:[13]

    1. The name of the lessor.[14]
    2. The legal description of the parcel of land to which the notice applies.[15]
    3. The specific language contained in the various leases prohibiting such liability;[16] and
    4. A statement that all leases entered into for premises on the parcel of land contain the language indentified.[17]

A lessor of a mobile home lot is also not subject to a construction lien if the lessee is a mobile home owner.[18]

The recording of the lease or short-form of the lease in the county records gives actual or constructive notice to any subcontractor that the lessor is not liable for any construction liens that result from the non-payment by the lessee.

Notice of Commencement

Section 713.13, F.S., provides that the recording of a Notice of Commencement (NOC) gives actual and constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance or demand not recorded against the real property prior to the time the notice is recorded. However, any conveyance, encumbrance or demand recorded prior to the time the notice is recorded and any proceeds thereof, regardless of when disbursed, shall have priority over liens.

The NOC must be recorded with the clerk of the court where the property is located by the owner or the owner's agent before a contractor actually begins an improvement to real property or recommences completion of any improvement after default or abandonment. A certified copy of the recorded notice or a notarized statement of filing and a copy must be posted at the jobsite. The NOC must include the legal description of the property, the street address and the tax folio number, if available. It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, and the anticipated expiration date if different from one year. The form for the NOC is provided in s. 713.13(1)(d), F.S.

One of the purposes of the NOC is to give subcontractors notification of who owns the property the subcontractor is improving and where that owner is located.

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[10] *See A.N. Drew, Inc. v. Frenchy's World Famous Cajun Café, Inc.*, 517 So.2d 766, 767 (Fla. 1st DCA 1988).
[11] The short form lease must also include the language disclaiming liability. *See 14th & Heinberg, L.L.C, v. Henricksen & Co., Inc.*, 877 So.2d 34 (Fla. 1st DCA 2004).
[12] Section 713.10(1), F.S.
[13] Section 713.10(2), F.S.
[14] Section 713.10(2)(a), F.S.
[15] Section 713.10(2)(b), F.S.
[16] Section 713.10(2)(c), F.S. All leases must contain the exact language in the blanket notice filed with the county clerk. *See Everglades Electric Supply, Inc. v. Paraiso Granite, LLC*, 28 SO.3d 235 (Fla. 4th DCA 2010).
[17] Section 713.10(2)(d), F.S.
[18] Section 713.10(3), F.S.

Effect of the Bill

The bill amends s. 713.10(1), F.S., to add that a lessor may record, in the county that the property is located, a memorandum of a lease that contains the specific language in the lease that prohibits liability for improvements to the property in lieu of filing the actual lease or a short form of the lease. The bill also requires that the recording of the lease, short form of the lease or memorandum of the lease must be recorded prior to the recording of a notice of commencement to be effective.

The bill amends s. 713.10(2), F.S., to provide that, where the lessor has multiple tenants and elects to record a statement regarding lease terms prohibiting liens, the lessor need only have the clause in a majority of the leases entered into for premises on the parcel of land.

The bill amends s. 713.10(3), F.S., to provide that:

- Any contractor or lienor under contract to furnish improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, and
- If the lessor does not serve a verified copy[19] of the lease within thirty days he or she may be subject to a lien by the contractor or lienor if the contractor or lienor is otherwise entitled to a lien and did not have actual or constructive notice that the property was not subject to a lien.
- A demand for a copy of the pertinent portion of the lease must contain a warning to the lessor regarding the thirty days to respond. The warning must be in conspicuous type and be in substantially the following form: YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

The bill amends s. 713.13(1), F.S., to provide that a lessee who contracts for the improvement is an owner[20] for purposes of the notice of commencement and must be listed as owner on the notice of commencement form.

B. SECTION DIRECTORY:

Section 1 amends s. 713.10, F.S., regarding construction liens.

Section 2 amends s. 713.13, F.S., regarding notice of commencement.

Section 3 provides an effective date of October 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

[19] Section 92.525, F.S. , provides the methods in which a document may be verified including being notarized.

[20] As defined in s. 713.01(23), F.S., "'Owner' means a person who is the owner of any legal or equitable interest in real property, which interest can be sold by legal process, and who enters into a contract for the improvement of the real property. The term includes a condominium association pursuant to chapter 718 as to improvements made to association property or common elements. The term does not include any political subdivision, agency, or department of the state, a municipality, or other governmental entity."

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 March 21, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment added "labor, services or materials" in order to conform the bill language to existing statutory language describing improvements. The bill was then reported favorably.

This analysis is drafted to the committee substitute.

A bill to be entitled

An act relating to construction liens; amending s. 713.10, F.S.; specifying that a lessor's interest in property is not subject to a construction lien for improvements made by a lessee if certain documents containing specific information and meeting certain criteria are recorded in the official records of the county before the recording of a notice of commencement; authorizing certain contractors and lienors to demand that a lessor serve verified copies of a lease prohibiting liability for improvements made by a lessee; subjecting the interest of a lessor to a specified lien for failing to serve such verified copies or serving a false or fraudulent copy; requiring that the demand include a specified warning; amending s. 713.13, F.S.; revising the form for notice of commencement to include information relating to the obligations of a lessee who contracts for improvements to property; providing an effective date.

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

Section 1. Section 713.10, Florida Statutes, is amended to read:

713.10 Extent of liens.—

(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the

improvement or is thereafter acquired in the real property. When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor.

(2)(a) When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making any such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor.

(b) The interest of the lessor shall not be subject to liens for improvements made by the lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises

~~(1) The lease or a short form thereof is recorded in the clerk's office~~ and the terms of the lease expressly prohibit such liability; or

2.~~(2)~~ The terms ~~All~~ of the lease expressly prohibit such liability and a notice advising that leases ~~entered into by a lessor~~ for the rental of premises on a parcel of land prohibit such liability ~~and a notice which sets forth the following is~~ has been recorded ~~by the lessor~~ in the official ~~public~~ records of the county in which the parcel of land is located before the

recording of a notice of commencement for improvements to the premises and the notice includes the following:

a.~~(a)~~ The name of the lessor.

b.~~(b)~~ The legal description of the parcel of land to which the notice applies.

c.~~(c)~~ The specific language contained in the various leases prohibiting such liability.

d.~~(d)~~ A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability ~~contain the language identified in paragraph (c)~~.

~~(3) The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.~~

(3) Any contractor or lienor under contract to furnish labor, services, or materials for improvements being made by a lessee may serve written demand on the lessor for a copy of the provision in the lease prohibiting liability for improvements made by the lessee, which copy shall be verified under s. 92.525. The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in s. 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, is subject to a lien under this part by the contractor or lienor who made the demand if the contractor or lienor is otherwise entitled to a lien under this part and did not have actual or constructive notice that the interest of the lessor was not subject to a lien for

improvements made by the lessee. The written demand must include a warning in conspicuous type in substantially the following form:

WARNING

YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

Section 2. Paragraphs (a) and (d) of subsection (1) of section 713.13, Florida Statutes, are amended to read:

713.13 Notice of commencement.—

(1)(a) Except for an improvement that is exempt pursuant to s. 713.02(5), an owner or the owner's authorized agent before actually commencing to improve any real property, or recommencing completion of any improvement after default or abandonment, whether or not a project has a payment bond complying with s. 713.23, shall record a notice of commencement in the clerk's office and forthwith post either a certified copy thereof or a notarized statement that the notice of commencement has been filed for recording along with a copy thereof. The notice of commencement shall contain the following information:

1. A description sufficient for identification of the real property to be improved. The description should include the legal description of the property and also should include the street address and tax folio number of the property if available or, if there is no street address available, such additional information as will describe the physical location of the real property to be improved.

2. A general description of the improvement.

3. The name and address of the owner, the owner's interest in the site of the improvement, and the name and address of the fee simple titleholder, if other than such owner. A lessee who contracts for the improvements is an owner as defined under s. 713.01(23) and must be listed as the owner.

4. The name and address of the contractor.

5. The name and address of the surety on the payment bond under s. 713.23, if any, and the amount of such bond.

6. The name and address of any person making a loan for the construction of the improvements.

7. The name and address within the state of a person other than himself or herself who may be designated by the owner as the person upon whom notices or other documents may be served under this part; and service upon the person so designated constitutes service upon the owner.

(d) A notice of commencement must be in substantially the following form:

Permit No..... Tax Folio No.....

NOTICE OF COMMENCEMENT

State of....

County of....

The undersigned hereby gives notice that improvement will be made to certain real property, and in accordance with Chapter 713, Florida Statutes, the following information is provided in this Notice of Commencement.

1. Description of property: ...(legal description of the property, and street address if available)....

2. General description of improvement:.....

3. Owner information (A contracting party who is a lessee is an owner as defined under section 713.01(23), Florida Statutes, and must be listed here as the owner):.....

a. Name and address:.....

b. Interest in property:.....

c. Name and address of fee simple titleholder (if other than Owner):.....

4.a. Contractor: ...(name and address)....

b. Contractor's phone number:.....

5. Surety

a. Name and address:.....

b. Phone number:.....

c. Amount of bond: $.....

6.a. Lender: ...(name and address)....

b. Lender's phone number:.....

7.a. Persons within the State of Florida designated by Owner upon whom notices or other documents may be served as provided by Section 713.13(1)(a)7., Florida Statutes: ...(name and address)....

b. Phone numbers of designated persons:.....

8.a. In addition to himself or herself, Owner designates ..... of ..... to receive a copy of the Lienor's Notice as provided in Section 713.13(1)(b), Florida Statutes.

b. Phone number of person or entity designated by owner:.....

9. Expiration date of notice of commencement (the expiration date is 1 year from the date of recording unless a different date is specified).....

WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT.

...(Signature of Owner or Owner's Authorized Officer/Director/Partner/Manager/Lessee—a contracting party who is a lessee meets the definition of owner under section 713.01(23), Florida Statutes, and should sign here as the owner)...
...(Signatory's Title/Office)...

The foregoing instrument was acknowledged before me this .... day of ...., ...(year)..., by ...(name of person)... as ...(type of authority, . . . e.g. officer, trustee, attorney in fact)... for ...(name of party on behalf of whom instrument was executed)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known .... OR Produced Identification ....

Type of Identification Produced.....

Verification pursuant to Section 92.525, Florida Statutes.

Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true to the best of my knowledge and belief.

...(Signature of Natural Person Signing Above)...

Section 3. This act shall take effect October 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1193 Health Insurance
SPONSOR(S): Health & Human Services Quality Subcommittee; Hudson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1754

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	10 Y, 4 N, As CS	Poche	Calamas
2) Judiciary Committee		De La Paz	Havlicak RH
3) Health & Human Services Committee			

SUMMARY ANALYSIS

CS/HB 1193 prohibits compelling a person to purchase health insurance, with several specific exceptions. The bill does not prevent the collection of debts lawfully incurred for health insurance.

The bill does not appear to have a fiscal impact.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA)[1], as amended by the Health Care and Education Reconciliation Act of 2010.[2] PPACA, as amended, consists of approximately 2,700 pages of text and several hundred sections of law. The law contains comprehensive reform of the entire health care system in the United States. Arguably the most essential provision of PPACA is the individual mandate requiring every person in the United States to purchase health insurance by 2014. Those who do not purchase health insurance will be fined by the U.S. government through enforcement by the Internal Revenue Service. The fine increases from $95 in 2014 to $750 in 2016, and higher in subsequent years. Exemptions for mandatory health insurance coverage will be granted for:

- American Indians;
- Cases of extreme financial hardship;
- Those objecting to the mandatory provision for religious reasons;
- Individuals without health insurance for less than three months; and
- Individuals in prison.[3]

Legal Challenges to PPACA

On the same day that PPACA was signed into law by President Obama, Florida's Attorney General Bill McCollum filed a federal lawsuit in Pensacola challenging the constitutionality of the new law. At the time suit was filed, Florida was joined by twelve states, by and through their individual attorneys general. A total of twenty six states, including Florida, are now plaintiffs in the federal action. In total, twenty three constitutional challenges to PPACA were filed in federal courts across the country. The majority of lawsuits challenge the mandate that requires individuals to purchase health insurance. Other constitutional issues raised in the federal lawsuits include the imposition of a fine for failing to purchase health insurance, whether the federal government has constitutional authority to institute health care reform, establishing financial disclosure rules for doctors, and changes made to Medicaid and Medicare.

The Florida lawsuit argues, in part, that the federal government is violating the Commerce Clause of the U.S. Constitution by forcing individuals to purchase health insurance or pay a penalty. On January 31, 2011, Judge Roger Vinson of the Federal District Court for the Northern District of Florida, Pensacola Division, entered an Order granting the plaintiffs' Motion for Summary Judgment and declared the individual mandate provision of PPACA unconstitutional. Judge Vinson also ruled that, because the provisions of PPACA were rendered ineffective without the individual mandate and because the law lacked a severability clause, the entire Act was struck down as unconstitutional.

Currently, the federal government has complied with certain terms established by Judge Vinson to stay his order. The terms included a provision that the federal government seek an expedited review of the order on summary judgment by the 11th Circuit Court of Appeals in Atlanta. The federal government filed an appeal and petitioned for expedited review on March 8, 2011. The 11th Circuit has scheduled the deadlines for filing briefs, beginning with the federal government's brief due on April 4, 2011. Based

[1] P.L. 111-148, 124 Stat. 119 (2010).
[2] P.L. 111-152, 124 Stat. 1029 (2010).
[3] Hinda Chaikind, et al., Private Health Insurance Provisions in Senate-Passed H.R. 3590, the Patient Protection and Affordable Care Act, CRS Report R40942.

on the briefing schedule, oral argument will likely be held in early June 2011. An opinion is likely to be issued in late summer or early fall 2011.

Florida Health Insurance Mandates

Florida law does not require state residents to have health insurance. However, Florida law does require drivers to carry Personal Injury Protection (PIP), which includes certain health care coverage, as a condition of receiving a state driver's license.[4] Florida also requires most employers to carry workers' compensation insurance, which includes certain health care provisions for injured workers.[5]

Effect of Proposed Changes

The bill prohibits compelling any person[6] to purchase health insurance, with several exceptions. A person may be compelled to purchase health insurance only as a condition of:

- Public employment;
- Voluntary participation in a state or local benefit;
- Operating a dangerous instrumentality[7];
- Undertaking an occupation having a risk of occupational injury or illness;
- An order of child support; or
- Activity between private persons.

The bill expressly provides that its terms do not prohibit the collection of debts lawfully incurred for health insurance.

B. SECTION DIRECTORY:

Section 1: Creates s. 624.24, F.S., relating to prohibition against requiring the purchase of health insurance; exceptions.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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[4] S. 627.736, F.S.

[5] S. 440.10(1)(a), F.S.

[6] S. 1.01(3), F.S., defines "person" as including individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

[7] A "dangerous instrumentality" is defined as anything which has the inherent capacity to place people in peril, either in itself (e.g. dynamite), or by a careless use of it (e.g. boat); *see* Black's Law Dictionary, 8th Ed.; In Florida, motor vehicles are dangerous instrumentalities. *See Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920). Forklifts have also been declared dangerous instrumentalities. *See Harding v. Allen-Laux, Inc.*, 559 So.2d 107 (Fla. 2d DCA 1990). Golf carts are dangerous instrumentalities in Florida. *See Meister v. Fisher*, 462 So.2d 1071 (Fla. 1984). Lastly, vessels have been statutorily determined to be dangerous instrumentalities. *See* s. 327.32, F.S. (Vessels are defined in s. 327.02(39), F.S., as synonymous with boat as referenced in s. 1(b), Art. VII of the Florida Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, used or capable of being used as a means of transportation on water). These are examples of dangerous instrumentalities in Florida and do not encompass all vehicles, items, or materials that may be considered dangerous instrumentalities in common law by the courts of Florida.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Citizens of the state of Florida cannot be forced to spend money on health insurance by state law, except in very limited circumstances that affect a very small percentage of the population.

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 will prohibit any state laws that require any person to purchase health insurance. It is unclear at this time how the bill will affect the Legislature's ability to implement the provisions of PPACA, should it ultimately be found constitutional and implemented. The federal preemption doctrine may be invoked in determining the impact of the bill on the Legislature's potential obligations to see that the provisions of PPACA are made effective in Florida.

The federal preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution[8], which reads, in part, "...Constitution and the laws of the U.S. ... shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding." In other words, federal law, whether found in the Constitution or statute, will trump state law.

Preemption may be express or implied, and is compelled whether Congress' command is explicitly stated within the language of the statute or is implicitly contained in its structure and purpose.[9]

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[8] Article VI, U.S. Constitution

[9] *See FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990).

Preemption is implied when there is a conflict between a federal law and a state law.[10] There is a conflict between federal law and state law when the dictates of both laws cannot be complied with or where dual compliance with the laws may be technically possible but the state law creates an obstacle to fulfilling the federal policy and goals.[11]

Assuming that PPACA is found to be constitutional and is implemented as the law of the land, this bill will conflict with the individual mandate provision of the Act. Under the current doctrine of federal preemption, this bill may be found to be implicitly preempted by PPACA.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 22, 2011, the Health & Human Services Quality Subcommittee adopted one amendment. The amendment creates s. 624.24, F.S., to include the bill language in an established chapter of law. Placement in ch. 624, F.S., makes an existing definition of "insurance" found in that chapter applicable to the bill. Previously, "insurance" was undefined by the bill.

The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.

[10] *See Talbott v. Am. Isuzu Motors, Inc.*, 934 So.2d 643, 645 (Fla. 2nd DCA 2006).
[11] *See id.*

A bill to be entitled

An act relating to health insurance; creating s. 624.24, F.S.; prohibiting a person from being compelled to purchase health insurance except under specified conditions; specifying that the act does not prohibit the collection of certain debts; providing an effective date.

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

Section 1. Section 624.24, Florida Statutes, is created to read:

624.24 Prohibition against requiring the purchase of health insurance; exceptions.—

(1) A person may not be compelled to purchase health insurance, except as a condition of:

(a) Public employment;

(b) Voluntary participation in a state or local benefit;

(c) Operating a dangerous instrumentality;

(d) Undertaking an occupation having a risk of occupational injury or illness;

(e) An order of child support; or

(f) Activity between private persons.

(2) This section does not prohibit the collection of debts lawfully incurred for health insurance.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1247 Parental Notice of Abortion
SPONSOR(S): Stargel and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1770

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 5 N	De La Paz	Bond
2) Judiciary Committee		De La Paz	Havlicak

SUMMARY ANALYSIS

In 2003, the Florida Supreme Court invalidated the Florida Parental Notice of Abortion Act enacted in 1999 on the grounds that it violated the express right to privacy provision of the Florida Constitution. In 2004, the voters approved an amendment to the Florida Constitution to authorize the Legislature to create a parental notification statute notwithstanding the privacy provision in the state constitution. The 2005 legislature enacted a statute pursuant to that constitutional authority.

Current law provides a means for a minor to receive a judicial waiver of the parental notification. In 2010, those petitions were granted in more than 97% of the cases.

HB 1247 makes several revisions to the parental notification law including:

- Adding a requirement that constructive notice of a minor's abortion must be mailed to the parent or legal guardian via first class mail in addition to certified mail.
- Requiring that actual notice provided by telephone be followed up with written confirmation.
- Requiring that when abortions are performed due to a medical emergency that the physician make reasonable attempts whenever possible, and without endangering the life of the minor, to contact the parent or legal guardian.
- Requiring follow up notification to the parent or legal guardian after an abortion is performed due to a medical emergency.
- Requiring written waivers of persons entitled to notice to be notarized and dated not more than 30 days prior to the abortion.
- Requiring petitions for judicial waiver to be filed in the circuit court where the minor resides.
- Requiring courts to rule on a minor's petition within 3 business days and to provide for a subsequent hearing within 48 hours if the petition is not ruled on in 3 business days.
- Removing the provision finding that failure of a trial court to rule is considered a granting of the petition and requiring a ruling in each case.
- Providing factors for the court to consider when determining a minor's maturity to decide whether to have an abortion without parental involvement.
- Providing that various financial considerations are not to be included in determining what is in a minor's best interest.

This 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

The Federal Standard

The United States Supreme Court (Supreme Court) has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over a minor's decision to terminate her pregnancy.[1] The Supreme Court, however, has consistently recognized the important role parents have in counseling their minor children considering abortion. In review of a parental consent statute the Supreme Court said:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[2]

The Supreme Court's jurisprudence on parental notification statutes has left questions concerning the minimum essential components of such statutes in order to pass constitutional muster. The uncertainty stems from the inclusion or "bootstrapping" of constitutional requirements of parental consent statutes into parental notification statutes.

In order to prevent another person from having an absolute veto power over a minor's abortion decision, a bypass procedure was developed for states electing to require parental consent for minors to have abortions.[3] In *Bellotti v. Baird*, the Supreme Court struck down a statute requiring a minor to obtain the consent of both parents before having an abortion, subject to a judicial bypass provision, because the statute's judicial bypass provision was too restrictive.[4] The Supreme Court explained that in order to be constitutional, a parental consent statute must contain a bypass provision that does the following:

- Allows the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently;
- Allows the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests;
- Ensures the minor's anonymity; and
- Provides for expeditious bypass procedures.[5]

Since the *Bellotti* opinion, the Supreme Court has reviewed parental notification statutes on four occasions.[6] In its review of parental notification statutes the Supreme Court has specifically declined to decide whether the judicial bypass procedures of parental consent statutes must be present in parental notification statutes.[7] Instead the Supreme Court has upheld such statutes reasoning that a parental

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[1] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74-75 (1976).
[2] *Bellotti v. Baird*, 443 U.S. 622, 640-41 (1979) (Quoting Justice Stewart concurring in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 at 91(1976)).
[3] See *Akron, supra* at 510-511.
[4] *Bellotti v. Baird*, 443 U.S. 622 (1979).
[5] *Id.* at 643-44, (plurality opinion).
[6] *H.L. v. Matheson*, 450 U.S. 398, 407 (1981); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); and *Hodgson v. Minnesota*, 497 U.S. 417 (1990)
[7] *Akron, supra* at 510; *Wicklund, supra* at 295.

notification statute that includes a judicial bypass provision sufficient to satisfy a parental *consent* statute, must necessarily be sufficient for a parental *notification* statute since mere notification does not afford anyone a veto power over a minor's abortion decision.[8]

Florida's Background on Parental Notice Statutes

In 1999, the Legislature passed the "Parental Notice of Abortion Act."[9] The act required a physician performing or inducing an abortion on a minor to provide the minor's parent or legal guardian at least 48 hours notice.[10] The act provided for limited exceptions, the most substantial of which were in the case of a medical emergency and when the notice requirement was waived by a judge.[11] The act was enjoined before it was ever enforced and was subsequently held unconstitutional by the Florida Supreme Court in *North Florida Women's Health and Counseling Services v. State* in July of 2003.[12] The Florida Supreme Court relied exclusively on the express right to privacy provision found in the Florida Constitution to invalidate the act.[13]

In 2004, the Legislature passed HJR 1 to amend the Florida Constitution to authorize the Legislature to create a parental notification statute notwithstanding the express provision in the state constitution regarding the right to privacy. The voters approved the amendment on November 2, 2004.[14] The amendment is found at Article X, Section 22 and provides:

> Parental notice of termination of a minor's pregnancy.--The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

In 2005, the Legislature passed a revised version of its parental notification statute which is currently codified at s. 390.01114, F.S.[15] Several provisions of the 2005 act were challenged in a federal district court but were upheld.[16]

Judicial Waiver Statistics

Current law includes a provision to track the number of waiver petitions being filed in court and their disposition.[17] Based on data obtained from the Office of State Courts Administrator for years 2006 through 2009, in response to that reporting requirement, the courts have granted an average of 95% of the petitions of minors seeking to waive the parental notice requirement.[18] For the 2010 calendar year, the percentage of waivers granted increased to over 97%.[19]

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[8] *Akron, supra* at 510-511; *Wicklund supra* at 295.
[9] Chapter 99-322, Laws of Florida, later codified as s. 390.01115, F.S. (1999).
[10] Section 390.01115(3)(a), F.S. (1999).
[11] Section 390.01115(3)(b), F.S. (1999).
[12] *North Florida Women's Health and Counseling Services v. State*, 866 So.2d 612 (Fla. 2003).
[13] *Id.* at 640.
[14] According to the Department of State website, 4,639,635 (64.7%) voted in favor of the amendment and 2,534,910 (35.3%) voted against the amendment. http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/2/2004&DATAMODE=
[15] Chapter 2005-52, L.O.F.
[16] *Womancare of Orlando v. Agwunobi*, 448 F.Supp.2d 1309 (N.D. Florida 2006).
[17] Section 390.01114(6), F.S.
[18] Office of State Courts Administrator, *Parental Notice of Abortion Act, Petitions Filed and Disposed*, reports dated January 28, 2007; January 30, 2008; January 28, 2009; March 17, 2010.
[19] *Id.* report dated January 24, 2011.

Penalties for Violation

Any violation of the current statute by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015, F.S.[20] Disciplinary action may result in the revocation or suspension of the physician's license to practice and/or the imposition of administrative fines of up to $10,000 for each violation.[21] HB 1247 provides the same penalty provisions for violation of the notification requirements as current law.

Current Law and the Effect of HB 1247

Notification Requirement

Current law requires a physician to notify the parent or legal guardian of a minor at least 48 hours before performing or inducing an abortion on that minor.[22] The physician must provide "actual notice"[23] unless "actual notice is not possible after a reasonable effort has been made," in which case "constructive notice"[24] must be given. "Actual notice" is given directly, in person or by telephone, to a parent or legal guardian of the minor. "Constructive notice" is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian.

HB 1247 provides that constructive notice must be given by both first class mail and certified mail. In addition, when actual notice is provided by telephone, it must be followed up with written confirmation by the physician and mailed to the last known address of the parent or legal guardian in the same manner as constructive notice.

Exceptions to the Notification Requirement

Current law provides that notice is not required if (1) in the physician's good-faith clinical judgment, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirement; (2) the parent or guardian waives notice in writing; (3) the minor is or has been married or has had the disability of nonage removed; (4) the minor has a minor dependent child; or (5) the minor has successfully petitioned a circuit court for a waiver of the notice requirement.[25]

Medical Emergency Exception

This bill does not amend the definition in current law of medical emergency, and provides the same exceptions under the same circumstances.[26] Under the bill, however, whenever a medical emergency exists, this bill adds that the physician "should make reasonable attempts, whenever possible without endangering the life of the minor, to contact the parent or legal guardian."

Current law allows a physician to proceed with an abortion in medical emergencies and requires that the physician document the reasons for the medical necessity in the minor's medical

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[20] Section 390.01114(3)(c), F.S.
[21] Section 456.072(2)(d), F.S.
[22] Section 390.01114(3)(a), F.S.
[23] Section 390.01114(2)(a), F.S.
[24] For purposes of "constructive notice," delivery is deemed to have occurred after 72 hours have passed. Section 390.01114(2)(c), F.S.
[25] Section 390.01114(3)(b), F.S.
[26] "Medical Emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function. Section 390.01114(2)(d), F.S.

records. This bill adds a requirement that the physician in this situation provide notice of the abortion directly in person or by telephone to the parent or legal guardian of the minor. The notice must include the details of the medical emergency and any additional risks to the minor. If such direct notice has not been provided to the parent or legal guardian within 24 hours after the abortion, the physician must provide notice in writing which must be delivered in the same manner required for constructive notice.

Written Waiver of Persons Entitled to Notice Exception

Current law provides an exception from the notice requirements of s. 390.01114(3), F.S., if "[n]otice is waived in writing by the person who is entitled to notice." The section contains no verification requirement to guarantee the authenticity of such written waivers, and so it is possible that minors could provide the physician with forged parental waivers and circumvent the entire notification requirement with a single unverified handwritten note.

This bill requires a written waiver to be notarized and dated no more than 30 days before the abortion. A written waiver must also contain a specific waiver of the parent's or legal guardian's right to notice of the minor's abortion.

Forum for Judicial Waiver

Current law allows a minor to petition for a judicial waiver in any circuit court within the jurisdiction of the District Court of Appeal having jurisdiction over the judicial circuit within which the minor resides. There are five appellate districts in the state with each having jurisdiction over two or more of the twenty judicial circuits statewide. HB 1247 requires a petition for waiver to be filed in any circuit court in the jurisdiction where the minor resides.

Time for Proceedings

Where judicial waiver is sought, current law requires the court to issue its ruling within 48 hours of the filing of the petition. If the court does not rule within 48 hours, the petition is granted by default.

This bill provides that a court has 3 business days to issue a ruling on a judicial waiver petition. The bill also eliminates the provision granting a motion by default. If a court does not rule within 3 business days, the minor may immediately petition the chief judge of the circuit who must ensure that a hearing is held within 48 hours of receipt of the minor's petition to the chief judge. The chief judge must also ensure that an order is entered within 24 hours of the hearing.

Appeals

Section 390.01114(4)(f), F.S., provides the right of a minor to an expedited appeal of a denial of a petition for a judicial waiver. Due to the ex parte nature of these proceedings, orders granting a waiver are not subject to appeal.

HB 1247 adds a new provision to s. 390.01114(4)(b), F.S., restating that a minor has a right to appeal a denial of a petition for a judicial waiver and adding a requirement that the appellate court must rule within 7 days after receipt of the appeal. The bill adds that a ruling on appeal may be remanded to the circuit court with instructions for the lower court to rule within 3 business days of the remand. The bill specifically requires that reversing a ruling of the lower court must be based on an abuse of discretion standard of appellate review and not based on the weight of the evidence presented to the trial court. In this sense, the bill requires an appellate court to defer to the factual and evidentiary evaluation of the trial judge in denying a petition. Under an abuse of discretion standard, a reversal would not be appropriate where reasonable people could differ as to the propriety of the decision of the trial court to deny a

petition.[27] According to the bill, the express deference to a trial court's evidentiary evaluation is due to the nonadversarial nature of the proceeding.

Grounds for Judicial Waiver

The current statute contains a *Bellotti* type bypass provision and allows the court to grant a waiver of its notice requirements under any of the following circumstances:

- Where the court finds by clear and convincing evidence, that the minor is "sufficiently mature" to decide whether to terminate her pregnancy.[28]
- Where the court finds by a preponderance of the evidence, that there "is evidence of child abuse or sexual abuse of the petitioner by one or both of her parents or her guardian."[29]
- Where the court finds by a preponderance of the evidence, that "the notification of a parent or guardian is not in the best interest of the petitioner."[30]

Sufficient Maturity

With respect to granting a waiver on the basis of a minor's "sufficient maturity," HB 1247 provides several factors the court must consider in determining whether to grant a petition:

- The minor's age.
- The minor's overall intelligence.
- The minor's emotional development and stability.
- The minor's credibility and demeanor as a witness.
- The minor's ability to accept responsibility.
- The minor's ability to assess both the immediate and long-range consequences of the minor's choices.
- The minor's ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.
- Whether there may be any undue influence by another on the minor's decision to have an abortion.

The bill requires a final order on a petition to include factual findings and legal conclusions regarding the maturity of the minor in view of these specific factors.

Child or Sexual Abuse

With respect to granting a waiver on the basis of the minor being a victim of child or sexual abuse of a parent or legal guardian, HB 1247 makes no substantive change to current law.

Best Interest

With respect to granting a waiver on the basis that notification of the parent or legal guardian is not in the best interest of the minor, HB 1247 raises the standard of proof from the *preponderance of the evidence* standard to the higher *clear and convincing evidence* standard of proof.[31] Also, HB 1247 specifically excludes financial best interest, financial considerations or potential financial impact on the minor or the minor's family for continuing the pregnancy, from what may be considered in the minor's best interest.

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[27] *See generally, Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).
[28] Section 390.01114(4)(c), F.S.
[29] Section 390.01114(4)(d), F.S.
[30] *Id.*
[31] Black's Law Dictionary describes the preponderance of the evidence standard as ". . . evidence which as a whole shows that the fact to be proved is more probable than not." It describes clear and convincing evidence as ". . . where the truth of the facts asserted are highly probable." Black's Law Dictionary 6th Edition.

Office of State Court Administrator Reporting

Current law requires the Supreme Court through the Office of the State Courts Administrator to report annually to the Governor, the President of the Senate and the Speaker of the House on the number of petitions filed requesting a judicial waiver and the manner of their disposal. HB 1247 adds a requirement that the annual report include the reason any such waivers are granted.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1 amends s. 390.01114, F.S., relating to the Parental Notice of Abortion Act.

Section 2 provides a severability clause.

Section 3 provides an effective date 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 to 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.

A bill to be entitled

An act relating to parental notice of abortion; amending s. 390.01114, F.S.; revising the definition of the term "constructive notice"; revising notice requirements relating to the termination of a pregnancy of a minor; providing exceptions to the notice requirements; revising procedure for judicial waiver of notice; providing for the minor to petition for a hearing within a specified time; providing that in a hearing relating to waiving the requirement for parental notice, the court consider certain additional factors, including whether the minor's decision to terminate her pregnancy was due to undue influence; providing a procedure for appeal if judicial waiver of notice is not granted; requiring that the court order contain factual findings and legal conclusions; requiring Supreme Court reports to the Governor and Legislature to include additional information; providing for severability; providing an effective date.

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

Section 1. Section 390.01114, Florida Statutes, is amended to read:

390.01114 Parental Notice of Abortion Act.—

(1) SHORT TITLE.—This section may be cited as the "Parental Notice of Abortion Act."

(2) DEFINITIONS.—As used in this section, the term:

(a) "Actual notice" means notice that is given directly,

in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files.

(b) "Child abuse" has the same meaning as s. 39.0015(3).

(c) "Constructive notice" means notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred.

(d) "Medical emergency" means a condition that, on the basis of a physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death, or for which a delay in the termination of her pregnancy will create serious risk of substantial and irreversible impairment of a major bodily function.

(e) "Sexual abuse" has the meaning ascribed in s. 39.01.

(f) "Minor" means a person under the age of 18 years.

(3) NOTIFICATION REQUIRED.—

(a) Actual notice shall be provided by the physician performing or inducing the termination of pregnancy before the performance or inducement of the termination of the pregnancy of a minor. The notice may be given by a referring physician. The physician who performs or induces the termination of pregnancy

must receive the written statement of the referring physician certifying that the referring physician has given notice. If actual notice is not possible after a reasonable effort has been made, the physician performing or inducing the termination of pregnancy or the referring physician must give constructive notice. Notice given under this subsection by the physician performing or inducing the termination of pregnancy must include the name and address of the facility providing the termination of pregnancy and the name of the physician providing notice. Notice given under this subsection by a referring physician must include the name and address of the facility where he or she is referring the minor and the name of the physician providing notice. If actual notice is provided by telephone, the physician must actually speak with the parent or guardian, and must record in the minor's medical file the name of the parent or guardian provided notice, the phone number dialed, and the date and time of the call. If constructive notice is given, the physician must document that notice by placing copies of any document related to the constructive notice, including, but not limited to, a copy of the letter and the return receipt, in the minor's medical file. Actual notice given by telephone shall be confirmed in writing, signed by the physician, and mailed to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian.

(b) Notice is not required if:

1. In the physician's good faith clinical judgment, a

medical emergency exists and there is insufficient time for the attending physician to comply with the notification requirements. If a medical emergency exists, the physician shall make reasonable attempts, whenever possible, without endangering the minor, to contact the parent or legal guardian, and may proceed, but must document reasons for the medical necessity in the patient's medical records. The physician shall provide notice directly, in person or by telephone, to the parent or legal guardian, including details of the medical emergency and any additional risks to the minor. If the parent or legal guardian has not been notified within 24 hours after the termination of the pregnancy, the physician shall provide notice in writing, including details of the medical emergency and any additional risks to the minor, signed by the physician, to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, with delivery restricted to the parent or legal guardian;

2. Notice is waived in writing by the person who is entitled to notice and such waiver is notarized, dated not more than 30 days before the termination of pregnancy, and contains a specific waiver of the right of the parent or legal guardian to notice of the minor's termination of pregnancy;

3. Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015 or a similar statute of another state;

4. Notice is waived by the patient because the patient has a minor child dependent on her; or

5. Notice is waived under subsection (4).

(c) Violation of this subsection by a physician constitutes grounds for disciplinary action under s. 458.331 or s. 459.015.

(4) PROCEDURE FOR JUDICIAL WAIVER OF NOTICE.—

(a) A minor may petition any circuit court ~~in a judicial circuit within the jurisdiction of the District Court of Appeal~~ in which the minor ~~she~~ resides for a waiver of the notice requirements of subsection (3) and may participate in proceedings on her own behalf. The petition may be filed under a pseudonym or through the use of initials, as provided by court rule. The petition must include a statement that the petitioner is pregnant and notice has not been waived. The court shall advise the minor that she has a right to court-appointed counsel and shall provide her with counsel upon her request at no cost to the minor.

(b)1. Court proceedings under this subsection must be given precedence over other pending matters to the extent necessary to ensure that the court reaches a decision promptly. The court shall rule, and issue written findings of fact and conclusions of law, within 3 business days ~~48 hours~~ after the petition is filed, except that the 3-business-day ~~48-hour~~ limitation may be extended at the request of the minor. If the court fails to rule within the 3-business-day ~~48-hour~~ period and an extension has not been requested, the minor may immediately petition for a hearing upon the expiration of the 3-business-day period to the chief judge of the circuit, who must ensure a hearing is held within 48 hours after receipt of the minor's

petition and an order is entered within 24 hours after the hearing ~~the petition is granted, and the notice requirement is waived~~.

2. If the circuit court does not grant judicial waiver of notice, the minor has the right to appeal. An appellate court must rule within 7 days after receipt of appeal, but a ruling may be remanded with further instruction for a ruling within 3 business days after the remand. The reason for overturning a ruling on appeal must be based on abuse of discretion by the court and may not be based on the weight of the evidence presented to the circuit court since the proceeding is a nonadversarial proceeding.

(c) If the court finds, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. If the court does not make the finding specified in this paragraph or paragraph (d), it must dismiss the petition. Factors the court shall consider include:

1. The minor's:

a. Age.

b. Overall intelligence.

c. Emotional development and stability.

d. Credibility and demeanor as a witness.

e. Ability to accept responsibility.

f. Ability to assess both the immediate and long-range

consequences of the minor's choices.

g. Ability to understand and explain the medical risks of terminating her pregnancy and to apply that understanding to her decision.

2. Whether there may be any undue influence by another on the minor's decision to have an abortion.

(d) If the court finds, by a preponderance of the evidence, that the petitioner is the victim ~~there is evidence~~ of child abuse or sexual abuse inflicted ~~of the petitioner~~ by one or both of her parents or her guardian, or by clear and convincing evidence that the notification of a parent or guardian is not in the best interest of the petitioner, the court shall issue an order authorizing the minor to consent to the performance or inducement of a termination of pregnancy without the notification of a parent or guardian. The best-interest standard does not include financial best interest or financial considerations or the potential financial impact on the minor or the minor's family if the minor does not terminate the pregnancy. If the court finds evidence of child abuse or sexual abuse of the minor petitioner by any person, the court shall report the evidence of child abuse or sexual abuse of the petitioner, as provided in s. 39.201. If the court does not make the finding specified in this paragraph or paragraph (c), it must dismiss the petition.

(e) A court that conducts proceedings under this section shall:

1. Provide for a written transcript of all testimony and proceedings; ~~and~~

2. Issue a final written order containing ~~and specific~~ factual findings and legal conclusions supporting its decision, including factual findings and legal conclusions relating to the maturity of the minor as provided under paragraph (c); and ~~shall~~

3. Order that a confidential record be maintained, as required under s. 390.01116. ~~At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor, and all other relevant evidence.~~

(f) All hearings under this section, including appeals, shall remain confidential and closed to the public, as provided by court rule.

(g) ~~(f)~~ An expedited appeal shall be made available, as the Supreme Court provides by rule, to any minor to whom the circuit court denies a waiver of notice. An order authorizing a termination of pregnancy without notice is not subject to appeal.

(h) ~~(g)~~ ~~No~~ Filing fees or court costs may not ~~shall~~ be required of any pregnant minor who petitions a court for a waiver of parental notification under this subsection at either the trial or the appellate level.

(i) ~~(h)~~ A ~~No~~ county is not ~~shall be~~ obligated to pay the salaries, costs, or expenses of any counsel appointed by the court under this subsection.

(5) PROCEEDINGS.—The Supreme Court is requested to adopt rules and forms for petitions to ensure that proceedings under subsection (4) are handled expeditiously and in a manner consistent with this act. The Supreme Court is also requested to

adopt rules to ensure that the hearings protect the minor's confidentiality and the confidentiality of the proceedings.

(6) REPORT.—The Supreme Court, through the Office of the State Courts Administrator, shall report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of petitions filed under subsection (4) for the preceding year, and the timing and manner of disposal of such petitions by each circuit court. For each petition resulting in a waiver of notice, the reason for the waiver shall be included in the report.

Section 2. If any provision of this act or its application to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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