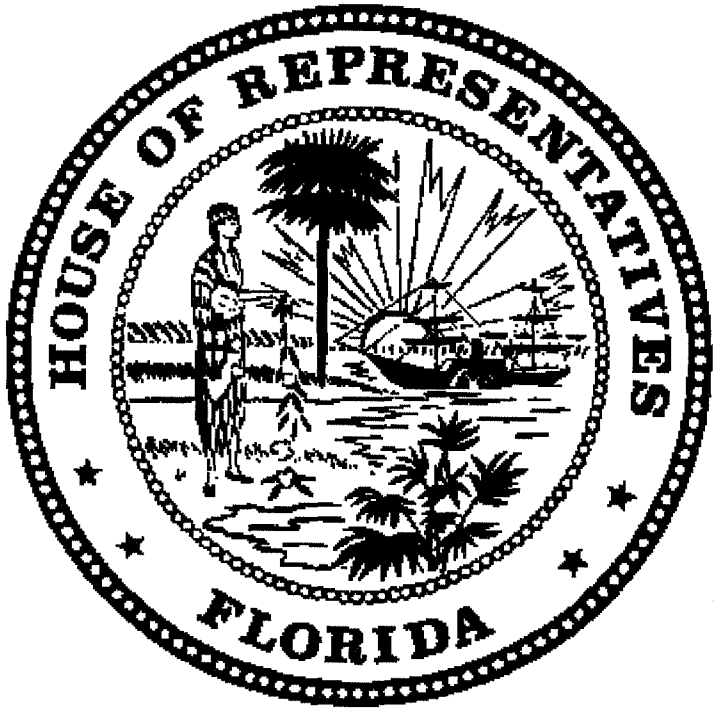

Civil Justice Subcommittee

Wednesday, February 23, 2011
1:00 PM
404 HOB

Dean Cannon
Speaker

Eric Eisnaugle
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, February 23, 2011 01:00 pm

End Date and Time: Wednesday, February 23, 2011 04:00 pm

Location: 404 HOB
Duration: 3.00 hrs

Consideration of the following bill(s):

HB 325 Estates by Wood
HB 469 Individual Retirement Accounts by Stargel

Consideration of the following proposed council bill(s):

PCB CVJS 11-01 -- Court Rulemaking
PCB CVJS 11-02 -- Court Rulemaking Process
PCB CVJS 11-03 -- Terms of Court

NOTICE FINALIZED on 02/16/2011 16:16 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn	Bond
2) Judiciary Committee			

SUMMARY ANALYSIS

Under current law, if a person dies with a will or some other means of devising his or her estate such as a trust, the person is considered intestate. Florida law directs how an intestate is to be divided amongst the deceased surviving family. The bill changes the intestate share of the surviving spouse from the first $60,000 and half of the remaining estate to the full estate, if the descendents (children) of the deceased spouse are also descendents of the surviving spouse and the deceased spouse and surviving spouse have no other descendents from another person. If there are descendents of the either spouse from another relationship then the surviving spouse receives half of the estate.

Under current law, a will may not be reformed if the will itself is unambiguous. If the will is unambiguous, a court may only look to the will itself to interpret the intent of the deceased. The bill would allow a court to modify a will for mistakes of law or fact or for tax purposes even if the will is unambiguous. The bill would also give a court discretion to award attorneys' fees and costs directly against a party in certain proceedings involving will challenges.

Under current law, an interested party would be able to claim that a will was revoked by fraud, duress, mistake, or undue influence by revocation by publication, but it is unclear whether a revocation by act may challenged under similar grounds. The bill provides that if a will is revoked though fraud, duress, mistake, or undue influence an interested party may challenge the revocation.

A revocable trust is a common substitute for a will. A revocable trust allows an individual the ability to reclaim the property from the trust at anytime by revoking the trust. Under current law, an interested person may not challenge the revocation of revocable trust that was procured under fraud, duress, mistake or undue influence either before or after the settlor's death. The bill would allow an interested party to challenge the revocation of a revocable trust on the grounds that the revocation was procured under fraud, duress, mistake or undue influence after the settlor's death.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Probate Law In General

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

Assets subject to probate are those owned by the decedent, whether individually or jointly, provided that joint assets with automatic succession are not subject to probate. Examples of probate assets include bank accounts or investment accounts that are in the sole name of the decedent, life insurance that is payable to the estate, and land that either was owned solely by the decedent or owned with another as tenants in common.

There are various legal instruments that direct the court how to divide assets during probate including will and trusts. If the decedent did not have a valid will or trust at his or her death the decedent is considered intestate.

Intestate Estate

When a person dies (the decedent) without a will, or part of the estate is not included in the will, then he or she is considered "intestate." Since there is not a will to direct the distribution of assets, Florida law would then apply to fill in for the will.[3]

Florida law provides that various family members, beginning with the surviving spouse and the children and grandchildren of the decedent (descendents) receive a share of the decedent's estate.

- If there is no surviving descendents of the decedent, then the spouse receives the entire intestate estate[4]
- If there are surviving descendents of the decedent, who are also lineal descendents of the surviving spouse, then the surviving wife receives the first $60,000 of the estate, plus one half of the remaining balance of the estate,[5] while the remaining estate is passed to the descendents of the decedent and the surviving spouse[6]
- If there are descendents of the decedent, one or more of whom are not lineal descendents of the surviving spouse then the surviving spouse receives one half of the estate.[7]
- If there is no surviving spouse, then the descendents of the decedent receive the entire estate.[8]

Sections 732.103 and 732.104, F.S. provide how the heirs, other than the decedent's spouse, inherit the estate.

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

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

[3] Section 732.101, F.S.

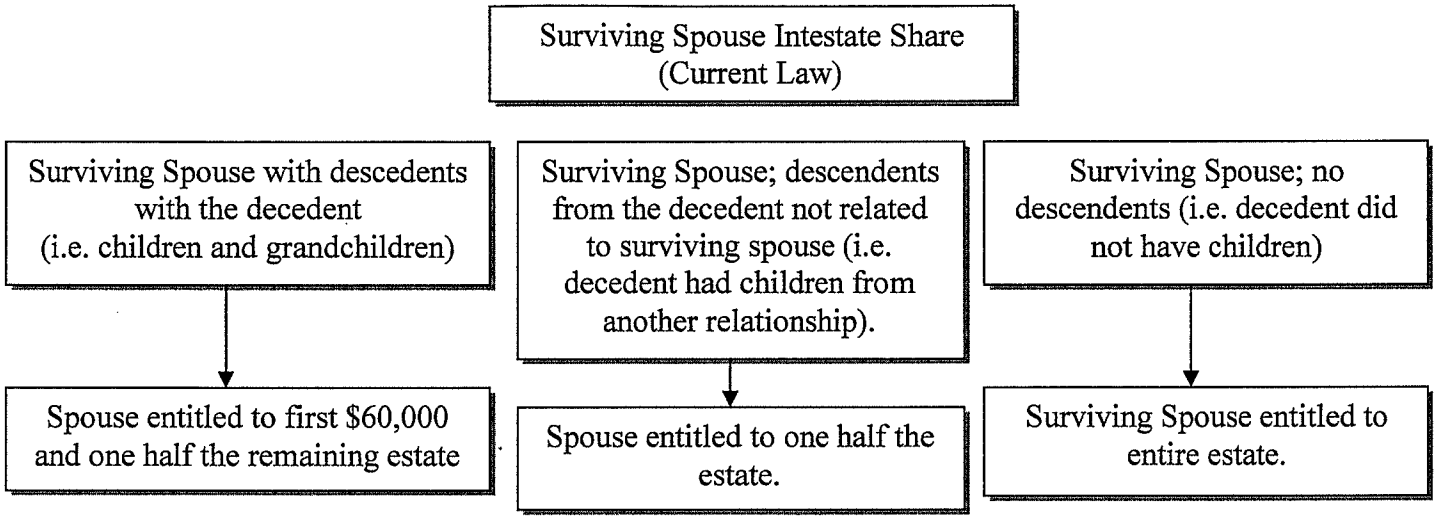
[4] Section 732.101(1), F.S.

[5] Section 732.102(2), F.S.

[6] Section 732.103(1), F.S.

[7] Section 732.102(3), F.S.

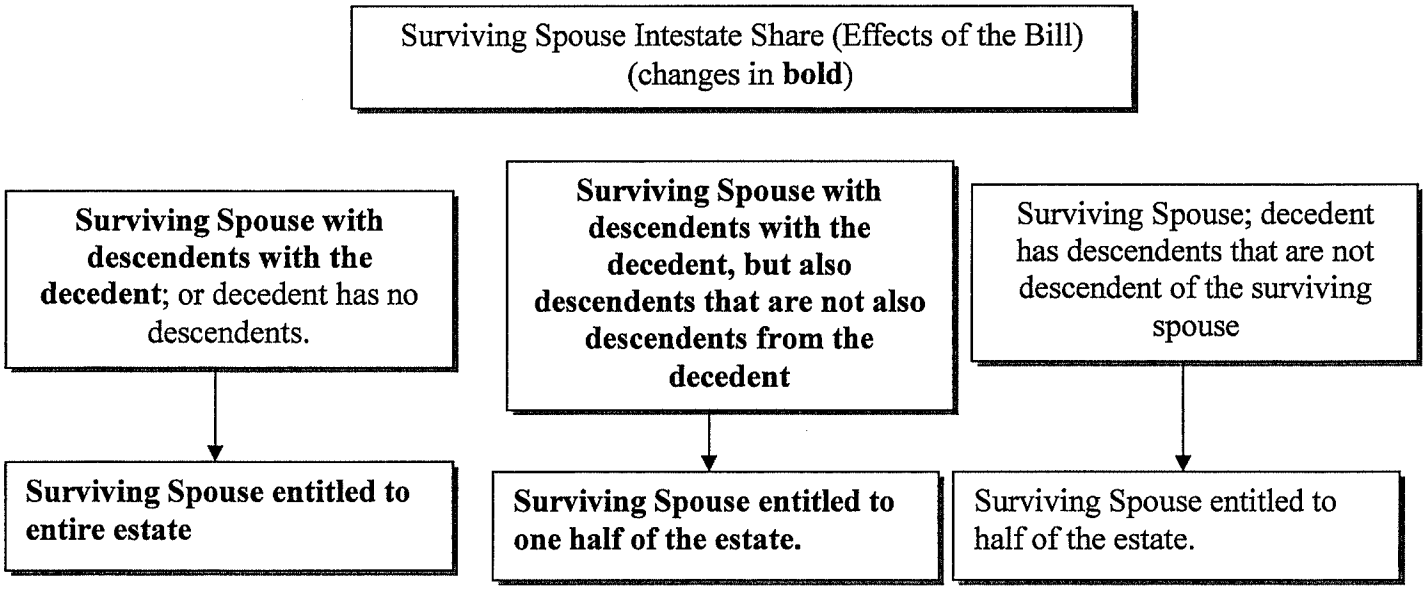
[8] Section 732.103(1), F.S.



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

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

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



Wills

A will is written instrument that names the beneficiaries whom the decedent wants to receive his or her probate assets after his or her death.[9] The decedent also designates a personal representative to administer the estate. There are several requirements for a valid will in the state of Florida including:

- The person (testator) be 18 years of age or older (or an emancipated minor) and be of sound mind.[10]
- The testator or someone at the direction of the testator in the testator's presence must sign the will at the end.[11]
- The signing of the will must be in the presence of two witnesses[12]
- The two witnesses must sign the will in the presence of the testator and each other.[13]

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

Reformation of a Will

Florida law allows the reformation of a will in the case of an ambiguity.[14] One court has described the legal standards of reformation:

> The paramount objective in constructing a will is to ascertain the intent of the testator. The will as a whole should be considered in order to ascertain the testamentary scheme. The construction of the will which leads to a valid testamentary disposition is favored over one which results in intestacy. If possible, the intent should be determined from the will itself. However, in case of ambiguity, extrinsic evidence is admissible to explain the intent of the testator.[15]

The issue that arises is that a mistake does not always involve an ambiguity but instead involves a mistake of fact or law. An example of an unambiguous mistake is *Azcunce v. Estate of Azcunce*.[16] In *Azcunce*, a father drafted a codicil[17] to his will prior to the birth of his fourth child.[18] The will allowed for the creation of a trust for his wife and three children when he died. His fourth child was born shortly after the publication of the codicil. Under current law, the fourth child would be considered a pretermitted child and would be entitled to a share of the estate.[19] The issue in the case was that the father then drafted and published another codicil after the birth of child which did not mention the child. The publication of the second codicil, which republished the previous will with the amendments, also terminated the child's pretermitted status. Shortly after the publication of the codicil, the deceased died of a sudden heart attack.[20]

The mother, on behalf of the minor child, filed suit challenging the will and requesting the child's pretermitted share of the estate under s. 732.302, F.S.[21] The court ruled that the republication of the will when the father published the second codicil terminated the child's pretermitted status and therefore the father had effectively disinherited his daughter.[22] The court noted that,

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[9] Section 732.201(40), F.S.
[10] Section 732.501, F.S.
[11] Section 732.502(1)(a), F.S.
[12] Section 732.502(1)(b), F.S.
[13] Section 732.502(1)(c), F.S.
[14] A will may be void if it is found to be procured by fraud, duress, mistake or undue influence under s. 732.5165, F.S.
[15] *Wilson v. First Florida Bank*, 498 So.2d 1289, 1291 (Fla. 2nd 1986) (Internal citations omitted).
[16] *Azcunce v. Estate of Azcunce*, 586 So.2d 1216 (Fla. 3rd DCA 1991).
[17] A codicil is an amendment to a will that in this case amended the will and republished the previous will with the amendment
[18] *Azcunce* at 1218.
[19] See s. 732.302, F.S.
[20] *Azcunce* at 1218-19.
[21] *Id.* at 1219.
[22] *Id.*

> ...there is utterly no ambiguity in the subject will and codicils which would authorize the taking of parol evidence herein...the mistake of which Patricia claims amounts, at best, to the draftsman's alleged professional negligence in failing to apprise the [father] of the need to expressly provide for Patricia in the second codicil; this is not the type of mistake which voids a will under Section 732.5165, Florida Statutes.[23]

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

Attorney's Fees and Costs in Probate Proceedings

In probate proceedings, the party challenging the will or offering an alternative will may seek attorney's fees and costs from the estate as long as (1) the will is due form, (2) there is not a contingency arrangement between the proponent and the attorney, and (3) the action was brought in good faith.[24] Probate proceedings are one of the few proceedings in which the losing party may still collect attorney's fees.[25] The court also has the discretion to direct from which part of the estate the attorney's fees and costs are to be paid.[26]

The court does not have the ability to tax attorneys' fees of the opposing party against the will proponent directly, instead the court may direct the fees against the person's share of the estate, if any.

An attorney may also request attorneys' fees from the estate directly if the attorney provided valuable services which benefitted the estate.[27] In a proceeding against the personal representative of an estate for improper exercise of power or breach of fiduciary duty, the court may award cost and attorneys' fees directly against either party.[28] A proceeding against the personal representative differs from other probate proceedings in awarding attorneys' fees because the attorneys' fees and costs may be awarded directly against any party in the form of a judgment.[29] The court awards the costs and attorneys' fees as in chancery actions.[30]

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

The bill creates s.732.615, F.S. which provides that a court may reform a will even if it is unambiguous. A person challenging the will would have to prove by clear and convincing evidence[31] that both the testator's intent and terms of the will were affected by a mistake of fact or law.[32] The bill changes current law to allow the court to look to extrinsic evidence even if the evidence contradicts the plain meaning of the will.

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[23] *Id.*

[24] Section 733.106(2), F.S.

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

[26] Section 733.106(4), F.S.

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

[28] Section 733.609, F.S.

[29] Section 733.609(1) & (2), F.S.

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

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

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

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

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

The bill creates s. 733.1061, F.S. which provides that in the newly created actions under s.732.615 and s. 732.616, F.S., "the court shall award taxable costs, including attorney's fees and guardian ad litem fees as in chancery actions."[33] A chancery action for attorneys' fees and costs is an action in equity that is similar to a prevailing party provision for attorneys' fees and costs, but equity does give the court discretion if the circumstances demand.[34] The new section would give the court the ability to charge attorney's fees and costs directly to a party. The bill also gives the court the discretion to tax the fees and costs against a party's interest in the estate or other property of the party that is not part of the estate.

Voided Will- Fraud, Duress, Mistake and Undue Influence

Section 732.5165, F.S. provides that a will is void if the execution is procured by fraud, duress, mistake or undue influence. "Undue influence comprehends over persuasion, coercion, or force that destroys or hampers the free agency and will power of the testator."[35] "If a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises."[36] The Florida Supreme Court articulated the following criteria which is relevant to determining whether a beneficiary has been improperly active in procuring a will:

- Presence of the beneficiary at the execution of the will;
- Presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
- Recommendation by the beneficiary of an attorney to draw the will;
- Knowledge of the contents of the will by the beneficiary prior to execution;
- Giving of instructions on preparation of the will be the beneficiary to the attorney drawing the will
- Securing of witnesses to the will be the beneficiary; and
- Safekeeping of the will by the beneficiary subsequent to execution.[37]

Will contestants are not required to prove all the criteria, but a showing of a significant number will create a rebuttable presumption of undue influence under s.733.107(2), F.S. which shifts burden of proof from the party challenging the will to the proponent of the will.[38]

Revoking a Will by Publication or Act

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

1. By a subsequent inconsistent will or codicil, even through the subsequent inconsistent will or codicil does not expressly revoke all previous will or codicils, but the revocation extends only so far as the inconsistency; or

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[33] The language mirrors part of s.733.609, F.S.

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

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

[36] *Carpenter v. Carpenter*, 253 So.2d 697, 701 (Fla. 1971).

[37] *Carpenter* at 702.

[38] *RBC Ministries* at 571-72.

2. By a subsequent will, codicil, or other writing executed with the same formalities required for the execution of wills declaring the revocation.

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

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

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

Effect of the Bill (Section 5 and Section 6)

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

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

Trusts and Revocable Trusts

A trust is a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (beneficiary).[39] A trust must include specific property, reflect the settlor's intent and be created for a lawful purpose.[40]

There are many different types of trusts, including a revocable trust. A revocable trust is a trust in which the settlor may, without the consent of the trustee, revoke the trust.[41] Unless the terms of a trust expressly provide that the trust is irrevocable, then the settlor may revoke or amend the trust at any time.[42] The capacity requirement is the same for a revocable trust as it is for a will.[43] The Florida Supreme Court noted,

> that a revocable trust is a 'a unique type of transfer' and 'by definition..., when a settlor sets up a revocable trust, he or she has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property.' The settlor's retention of control 'distinguishes a revocable trust from other types of conveyances...' [44]

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

Challenging the Revocation of a Revocable Trust

A court may void a trust if the *creation* of the trust is procured by fraud, duress, mistake, or undue influence.[45]

Florida courts have found that a revocation, procured under undue influence, of a revocable trust is not challengeable in court. In *Florida National Bank of Palm Beach County v. Genova*, the Florida Supreme

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[39] Black's Law Dictionary (9th ed. 2009), trust.
[40] Id.
[41] Section 736.0103(15), F.S.
[42] Section 736.0602(1), F.S.
[43] Section 736.0601, F.S.
[44] *MacIntyre v. Wedell*, 12 So.3d 273, 274 (Fla. 4th DCA 2009) (quoting *Florida National Bank of Palm Beach County v. Genova*, 460 So.2d 895(Fla. 1985)).
[45] See s. 736.0406, F.S.

Court ruled that the principle of undue influence is not applicable when revoking a revocable trust.[46] In the facts of the case, Mrs. Genova, who was 76, had married Mr. Genova, who was 32.[47] The couple was divorced a year later but then remarried a year after the divorce. Mrs. Genova had established a revocable trust with Florida National Bank of Palm Beach County as the trustee.[48] Mrs. Genova attempted to revoke her trust, but the trust officer refused to do so suspecting undue influence on the part of Mrs. Genova's husband.[49] Mrs. Genova filed an action to force the bank to revoke the trust shortly after. The Supreme Court ruled that, "Mrs. Genova has the power to revoke this trust at any time she wishes to do so."[50] The Court further noted that:

> The courts have no place in trying to save person such as Mrs. Genova, the otherwise competent settlor of a revocable trust, from what may or may not be her own imprudence with her own assets. When she created this trust, she provided a means to save herself from her own incompetence, and the courts can and should zealously protect her from her own mental capacity. However, when she created this trust, she also reserved the absolute right to revoke if she were not incompetent. In order for this to remain a desirable feature of a trust instrument, the right to revoke should also be absolute.[51]

The Florida Fourth District Court of Appeal furthered the opinion in *Genova* to include barring challenges to the revocation of a revocable trust under undue influence after the death of the settlor.[52]

The revocable trust has become a common substitute for a will and a will revoked under undue influence[53] is subject to a post death challenge where a revocable trust is not, so there is inconsistency between the two instruments.

Effects of the Bill (Section 7 and 8)

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

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

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

Attorney's Fees and Costs in Trust Proceedings

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

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[46] *Florida National Bank of Palm Beach County v. Genova*, 460 So.2d 895, 895 (Fla. 1985).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 896.
[50] *Id.*
[51] *Id.* at 898
[52] *MacIntyre v. Wedell*, 12 So.3d 272 (Fla. 4th DCA 2009).
[53] Revocation of a will by publication would be able to be challenged under current law

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

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

The rule was created in the civil litigation context "to cure the evil" of uncertainty created by tardy motions for fees and costs, and to eliminate the prejudice that tardy motions cause to both the opposing party and the trial court.[54] Application of the rule can be confusing in trust proceedings. In many trust proceedings the trustee is entitled to pay its attorneys' fees and costs from trust assets. Whereas, in civil litigation taxation of attorneys' fees is usually based on prevailing party considerations, trusts actions do not necessarily follow the same considerations. Also, attorneys who have provided benefit to the trust may apply directly for attorneys' fees and costs.[55] When and when not to apply Rule 1.525 has created confusion for probate attorneys and the courts.[56]

There was a similar issue with the application of Rule 1.525 to the family law proceedings as well. The Family Law Rules Committee filed a petition with the Florida Supreme Court to eliminate the application of Rule 1.525 to family law proceedings.[57] The petition was granted and Family Law Rule 12.525 was created. The court noted that:

> The method of taxation of attorneys' fees and costs in family law cases is quite different from that in civil litigation. Whereas the former is based on need and ability of the parties to pay, the latter is based on prevailing party considerations.[58]

The court then ruled that:

> Because the application of rules 1.525 in family law cases could be creating confusion among the courts, and because there already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in family law matters...we hereby adopt new Florida Family Law Rule of Procedure 12.525...[59]

The confusion was able to be rectified with an additional rule that exempted family law proceedings from Rule 1.525.

Effect of the Bill (Section 10)

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

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[54] *Barco v. School Board of Pinellas County*, 975 So.2d 1116, 1123 (Fla. 2008)
[55] Florida Statutes awarding attorneys' fee in trust proceedings include ss. 736.1004; 736.1005; 736.1006; 736.1007; 736.0201;736.0206; 736.0410; 736.04113; 736.04113; 736.04115; 736.04117; 736.0412; 736.0413; 736.0414; 736.0415; 736.0416; 736.0417, F.S.
[56] Scuderi and Zung-Clough, "Does Florida Rule of Civil Procedure 1.525 Apply to Probate and Trust Proceedings?" ActionLine (Fla. Bar RPPTL Section Winter 2009).
[57] Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So.2d 467 (Fla. 2005)
[58] *Id.* at 467.
[59] *Id.* at 468.

B. SECTION DIRECTORY:

Section 1 amends s. 732.102(2), F.S. and creates s. 732.102(4) changing the intestate share of the surviving spouse. This section is effective October 1, 2011.

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

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

Section 4 creates s. 733.1061, F.S. allowing for the judge to award attorneys' fees and costs. This section is effective July 1, 2011.

Section 5 amends s. 732.5165, F.S. allowing revocation of a will to be challenged

Section 6 amends s. 732.518, F.S. restricting will challenges

Section 7 amends s. 732.0207, F.S. restricting challenges to revocable trusts

Section 8 amends s. 736.046, F.S. allowing for the challenging of the revocation of a trust

Section 9 amends s. 744.441(11), F.S. creating a rebuttable presumption

Section 10 amends s. 736.0201, F.S. and creates 736.0206(6)(a) and (b) conforming trust proceedings to civil procedure rules.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

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

Article V, s. 2(a) of the state constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts. Article II, s. 3 of the state constitution prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches." The courts have read these sections together in ruling that the supreme court has exclusive rulemaking power, and the legislature has no power to amend procedural rules.[60]

It is possible that this change may be interpreted as an attempt to amend a court rule.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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

A bill to be entitled

An act relating to estates; amending s. 732.102, F.S.; revising provisions relating to the intestate share of a surviving spouse; creating s. 732.615, F.S.; providing a right to reform the terms of a will to correct mistakes; creating s. 732.616, F.S.; providing a right to modify the terms of a will to achieve tax objectives; creating s. 733.1061, F.S.; providing for a court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually; amending s. 732.5165, F.S.; clarifying that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 732.518, F.S.; specifying that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 736.0207, F.S.; clarifying when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406, F.S.; providing that the creation of a trust amendment or trust restatement and the revocation of a trust are subject to challenge on the grounds of fraud, duress, mistake, or undue influence; amending s. 744.441, F.S.; limiting the circumstances under which a guardian of an incapacitated person may bring a challenge to a settlor's revocation of a revocable trust; amending s. 736.0201, F.S.; clarifying that certain payments by a trustee from trust assets are not taxation of attorney's

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

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

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

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

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

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

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

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

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

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

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

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

733.1061 Fees and costs; will reformation and modification.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

736.0201 Role of court in trust proceedings.—

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

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

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

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 469 Individual Retirement Accounts
SPONSOR(S): Stargel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 978

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Woodburn	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

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

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

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

The bill takes effect upon becoming law and applies retroactively.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Introduction

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

Individual Retirement Account (IRA)

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

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

There are different types of IRA's, including the traditional IRA and the Roth IRA. The traditional IRA allows the owner of the account to make tax deductable contributions to the account and defer paying taxes on the income until withdrawals from the IRA after retirement.[7] The Roth IRA[8] allows an owner of the account to make non-tax deductible contributions into the account and make tax free withdrawals from the account upon retirement.[9]

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[1] *Robertson v. Deeb*, 16 So.3d 936 (Fla. 2nd DCA 2009).
[2] *In re: Ard*, 435 B.R. 719 (Bkrtcy. M.D. Fla. 2010).
[3] *See Internal Revenue Publication, Publication 590, Individual Retirement Arrangements (IRA)* at 3 (2010).
[4] Lynch and Griffin, "The *Robertson* Case: A Beneficiary by Any Other Name is Still a Beneficiary," The Florida Bar Journal, April 2010, Vol. 84, No.4.
[5] 26 U.S.C. §408(a)
[6] *IRS Publication 590* at 9.
[7] *Id.* at 7.
[8] A Roth IRA also differs from a traditional IRA in that the owner can open one at any age and does not have to take deductions at age 70 1/2.
[9] *Id.* at 57.

IRAs have become increasing important since their creation in 1974.[10] At the end of 2009, IRAs held $4.3 trillion, or more than one quarter of the $16.1 trillion in estimated total U.S. retirement assets and makes up almost ten percent of U.S. households' total assets.[11] It is estimated that 41.4 percent of U.S. households owned one or more types of IRAs.[12]

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

1. The beneficiary must withdrawal all of the funds from the original IRA within five years of the original owner's death, or

2. The beneficiary must transfer the funds to an inherited IRA and take annual distributions over the remaining lifespan of the beneficiary.[16]

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

IRA Asset Protection

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

> Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:
>
> 1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;
>
> 2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable

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[10] The IRA was created by the passage of the Employee Retirement and Security Act (ERISA) in 1974.
[11] *The IRA Investor Profile: Traditional IRA Investors' Rollover Activity, 2007 and 2008.* ICI Investment Company Institute www.ici.org
[12] *Id.* at 3.
[13] 26 U.S.C. §408(d)(3)(C)(ii)
[14] An IRA inherited by a spouse is not considered an inherited IRA and is treated the same as the original account.
[15] 26 U.S.C. §408(d)(3)(C)(ii)
[16] 26 U.S.C. §401(a)(9)

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

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

Robertson v. Deeb & In Re: Ard

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

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

The Court reasoned that since the inherited IRA was not the original IRA[21] and the tax status was different,[22] the exception in s. 222.21(2)(a), F.S. did not apply since the exception was conditioned on the tax status of the original account.

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

Effect of Proposed Changes

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

The bill amends s. 222.21(2)(c), F.S. to provide that an IRA exempt from creditors under s. 222..21(2)(a), F.S. would continue to be exempt if the original IRA is transferred to an inherited IRA. Under the proposed changes, when an owner of an IRA passes away, his or her named beneficiary would continue to enjoy the protection from creditors that the original owner enjoyed under s. 222.21(2)(a), F.S. This protection would most likely extend to protection in bankruptcy proceedings as well.

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[17] 11 U.S.C. s. 522(b) (Federal Bankruptcy law allows a debtor to exempt certain property from bankruptcy proceedings according to state law)
[18] *Robertson*, at 937.
[19] *Id.* at 938.
[20] *Id.* at 938.
[21] The court reasoned that the IRA ceased to be the original IRA when it was passed to a beneficiary
[22] The court noted that inherited IRAs do not have a penalty for early withdrawals, distributions must be made and inherited IRAs are not entitled to contributions or rollovers into existing IRAs to point out the inconsistencies with the original IRA.
[23] *In re: Ard*, at 719
[24] *Id.* at 722.
[25] *Id.*

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

The bill takes effect upon becoming a law.

B. SECTION DIRECTORY:

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

Section 2 provides that the bill becomes effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

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

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

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

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

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

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

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

A bill to be entitled

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

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

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

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

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

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

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

(2)

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CVJS 11-01 Court Rulemaking
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Bond NB	Bond NB

SUMMARY ANALYSIS

Article V, s. 2(a) of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts. The courts have stricken numerous substantive laws on the grounds that such laws violate the court's rulemaking power.

This joint resolution proposes to amend art. V, s. 2(a) of the Florida Constitution to provide that no court has the power, express or implied, to adopt rules for practice and procedure in any court. It provides that the court rules of practice and procedure may be recommended by the Florida Supreme Court to be adopted, amended, or rejected by the Legislature in a manner provided by general law. The joint resolution also provides that a statute will control over a court rule in the event of a conflict.

The proposed joint resolution, if passed by the Legislature, would be considered by the electorate at the November 2012 general election.

This proposed joint resolution appears to require a nonrecurring expense payable from the General Revenue Fund in FY 2012-13 for required advertising of the proposed joint resolution. Future impact on state revenues and expenditures are unknown, speculative, and contingent upon how the amendment is implemented. This proposed joint resolution does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Constitutional Provision to be Amended

Article V, Section 2(a) of the Florida Constitution provides, currently reads in part:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

History of Court Rulemaking Power in Florida Prior to Current Law

Early state constitutions did not address whether the court had any rulemaking power. An early statute on rulemaking recognized the inherent legislative power over rulemaking, providing:

> The supreme court shall have the following powers, and action taken by it thereunder shall have the force of law until otherwise provided by the legislature, to-wit: 1. To make, etc., rules of practice.[1]

It is unclear why, but just 5 years later the Legislature passed the following restriction, amended onto the end of the above law:

> To make, amend, annul or modify rules of practice or pleading of the supreme court or any other court, as it may see fit, not inconsistent with law.[2]

The limitation that court rules may not be inconsistent with general law remained in statute until 1957.

In 1940, the Florida Bar filed a petition with the Supreme Court proposing that the court enact a comprehensive set of rules of civil procedure governing the trial courts. In rejecting the petition, Chief Justice Terrell[3], writing for the majority, cautioned against the enactment of any court rule that might have the effect of encroaching on substantive law.

In the 1956 general election, the voters adopted a legislative proposal largely re-writing the judicial article of the constitution. Included in those changes was the first ever section on court rules. Effective as of 1957, the new judicial article included:

> Section 3. Practice and Procedures. The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

The 1957 Legislature passed a conforming bill, substantially changing ch. 25, F.S., the statute governing the Supreme Court. Included in the changes was repeal of s. 25.03, F.S., the statute that had authorized, and limited, the court's rulemaking power.

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[1] Chapter 1626, s. 3. Enacted August 1, 1868.
[2] Chapter 1938, s. 12. Enacted February 1, 1873.
[3] Former Justice William Glenn Terrell was a justice for 41 years, from 1923 through 1964. He is generally regarded as one of the court's most respected alumni.

The current language in the state constitution regarding court rulemaking was adopted by the voters in 1972 and became effective January 1, 1973.

Relevant Current Constitutional Provisions

Article V, s. 2(a) of the Florida Constitution currently reads in relevant part:

> **SECTION 2. Administration; practice and procedure.--**
>
> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Article II, s. 3 of the Florida Constitution currently reads:

> **SECTION 3. Branches of government.--**The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The Supreme Court has found that the interplay of these two sections gives the Supreme Court exclusive power over rules of practice and procedure, while the Legislature has the exclusive power to enact substantive law. The two branches sometimes appear to disagree as to what is substantive and what is procedural.

Defining Procedure and Substance

The Florida Supreme Court has defined substantive law as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.[4]

The Florida Supreme Court has defined practice and procedure as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing

[4] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730, 732 (Fla. 1991).

the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[5]

The "Twilight Zone" Between Procedure and Substance

The courts have long struggled to determine the line between rules and substantive law. In 1940, for instance, the Supreme Court set forth the difficulty in finding that line, and denied a petition to create rules of civil procedure, ruling:

> It was admitted at the bar that this court was powerless to promulgate a rule which had the effect of enacting or repealing a statute involving jurisdiction or substantive law. It is shown, however, that the proposed Rules of Civil Procedure will amend, modify, or repeal more than 350 statutes. **The limits of procedural and substantive law have not been defined and no two would agree where the one leaves off and the other begins. There is also between the two a hiatus or twilight zone that has been constantly entered by the courts and the Legislatures.** Petitioners contend that none of the proposed rules affect substantive law but suggest that if there be such, they should be discarded. We have examined the affected statutes and I think many of them go to matters of substantive law and jurisdiction.
>
> Another element that lends confusion to the situation is that the current of substantive law and procedural law often coalesce. **What is regarded as substantive law today may become procedural law tomorrow, and vice versa. Conflicts on this point have given rise to powers that are said to be not strictly legislative or judicial and when this is the case, the power of the Legislature is dominant.**
>
> . . .
>
> **It would be impossible to separate the rules that affect procedural statutes from those which affect substantive or jurisdictional statutes and to attempt it would create confusion and uncertainty in procedure that we would be a generation construing and straightening out.**[6]

The 1940 court was not alone in being unable to find the line between procedure and substance. Thirty-two years later, Justice Adkins noted the difficulty in separating substantive law from procedural law:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.[7]

Just 3 years ago, the Supreme Court struggled again with how to cope with a statute which contains portions that the court deems substantive and portions that the court deems procedural:

> Of course, statutes at times may not appear to fall exclusively into either a procedural or substantive classification. We have held that where a statute contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and

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[5] *Allen v. Butterworth*, 756 So.2d 52, 60 (Fla. 2000) (quoting *In re Florida Rules of Criminal Procedure* 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring)).

[6] *Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure*, 199 So. 57 (Fla. 1940) (emphasis added).

[7] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972)(Adkins, J., concurring).

procedure of the courts in a constitutional sense, causing a constitutional challenge to fail.[8]

In other cases of conflict, however, the court has declined to decide whether a statute is procedural or substantive by simply adopting the statute as a rule "to the extent it is procedural."[9] Unfortunately, there is no fixed standard by which the Legislature can know when its acts will be upheld and subsequently adopted to the extent procedural, or will be stricken as violating the court's rulemaking power.

The Difficulty in Determining the Line Between Procedure and Substance Appears to Have Affected the Balance of Power between the Legislature and the Courts

Since the 1972 change in the constitution, the courts have stricken substantive law for violating the court's rulemaking power, as will be further described below. The Supreme Court has also written rules that arguably contain substantive law.

The check and balance to stop legislative encroachment into the authority of the court system is the striking of laws. The check and balance to stop court encroachment into legislative authority is the power to repeal a court rule. In practice, some believe that these checks and balances are not equal.

The court that writes court rules is the same court and the sole judge of whether a rule controls over the statutes. On the other hand, the Legislature does not pass a law by itself, every law, including a repeal of a court rule, is subject to veto by the executive branch. Additionally, while a court striking a law is final on entry of a court opinion, a rule repeal is not actually implemented unless the court takes action. There is no apparent remedy should the court refuse to honor a repeal by refusing to either remove a repealed rule from the compiled rules or amend the rule to conform to a repeal.

This analysis will first look to a number of examples of laws stricken by the courts and at rules that perhaps have encroached on substantive law. This analysis will then examine prior repeals and how the court has reacted.

Court Rules May Conflict With Statutes

Conflicts occur when statutes and court rules attempt to address the same issues. For example, s. 57.085(7), F.S., requires a prisoner seeking to file a lawsuit without paying court costs and fees due to indigence to file a list of all other lawsuits the prisoner has participated in during the previous 5 years and copies of the pleadings commencing such lawsuits with the court. The statute appears to have been passed to prevent inmates from filing frivolous lawsuits at taxpayer expense and the copy requirement allowed the court to review the prior pleadings filed by an inmate.

In *Jackson v. Department of Corrections*, 790 So.2d 381 (Fla. 2001), the Florida Supreme Court ruled that the copy requirement infringed on the court's rulemaking authority. The court said that the "existence of a right for indigents to proceed without the payment of court costs is a substantive one and is properly provided by the Legislature."[10] However, the court said it has the exclusive authority for "formulating procedures for granting in forma pauperis status."[11] The court appears to hold that once the Legislature provides for the ability to proceed without payment of court costs, the court has the exclusive authority to implement that right.[12]

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[8] *Massey v. David*, 979 So.2d 931, 937 (Fla. 2008).

[9] *See, e.g., In re Amendments to the Florida Evidence Code*, __ So.3d. __, 2011 WL 101668 (Fla. January 13, 2011)(an example of a case where the court adopts a statute as a rule of court).

[10] *Jackson*, 790 So.2d at 383.

[11] *Jackson*, 790 So.2d at 384.

[12] After allowing Jackson's litigation to proceed at taxpayer expense, the court found it frivolous, denied Jackson's claim, and required Jackson to show cause why, after initiating meritless litigation at least 24 times, he should not be barred from filing further appeals.

In *Massey v. David*, 979 So.2d 931 (Fla. 2008), the court held the Legislature could not impose requirements which a litigant must fulfill before a litigant can recover expert witness fees from the opposing party in a lawsuit. In *Massey*, the statute set forth time limits within which a party must furnish expert witness opinions and reports to the opposing party in a lawsuit. The statute gave the court discretion to adjust the time limit to meet the needs of a particular case. The statute did not preempt the court's discovery rules but rather provided that if a party did not comply with the statute, it could not recover expert witness fees. The court held that such requirements conflicted with the rules of court relating to discovery and were therefore procedural.[13]

Justice Cantero dissented:

> The Legislature's decision to condition the taxation of expert witness fees on providing a report to the opposition is a substantive one. The statutory deadline for filing this report, while procedural, is necessary to implement the substantive law and does not conflict with existing procedural rules.[14]

Another example involves postconviction DNA testing. In January of 2001, House and Senate bills were filed to create a statutory right and process for DNA testing[15] and legislation providing for DNA testing was signed by the Governor on May 31, 2001, as ch. 2001-97, L.O.F. The law created a limited right to DNA testing.

On October 18, 2001, the court first adopted Rule 3.853.[16] The rule made substantive changes to the statutory provisions, one of which greatly expanded the application of the testing program. The first change involved testing laboratories. The statute limited testing to the FDLE crime lab while the rule allowed a prisoner with enough money to employ any accredited lab. The second change was to eligibility for testing. Where the statute had limited testing to persons who had claimed innocence and gone to trial, the rule also allowed DNA testing by persons who had pled either no contest or guilty.[17] This expansion was a proposal that had been considered by the Legislature and rejected.[18] The third change provided additional grounds for DNA testing. The statute provided that a petition for DNA testing must include a statement that "identification of the defendant is a genuinely disputed issue in the case, and why it is an issue." The rule provided that a motion for DNA testing must include "a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue **or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received**. (emphasis added).

In *Crow v. State*, 866 So.2d 1257, 1259 (Fla. 1st DCA 2004), the court acknowledged that the statute was more restrictive than the rule but held that the rule prevailed over the statute. The court explained:

> In the present case, the defendant qualifies for testing under the rule but not under the more restrictive terms of the statute. This brings us to the heart of the issue: whether the right to obtain scientific evidence to show that a person was wrongfully convicted is a matter for the courts or for the Legislature.
>
> The state contends that eligibility for postconviction DNA testing is a matter of substantive law and therefore that the statute prevails over contrary provisions in the rule. This argument would be more appealing if we were to consider only the text of the

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The court described Jackson as a "litigating engine" and noted "in all likelihood, Jackson will have filed more petitions in this Court before this decision is published." *Jackson*, 790 So.2d at 387-388.

[13] *Massey*, 979 So.2d at 943.

[14] *Massey*, 979 So.2d at 952 (Cantero, J., dissenting).

[15] 2001 HB 147 and SB 366.

[16] *Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So.2d 633 (Fla. 2001).

[17] See discussion under heading of "PROPOSED RULE 3.853", 807 So.2d at 634.

[18] *See House of Representatives Committee on Crime Prevention, Corrections & Safety Final Analysis of CS/HB 147, July 11, 2001, at page 8 (*discussing floor action on the bill and noting that the language relating to testing subsequent to a plea was removed from the bill).

> statute and rule and not the underlying authority to define the rights at issue. Some separation of powers issues cannot be resolved merely by characterizing the nature of the regulation as substantive or procedural.
>
> The distinction between procedural law and substantive law is controlling if the only source of authority for a rule or statute is the general power conferred by the state constitution, but this distinction is immaterial if the rule or statute is based on a specific grant of constitutional power. If a statute purports to regulate a matter that is within the exclusive control of the judiciary under a specific grant of constitutional authority, then it makes no difference whether the right created by the statute is characterized as substantive or procedural. In neither case could the statute prevail over conflicting provisions of a court rule implementing the constitutional authority in question.[19]

In *Crow*, the court held that Rule 3.853 controlled over a more restrictive statute. Similarly, in *Gonzalez v. State*, 41 So.2d 1050 (Fla. 2d DCA 2010), the court held the rule was broader than the statute.

These cases demonstrate how legislative policy objectives (limiting frivolous litigation by inmates at taxpayer expense, limiting DNA testing to specific classes of criminals, and encouraging prompt settlement of lawsuits) can be found to encroach on court rulemaking authority.

Court Rules May Create Substantive Rights Not Required by the Constitution or Statute

Florida Rule of Criminal Procedure 3.191 was enacted to implement the right to a speedy trial created in art. I, s. 16 of the state constitution. The rule provides the ability for a criminal defendant to be discharged if he or she is not brought to trial within a certain time from arrest. If the defendant is not brought to trial within the specified time, the defendant is discharged and cannot be prosecuted.

Neither the Florida Constitution nor the United States Constitution provides for a specific number of days within which a defendant must be tried.[20] The discharge remedy has become Florida law solely because it is in a court rule. The Legislature's ability to change the rule is limited. In *State el rel. Maines v. Baker*, 254 So.2d 207 (Fla. 1971), the court held the speedy trial rule was procedural and rejected a claim that it was unconstitutional. In *R.J.A. v. Foster*, 603 So.2d 1167 (Fla. 1992), the court held that Legislature's attempt to impose a shorter speedy trial period in juvenile cases infringed on the court's rulemaking authority. Justice Barkett dissented:

> Like statutes of limitations, which define when an action must be commenced, section 39.048 defines when a lawsuit must be commenced and tried. This Court has previously held that statutes of limitations create substantive rights that cannot be abrogated by rules of procedure.[21]

In *Reed v. State*, 649 So.2d 227, 229 (Fla. 1995), Justice Overton argued that the speedy trial rule had expanded to confer a substantive right:

> I write to express my belief that the majority has now crossed the line and made our speedy trial rule substantive rather than procedural by this construction and that, consequently, it is unconstitutional. *See* art. II, § 3, Fla. Const. The rule is no longer a procedural "triggering mechanism," as explained by the United States Supreme Court in *Barker v. Wingo* and by this Court in *R.J.A. v. Foster.* It is now a right granted by this Court which, as explained by Justice Wells, effectively eliminates the statutes of limitations lawfully enacted by the legislature.

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[19] *Crow v. State*, 866 So.2d 1257, 1260 (Fla. 1st DCA 2004).
[20] *See Barker v. Wingo*, 407 U.S. 514 (1972); *State v. Polk*, 993 So.2d 581 (Fla. 1st DCA 2008).
[21] *R.J.A. v. Foster*, 603 So.2d 1167, 1172 (Fla. 1992)(Barkett, J., dissenting)(emphasis in original).

Section 775.15, F.S., creates statutes of limitation for criminal actions. The court has held that statutes of limitation are substantive law. However, in many cases, the limitation periods are significantly shortened by the speedy trial rule. According to statistics from the Office of State Court Administrator, 1,236 defendants in circuit court (including 12 defendants charged with murder or capital murder) and 2,638 defendants in county court were discharged by speedy trial rule dismissals from January, 1986 through June, 2009. It is possible that the resolution of other cases is delayed because the speedy trial rule could force the court to dispose of those cases before dealing with cases that do not have a court-imposed time limit for trial.

Another example of the Supreme Court apparently creating a substantive law through court rules can be found in the case of *Amendments to the Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996). The Legislature passed the Criminal Appeals Reform Act of 1996 in an attempt to reduce the number of frivolous appeals in the appellate courts. Opponents of the legislation argued that it was procedural and could not be applied if it conflicted with court rules. The court adopted rules that were in conflict with statute and that expanded the right of defendants to appeal beyond constitutional requirements.[22]

Other cases where the court has created substantive rights are discussed elsewhere in this analysis, including limiting the ability of a juvenile to waive the right to counsel, providing counsel in cases where it is not required by the Constitution or statute, and increasing the number of cases in which DNA testing is required.

Court Rules May Cause the State to Make Expenditures

Some court rules can, or have, caused the state to expend funds. The courts can require the state to provide a service required by the constitution. However, where there is no constitutional right to a service, a court rule requiring the state to provide that service infringes upon the constitutional provision that prohibits the courts from making appropriations.[23] The Legislature is supposed to have the "power of the purse." These are a few examples of court rules that have caused, or might cause, the state to expend funds:

Adult First Appearances

In *In re Amendments to Florida Rule of Criminal Procedure 3.130*, 11 So.3d 341 (Fla. 2009), the court amended a court rule to require that the state attorney and the public defender, or their designated assistants, must attend all first appearance hearings. The opinion noted that not every county required a state attorney and public defender to attend first appearance hearings "apparently due to practical and financial obstacles."[24] The court's opinion does not indicate the cost of imposing the requirement on state attorneys and public defenders. The court did not claim that the presence of a public defender was required by the constitution. Certainly, there is no constitutional right to the presence of an assistant state attorney at a first appearance hearing. The effect of this ruling may be to increase workloads and thereby require the state to allocate additional funding to the offices of the state attorneys and public defenders.

Juvenile Waiver of Counsel in Delinquency Cases

There is no constitutional right to consult an attorney before waiving the right to an attorney. In *In re Amendments to the Florida Rules of Juvenile Procedure,* 894 So.2d 875 (Fla. 2005), the court proposed an amendment to the rules applicable to juvenile procedure requiring that a juvenile charged with a crime consult with counsel before waiving the right to be represented. The court considered the financial impact on the court system in deciding not to impose the requirement at that time:

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[22] The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).
[23] Article V, s. 14 of the state constitution.
[24] *In re Amendments to Florida Rule of Criminal Procedure 3.130*, 11 So.3d 341 (Fla. 2009).

> Because of the potential financial impact of the amendment to rule 8.165(a) regarding consultation with attorneys and our desire to work cooperatively with the Legislature, we urge the Legislature to consider the Commission's recommendations. We also strongly urge that the voluntary practice that exists in many jurisdictions in which consultation with an attorney takes place be continued and, where possible, expanded in the interim.
>
> We thus decline to adopt at this time the portion of rule 8.165(a) regarding consultation with an attorney prior to a waiver. We emphasize that we are not rejecting this proposed amendment to rule 8.165(a), but are merely deferring its consideration. We intend to readdress the adoption of the amendment to rule 8.165(a) at a future time following the conclusion of the legislative session. We further take this opportunity to reinforce that it is critical for delinquency judges to ensure that any waiver of counsel by a child is knowingly and voluntarily given, especially prior to accepting a plea of guilty or nolo contendere.[25]

Three years later, in *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 463 (Fla. 2008), the Supreme Court amended the rules of procedure to provide that a juvenile in a criminal proceeding could not waive his or her right to counsel without first conferring with counsel. The court acknowledged that imposing such a rule could result in "a significant increase in caseloads"[26] and acknowledged that the Legislature had considered a number of bills to implement the requirement but the bills had not passed.[27] Despite these concerns, the court adopted the rule. Three justices dissented, saying:

> Essentially, this amendment creates a *new,* unwaivable right in all juveniles to a prewaiver consultation with counsel. Such a change is clearly substantive, not procedural. And, given the complete absence of any substantive law upon which to base this new rule, I do not believe we can or should use our procedural rulemaking authority to impose such a sweeping mandate. To do so puts the proverbial cart before the horse.[28]

Justice Bell further noted that "proposed legislation supporting this substantive change in the law failed to pass during the 2006 and 2007 Florida legislative sessions" and that the failure of a bill to pass is an "insufficient basis for this Court to usurp the legislative prerogative to make this policy decision and impose the change in a rules case."[29]

Appointed Attorneys for Juveniles in Dependency Cases

In *In re Amendment to the Rules of Juvenile Procedure Fla. R. Juv. P. 8.350*, 842 So.2d 763 (Fla. 2001), the court proposed rules to require appointment of counsel for a dependent child recommended for placement in a residential mental health facility and to require a court hearing before the placement of a dependent child in a residential mental health treatment facility. Justice Wells dissented and argued the court lacked the authority to require appointment of counsel:

> In respect to the appointment of an attorney for the child, I conclude that the court cannot mandate counsel by rule. There has not been determined to be a constitutional requirement for counsel for the child. There is no statutory right to counsel for the child. Procedural rules in respect to counsel should be just that-procedures for the implementation of substantive rights having either a constitutional base or a statutory creation. It is only in this way that the other fundamental in respect to a requirement for counsel, which is the essential fundamental of funding, has a basis.

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[25] *In re Amendments to the Florida Rules of Juvenile Procedure*, 894 So.2d 875, 880-881 (Fla. 2005).
[26] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 463, 466 at n. 3 (Fla. 2008).
[27] *See In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 463, 466 at n. 3 (Fla. 2008).
[28] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a),* 981 So.2d 463, 467 (Fla. 2008)(Bell, J., dissenting).
[29] *In re Amendment to Florida Rule of Juvenile Procedure 8.165(a)*, 981 So.2d 469 (Fla. 2008)(Bell, J., dissenting).

> To have rule-mandated counsel without a legislative commitment for funding serves only to create confusion. For this Court to offer a proposed rule with a requirement for such an appointment of counsel is to propose a rule which has a provision which cannot become effective and therefore proposes what the Court cannot deliver.[30]

Two years later, after receiving comments, and apparently after giving the Legislature the opportunity to pass a law and funding for the idea (which did not happen), the court in 2003 issued an opinion adopting the proposed rule. The court argued that funding could be shifted from a legislatively-created Guardian Ad Litem program to a court-created attorney program:

> Finally, regarding potential sources of funding, several commentators pointed out that during the 2002 legislative session the Florida Legislature appropriated, and Governor Bush approved, $7.5 million to Guardian Ad Litem programs for representation of children in chapter 39 proceedings. *See* Ch. 2002-394, § 7, at 4613-15, Laws of Fla. Chapter 39 governs proceedings related to children and section 39.407(5) specifically governs proceedings related to the placement of dependent children into residential treatment facilities. Thus, it is possible that a portion of the funding appropriated by the Legislature and approved by Governor Bush could be used as a source to pay those attorneys who are appointed to represent dependent children in rule 8.350 proceedings as mandated by this rule.[31]

Justice Wells dissented and noted the separation of powers concern with the majority's proposal to shift funding:

> The majority has now adopted a rule, which in material part was rejected by a vote of eighteen to seven by the committee which had the responsibility to first review this rule. As I stated in my earlier opinion, I have serious concerns about the practical ramifications of the rule that the majority now adopts in respect to the court-mandated counsel. I know of no authority for this Court to mandate the appointment of counsel by rule when there is no constitutional or statutory requirement for counsel. The majority has no evidentiary support for its statement, "There are multiple sources of experienced attorneys that can be tapped by judges to represent children in rule 8.350 proceedings." Majority op. at 767. Nor does the majority have any sources of funds to pay such attorneys. Clearly, money appropriated by the Legislature for the guardian ad litem program cannot be properly redirected from that program without legislative approval.[32]

Justice Harding also dissented from the adoption of the rule mandating appointment of counsel, noting the constitutional issue and explaining that funding was not available in statute:

> [T]he majority sets forth no constitutional or statutory basis for requiring that counsel be appointed. Absent reliance upon such a basis, I do not think this Court has the authority, by rule, to require trial judges to appoint counsel for dependent children facing commitment to treatment facilities. *Cf. State v. Garcia, 229 So.2d 236, 238 (Fla. 1969)*("The rules adopted by the Supreme Court are limited to matters of procedure, for a rule cannot abrogate or modify substantive law.").
>
> In addition, there are no statutory provisions for compensation of counsel appointed pursuant to the rule adopted by the majority. While section 39.0134, Florida Statutes, provides that counties are to pay for court-appointed counsel for dependent children, this section applies only to counsel entitled to compensation "pursuant to a court appointment in a dependency proceeding pursuant to this chapter." § 39.0134(1), Fla. Stat. (2002). The precommitment hearing required by the rule is not a "dependency

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[30] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 804 So.2d 1206, 1216 (Fla. 2003) (Wells, J., dissenting).
[31] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 766-767 (Fla. 2003).
[32] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 769-770 (Fla. 2003)(Wells, J. dissenting).

> proceeding" pursuant to chapter 39, Florida Statutes (2002), nor could a court appointment pursuant to the rule be considered a court appointment pursuant to chapter 39. Thus, this section does not apply.
>
> Nor does there appear to be any other applicable statutory provision for compensation of attorneys appointed pursuant to the rule adopted by the majority. Section 29.001, Florida Statutes (2002), which requires counties to fund the costs of court-appointed counsel, expressly defines court-appointed counsel as "counsel appointed to ensure due process in criminal and civil proceedings in accordance with state and federal constitutional guarantees." § 29.001(1), Fla. Stat. (2002). As noted above, the majority has identified no constitutional basis for mandating counsel in these cases; thus, this section does not apply. Nor would section 925.036, Florida Statutes (2002), apply, as it provides compensation only for counsel appointed in death cases and as special assistant public defenders.[33]

Requiring that Mental Retardation Hearings be Held Before Trial

In 2001, the Legislature created s. 921.137, F.S., to bar the imposition of the death sentence on a mentally retarded person. The statute establishes a method to determine which defendants are mentally retarded. The statute requires the defendant give notice of intent to raise the mental retardation issue during the penalty phase of the trial. After the defendant has given notice and after the advisory jury has returned a recommendation that the court impose a death sentence, the defendant may file a motion to determine if the defendant suffers from mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation, it cannot impose a death sentence.[34]

In 2004, the court adopted a rule of procedure that conflicted with the statute. While the statute provides that a hearing on mental retardation is only held in the few capitol cases where a jury has recommended a sentence of death, the court rule requires that the motion be filed and the hearing be held prior to trial. Justice Cantero explained that he believed the court has the sole authority to set the time of the hearing:

> Therefore, the rule we adopt conflicts with the statute. Under the Florida Constitution, however, this Court is ultimately responsible for enacting rules of procedure. *See art. V., § 2, Fla. Const.* Once a case is filed in a court of law, the decision of when that right may be invoked is quintessentially a matter of *procedure,* over which this Court has ultimate authority. *See Haven Fed. Sav. & Loan Ass'n v. Kirian,* 579 So.2d 730, 732 (Fla.1991) (stating that this Court has the exclusive authority to regulate matters of practice and procedure); *Markert v. Johnston,* 367 So.2d 1003, 1004 (Fla.1978) (noting that procedural aspects of trial are reserved to the rulemaking authority of this Court).[35]

This opinion has the effect of taking the policy matter of when the hearing should be held away from the Legislature and placing it in the Supreme Court. While three justices asserted that the court's rule would result in increased judicial efficiency, it can be argued that the Legislature is in a better position to make such a determination. Under the statute, the time and expense of a hearing is avoided if the defendant is found not guilty or if the jury determines death is not an appropriate sentence. Under the court rule, however, a hearing on mental retardation is held in substantially more capital cases.

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[33] *In re Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350*, 842 So.2d 763, 769 (Fla. 2003)(Harding, J., concurring in part and dissenting in part).
[34] *See* s. 921.137(3) and (4), F.S.
[35] *Amendments to Florida Ruls of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So.2d 563, 569 (Fla. 2004)(Cantero, J., concurring).

DNA Testing

DNA testing is discussed further in other parts of this analysis. The financial aspect cannot be overlooked. The courts had already determined that DNA testing was not a constitutional right, meaning that if it was to be done at state expense, that expense would be a matter of legislative grace. One factor that the Legislature considered in passing a DNA law was a limit on who could receive testing, because a limitless right to testing would lead to limitless costs incurred by the state crime lab. As shown in the DNA discussion herein, the court ignored the legislative limits in requiring testing for a far larger group of offenders.

Court Rules May Cause Private Parties to Incur Substantial Costs

It is common that may divorcing spouses decide on their marital settlement agreement before filing their divorce action. Until 1995, it was common for such spouses to file a bare petition for divorce together with a marital settlement agreement proposed for adoption by the trial judge. This simple and inexpensive procedure was upended in 1995 by *In re Family Law Rules of Procedure*, 663 So.2d 1047 (Fla. 1995). By that case, the court adopted rules in family law cases which require parties to file extensive financial affidavits in divorce cases even though the parties had agreed on a distribution of assets and responsibilities.[36] Additional time involved in gathering relevant documents and completing the forms has the effect of raising the cost of a divorce action.

In *In re Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases*, Case No. AOSC10-57, the Florida Supreme Court issued an administrative order authorizing circuit courts to order residential foreclosure cases to mediation. While not formally labeled as a court rule, this administrative order is arguably a court rule. The administrative order requires foreclosing lenders to pay as much as $750 more in fees per case.

Rules Can Limit the Legislature from Changing Substantive Law

In 1976, the Legislature adopted the Evidence Code.[37] The Florida Supreme Court ruled that the Evidence Code contained both substantive and procedural provisions. To prevent a constitutional challenge to the Code, the Florida Supreme Court adopted the Code to the extent it was procedural before the Code's 1979 effective date.[38] The Legislature's ability to amend the Evidence Code is therefore limited. The court has explained:

> It is generally recognized that the present rules of evidence are derived from multiple sources, specifically, case opinions of this Court, the rules of this Court, and statutes enacted by the legislature. Rules of evidence may in some instances be substantive law and, therefore, the sole responsibility of the legislature. In other instances, evidentiary rules may be procedural and the responsibility of this Court.[39]

This substantive/procedural split in the Evidence Code means that every revision the Legislature enacts relating to evidence is subject to constitutional challenge on the procedure versus substance argument. In addition, the court has held some portions of the Evidence Code cannot be changed by the Legislature. An example of an evidence law that the Legislature apparently cannot amend is s. 90.610, F.S., which provides:

> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted,

[36] *See* Florida Rules of Family Law Procedure 12.105 and 12.285.
[37] Ch. 76-237, L.O.F.
[38] *See In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979).
[39] *In re Florida Evidence Code*, 372 So.2d 1369, 1369 (Fla. 1979).

or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:

(a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

(2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.

(3) Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.

In *State v. Page*, 449 So.2d 813, 815 (Fla. 1984), the court considered whether theft was a crime of dishonesty under s. 90.610, F.S. The court ruled:

> Article V, section 2(a) of the Florida Constitution grants to this Court the power to "adopt rules for the practice and procedure in all courts." Subsection 90.610(1), dealing with the use of prior convictions for the purpose of impeachment, clearly falls within the realm of "procedure." To avoid a constitutional attack on the evidence code and recognizing that matters of court procedure are the sole responsibility of this Court, we adopted the legislatively enacted evidence code as a court rule in 1979. *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979). Thus, pursuant to article V of the constitution it is our sole responsibility to determine which crimes involve "dishonesty or false statement" for the purpose of impeachment.

In the same opinion, the Supreme Court ruled that legislative intent is "irrelevant" when interpreting the provisions of the Evidence Code that the court deems procedural.[40] Accordingly, any attempt by the Legislature to specify whether a crime involves dishonesty or false statement for purposes of impeachment is procedural and can only be set by court rule.

Similarly, the court has held that the Legislature cannot determine whether crimes where adjudication was withheld can be used for impeachment purposes. In *State v. McFadden*, 772 So.2d 1209, 1213 (Fla. 2000), the court asserted complete control over that determination:

> The key to our analysis is the definition to be given to the term "conviction" as used in section 90.610(1) of the Florida Evidence Code. Section 90.610 does not define the term "conviction" for purposes of impeaching a witness. As this Court has determined, section 90.610(1) involves a matter of court procedure solely within the province of this Court to enact pursuant to article V, section 2(a) of the Florida Constitution. It is therefore this Court's responsibility to determine what constitutes a prior "conviction" for purposes of impeachment under section 90.610(1) consistent with the limited purpose for which convictions have been historically admissible.

Pursuant to *McFadden*, the Legislature cannot define "conviction" for purposes of s. 90.610, F.S.

In 1998, the Legislature modified s. 90.803(22), F.S., relating to the admission of former testimony. Chapter 98-2, Laws of Florida, provides, in relevant part:

> Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in

[40] *State v. Page*, 449 So.2d 813, 815 n.2 (Fla. 1984).

> interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination; provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

In 2000, the court declined to adopt ch. 98-2, L.O.F., as part of the Evidence Code and refused to decide whether the revision was substantive or procedural.[41] Accordingly, the Florida Statutes and the court's evidence code contain different provisions. Justice Lewis wrote a separate opinion where he argued that the statutory provision was a rule of procedure and that the court should hold that the provision violated art. V, s. 2(a), Fla. Const. He explained the problems caused by the court's failure to act:

> I see no reason to wait for or encourage a separate dispute to arise before providing guidance to the judiciary and the public concerning this provision. If the proposed change is an unacceptable rule of procedure, we should address the answer in a direct fashion to avoid any unnecessary waste of both judicial and litigation resources. The bench, bar, and public should not be required to engage in futile efforts only to face the same conclusion we announce today in a different form with simply more specifically stated reasoning.[42]

In *Grabau v. Department of Health*, 816 So.2d 701, 707-709 (Fla. 1st DCA 2002), the First District Court of Appeal held the law created by ch. 98-2, L.O.F. unconstitutional as an infringement on the Florida Supreme Court's exclusive rulemaking authority.

In addition to these examples, some other examples of statutes found to be unconstitutional for violating the court's rulemaking power include:

- A law tolling a statute of limitations while mediation is pending.[43]
- Portions of the offer of judgment law.[44]
- Restrictions on whether an insurance company may be joined as a party defendant[45] or may be referred to in trial.[46]
- Laws relating to offer of judgment in a civil action.[47]
- Limits on class actions affecting a condominium association.[48]

Effectiveness of the Power to Repeal a Court Rule as a Check and Balance

The Constitution provides that the Legislature can repeal rules of court by general law enacted by two-thirds vote of the membership of each house of the Legislature. However, the Constitution provides no remedy to the Legislature where the court ignores the repeal or even specifically readopts a repealed rule. Repealing a court rule is a rare occurrence. Since 1973, only 14 bills, repealing 21 rules, have passed. As two of those bills were identical and in the same session, it is probably fairer to say that there have been 13 bills repealing 19 rules. The results of those repeals are detailed here:

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[41] *See In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 341-342 (Fla. 2000).
[42] *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 343 (Fla. 2000)(Lewis, J., specially concurring).
[43] *Ong v. Mike Guido Properties*, 668 So.2d 708 (Fla. 5th DCA 1996).
[44] *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995).
[45] *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978).
[46] *Carter v. Sparkman*, 335 So.2d 802 (1976), cert. denied, 429 U.S. 1041.
[47] *Hanzelik v. Grottoli and Hudon Inv. of America, Inc.*, 687 So.2d 1363 (Fla. 4th DCA 1997), *review denied* 697 So.2d 510. The court has matched the offer of judgment rule to the statute so there is no current conflict, although the Legislature may be powerless at this point to amend the statute.
[48] *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So.2d 599 (Fla. 1977). The limits have been adopted as rules, but the Legislature may be powerless at this point to amend the statute.

Specific Readoption After Repeal

In total, the court has specifically readopted 5 complete rules in two separate actions, and part of another repealed rule in a 3rd instance.

In 1979, the Legislature passed ch. 79-336, L.O.F. to amend laws relating to criminal defendants suffering from mental illness. Section 4 of the act unconditionally repealed rule 3.210. The act, and the repeal, were effective October 1, 1979. On October 9, 1979, the Supreme Court adopted temporary rules regarding mentally ill defendants that specifically readopted part of the repealed rule 3.210.[49]

In 2000, the Legislature passed the Death Penalty Reform Act of 2000 ("DPRA"). The legislation was an attempt to increase efficiency in capital appellate and postconviction cases. It created a "dual-track" system so that direct appeals and postconviction proceedings could proceed at the same time and imposed time limits for the filing of postconviction pleadings. In order for the new procedure to function, the Legislature repealed two rules of court and repealed a third to the extent it was inconsistent with the DPRA. The DPRA became effective on January 14, 2000.[50] On February 7, 2000, 24 days later, the court readopted, retroactive to January 14, 2000, the repealed rules while it considered challenges to the DPRA.[51] In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), the court held that the DPRA was an unconstitutional encroachment on rulemaking and adopted its own rules on capital postconviction litigation. In *Allen*, the court held that it has exclusive jurisdiction to control capitol collateral proceedings:

> Based on the foregoing, we conclude that the writ of habeas corpus and other postconviction remedies are not the type of "original civil action" described in *Williams* for which the Legislature can establish deadlines pursuant to a statute of limitations. Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.[52]

Another case where the court readopted a rule that had been repealed by the Legislature was in *State v. Raymond*, 906 So.2d 1045 (Fla. 2005). In 2000, the Legislature enacted ch. 2000-178 and ch. 2000-229, L.O.F., to provide that "no person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing." Both acts repealed conflicting court rules. The rule repeal was ignored and the rules continued to be printed. Five years later, the *Raymond* court held that the statute was unconstitutional because it was procedural and not a substantive law. The court readopted the repealed rules:

> Therefore, we temporarily readopt rules 3.131 and 3.132 in their entirety and publish the rules for comment concerning whether they should be amended to reflect the Legislature's intent as demonstrated in section 907.041. We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules. For that reason, we expressly invite the Legislature to file comments particularly addressing the policy concerns that the Legislature was attempting to address by enacting section 907.041(4)(b).[53]

In summary, the *Raymond* court invalidated a statute, readopted a repealed rule, and asked the Legislature to justify its policy.

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[49] *In re Transition Rule 23 Competency to Stand Trial and be Sentenced: Insanity as a Defense*, 375 So.2d 855 (Fla. 1979).
[50] The DPRA was adopted during a special session held for the purpose of considering reform to death penalty cases.
[51] *See In re Rules Governing Capital Postconviction Actions*, 763 So.2d 273 (Fla. 2000).
[52] *Allen v. Butterworth*, 756 So.2d 52, 62 (Fla. 2000).
[53] *State v. Raymond*, 906 So.2d 1045, 1051-1052 (Fla. 2005).

Results of Other Repeals

In addition to the readoptions described above, the Supreme Court has ignored 6 rule repeals[54], 3 rules were amended but not in compliance with the repealing act,[55] and in only 4 rule repeals has the court fully honored a legislative repeal of a court rule.[56] That is, in only 21% of the rules repealed by general law has the court fully implemented the will of two-thirds of the Legislature joined by the Governor.

The Theory of Inherent Power of Rulemaking

To understand the proposed constitutional amendment, one must also understand the concept of express and inherent powers. No constitution before 1957 gave the courts express rulemaking power. While early records are sparse, it appears that the courts were given some statutory authority for rulemaking as early as 1868. Before the courts had express constitutional rulemaking power, they apparently assumed an inherent power. For instance, in 1940 the court discussed inherent power before finding that this inherent power is subject to legislative amendment:

> Few subjects in the law have been bruited and discussed more than the inherent power of the courts to make rules. This court has approved the doctrine but it has never attempted to limit or define the scope of its power in that field. *Petition of the Florida State Bar Association*, 186 So. 280.
>
> If not limited in the Constitution, the great weight of authority in this country supports the view that courts have inherent power to make rules governing contempt, admissions to the bar, and for the conduct of the business brought before them. They have no power to affect substantive law or jurisdiction.
>
> In any event, the question must be approached in the light of the dominant law of the State concerned. Some of the State Constitutions are silent on the subject; some of them confer the rule-making power exclusively on the courts; some of them vest it in the Legislature while others divide it between the courts and the Legislature. Florida appears to fall in the latter class, since Section 20 of Article 3 of the Constitution, among other things, provides that the Legislature shall not pass special or local laws regulating the practice of courts of justice, except municipal courts. Section 21 of the same article requires that all such laws be general and of uniform operation throughout the State.
>
> I do not construe these provisions to be exclusive but supplemental to the power of the courts to prescribe rules regulating contempts, admissions to the bar, and for the conduct of judicial business. Certainly they authorize the Legislature to enter these fields and, when so entered, legislative acts will be respected by this court.[57]

A more recent discussion of inherent rulemaking authority is in the case of *Crow v. State*, 866 So.2d 1257 (Fla. 1st DCA 2004). In that case, a district court of appeal ruled that a court could find an inherent right to draft court rules, contrary to general law, anywhere that the court felt such was necessary to interpret some other provision of the constitution. Another judge on that same court of appeal has written an article arguing that courts have an inherent right to rulemaking in certain circumstances.[58]

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[54] Repeals ignored in: ch. 77-312, L.O.F., ch. 79-69, L.O.F., ch. 80-72, L.O.F., and ch. 82-392, L.O.F.
[55] Repeals not honored in: ch. 73-84, L.O.F., ch. 98-194, L.O.F., and ch. 2006-292, L.O.F.
[56] Repeals honored in: ch. 76-138, L.O.F., ch. 2004-60, L.O.F., and ch. 2006-96, L.O.F.
[57] *Petition of Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure*, 199 So. 57, 58 (Fla. 1940).
[58] Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U.Miami.L.R. 507

Effect of Joint Resolution

This proposed joint resolution repeals the Supreme Court's claim to exclusive rulemaking authority and rebuts any claim to an inherent right to rulemaking by providing that no court has the power to adopt rules for the practice and procedure in any court. The joint resolution then requires the Supreme Court to suggest rules of practice and procedure that can be adopted as provided for in general law. Additionally, the joint resolution provides that, if there a conflict between a court rule and general law, the general law prevails.

The effect of this joint resolution, should it be adopted by the voters, would be to end conflicts between the courts and the Legislature over procedure versus substance and to end private litigation over whether a particular law is procedural or substantive.

B. SECTION DIRECTORY:

n/a

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Article XI, s. 5(d) requires that a proposed constitutional amendment must be published in one newspaper of general circulation in each county in which a newspaper is published. The Department of State has not provided an estimate of the publication cost.

   The future cost to the state of this amendment is unknown and speculative, as the cost, if any, is contingent upon how the amendment is implemented.

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:

   A mandates analysis is inapplicable as this bill is a proposed constitutional amendment.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This is a legislative joint resolution, which is one of the methods for proposing, approving or rejecting amendments to the Florida Constitution. The joint resolution requires passage by a three-fifths vote of the membership of each house of the Legislature. The proposed constitutional amendment must be submitted to the electors at the next general election held more than 90 days after the joint resolution is filed with the custodian of state records. If approved by a majority of the electors voting on the question, the proposed amendment becomes effective on the Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment.

Justice Lewis has called for a procedure in which the Legislature and the Florida Supreme Court can work cooperatively on rulemaking:

> Recognizing the importance of a cooperative effort in this matter involving both substantive and procedural areas of mutual concern, I suggest that it may be time to consider and discuss some type of formalization of a cooperative venture in an attempt to properly harmonize the elements necessarily involved in the process rather than permitting an atmosphere to exist in which unnecessary conflict may arise.[59]

The joint resolution creates a mechanism for such cooperation.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[59] *In re Amendments to the Florida Evidence Code*, 782 So.2d 339, 343 (Fla. 2000)(Lewis, J., specially concurring).

House Joint Resolution

A joint resolution proposing an amendment to Section 2 of Article V of the State Constitution to provide that no court may adopt rules of practice and procedure, the supreme court may recommend rules to be adopted, amended or rejected by the legislature, and providing that, in the event of conflict, a statute supersedes a rule.

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

That the following amendment to Section 2 of Article V of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE V

Judiciary

SECTION 2. Administration; practice and procedure.—

(a) No court ~~The supreme court~~ shall have the power, express or implied, to adopt rules for ~~the~~ practice and procedure in any court. Court rules of practice and procedure may be recommended by the supreme court to be adopted, amended or rejected by the legislature in a manner prescribed by general law. If there is a conflict between general law and a court rule, the general law supersedes the court rule ~~all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the~~

~~jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature~~.

(b) The chief justice of the supreme court shall be chosen by a majority of the members of the court; shall be the chief administrative officer of the judicial system; and shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that circuit.

(c) A chief judge for each district court of appeal shall be chosen by a majority of the judges thereof or, if there is no majority, by the chief justice. The chief judge shall be responsible for the administrative supervision of the court.

(d) A chief judge in each circuit shall be chosen from among the circuit judges as provided by supreme court rule. The chief judge shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 2

RULES OF COURT.—Proposing an amendment to the State Constitution regarding court rulemaking.

Under the current constitution, Florida court rules are adopted solely by the state supreme court, and laws that are adopted by the legislature and approved by the Governor which conflict with those court rules are ruled invalid by the same state supreme court. One state court has expressed an opinion that the courts have an inherent right to enact rules even if such right is not provided for in the state constitution. By contrast, in the federal court system, court rules of practice and procedure are subordinate to general federal law and are subject to the approval of Congress before they are enacted.

By this amendment, no state court, including the Florida Supreme Court, will have the express or implied power to adopt court rules of practice and procedure. The Supreme Court may recommend rules of practice and procedure that may be adopted, amended or rejected in a manner provided for in general law. If there is a conflict between a court rule and a general law, the general law would prevail.

In short, a general law in Florida is enacted if passed by a majority of members voting in each of the two legislative chambers and then either signed by the Governor or, if vetoed by

the Governor, then passed by a two-thirds vote of the members voting in each of the two legislative chambers.

Specifically, the proposal amends subsection (a) of section 2 of Article V of the State Constitution, to read as set forth below. The words ~~stricken~~ are deletions; words underlined are additions:

SECTION 2. Administration; practice and procedure.—

(a) No court ~~The supreme court~~ shall have the power, express or implied, to adopt rules for ~~the~~ practice and procedure in any court. Court rules of practice and procedure may be recommended by the supreme court to be adopted, amended or rejected by the legislature in a manner prescribed by general law. If there is a conflict between general law and a court rule, the general law supersedes the court rule ~~all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature~~.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CVJS 11-02 Court Rulemaking Process
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Bond MB	Bond MB

SUMMARY ANALYSIS

Article V, s. 2(a) of the state constitution has been interpreted by the Florida Supreme Court to give that court exclusive rulemaking power regarding court rules. The court relies on volunteer committees provided by the Florida Bar to assist the court in creating and amending the rules.

Pending before the legislature is a proposed amendment which would require court rules to be recommended by the Supreme Court, subject to legislative review before adoption by the legislature. This proposed committee bill is a related implementing bill that is only effective should the constitutional amendment pass the legislature and be adopted by the electorate.

This proposed committee bill creates a state court rulemaking process modeled after the federal system of court rulemaking. Proposed rule changes would be heard by appropriate committees and the Florida Supreme Court. Recommended rules would be delivered to the Legislature in December and would be effective the following July 1 unless the Legislature amends or rejects the proposed rule. If a rule conflicts with statute, the statute prevails.

This proposed committee bill also provides that administrative orders, local rules, forms and jury instructions may be adopted without legislative approval. Like rules, these cannot conflict with statute.

This proposed committee bill may require recurring funding commencing in FY 2012-13 for the administrative costs related to court rulemaking. Funding would likely be from the General Revenue Fund. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law and Practice

Article V, section 2(a), of the Florida Constitution provides:

> The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

Pursuant to this grant of authority, the Florida Supreme Court has promulgated the following rules of court:

- Appellate Procedure
- Civil Procedure
- Criminal Procedure
- Family Law Rules of Procedure
- Judicial Administration
- Juvenile Procedure
- Probate Rules
- Small Claims Rules
- Traffic Court

In addition, there is an ongoing debate regarding the Florida Evidence Code.[1] The legislature appears to have taken the position that it is substantive, and accordingly the evidence laws have been placed into the Florida Statutes. The courts, however, believe that the evidence laws are part substance and part procedure. Accordingly, the courts review the code, and any changes to it, to determine which parts the court considers procedure and which parts are substance. The Supreme Court routinely will adopt a rule of evidence that the court agrees with as a rule of court "to the extent it is procedural."

These rules govern the practice and procedure in Florida courts and cannot be amended by the Legislature.[2] The Florida Rules of Judicial Administration set forth the procedure for amending court rules. The procedure for amending court rules is governed by Rule 2.140, Fla. R. Jud. Admin.

Any person may propose new rules, propose repeal of court rules, or propose amendments to court rules.[3] Proposals must be submitted to the clerk of the supreme court. The clerk refers the proposals to a committee appointed by the Florida Bar to consider each proposal.[4] The supreme court has created the following committee consider rule proposals:

- Appellate Court Rules Committee
- Civil Procedure Rules Committee
- Criminal Procedure Rules Committee

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[1] Ch. 90, F.S.

[2] See *In re Clarification of Florida Rules of Practice and Procedure*, 281 So. 2d 204 (Fla. 1973)(" The Legislature has the constitutional right to repeal any rule of the Supreme Court by a two-thirds vote, but it has no constitutional authority to enact any law relating to practice and procedure").

[3] *See* Rule 2.140(a)(1), *Fla. R. Jud. Admin.*

[4] *See* Rule 2.140(a)(2), *Fla. R. Jud. Admin.*

- Family Law Rules Committee
- Rules of Judicial Administration Committee
- Juvenile Court Rules Committee
- Probate Rules Committee
- Small Claims Rules Committee
- Traffic Court Rules Committee
- Code and Rules of Evidence Committee.[5]

The committees meet and vote on each proposal. Committees may also originate proposals. In addition, committees regularly review the rules under committee jurisdiction and propose changes pursuant to a review/reporting cycle established by the Rules of Judicial Administration. Each committee will report once every three years pursuant to the rule.[6]

During each reporting cycle, the committees submit proposals to the Florida Bar Board of Governors and interested persons may file comments. The committee reconsiders its proposals in light of the comments and submits, if necessary, revised proposals. The Florida Bar Board of Governors meets and votes whether to accept, reject, or modify the committee proposals.[7] Each committee files its proposals with the Florida Supreme Court and may accept the proposals of the Board of Governors or reject them.[8]

The Florida Supreme Court may set the matter for oral argument and permit written comments by any interested person. The court issues an opinion prior to January 1 so the rules can be implemented.[9] The court can adopt the proposed rules, refuse to adopt them, or adopted amended rules.

The Rules of Judicial Administration also provide mechanisms for emergency rule amendments by the Florida Supreme Court, for emergency recommendations by the committees, and for special consideration of proposals outside the normal cycle as directed by the Florida Supreme Court.

Effect of the Bill

This bill implements the constitutional amendment in PCB CVJS 11-01. If the amendment is adopted, the Constitution would read:

> (a) No court shall have the power, express or implied, to adopt rules for practice and procedure in any court. Court rules of practice and procedure may be recommended by the supreme court to be adopted, amended or rejected by the legislature in a manner prescribed by general law. If there is a conflict between general law and a court rule, the general law supersedes the court rule.

The amendment removes the authority of the Florida Supreme Court to adopt rules of court and replaces it with a procedure where the court rules of practice and procedure are recommended by the supreme court and adopted, amended, or rejected by the Legislature. This bill implements the amendment.

When a Statute and a Rules Conflict, the Statute Controls

Section 25.371, F.S., provides that when a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statute.[10] This bill provides that if a rule conflicts with a statute, the statutory provision supersedes the rule.

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[5] *See* Rule 2.140(a)(3), *Fla. R. Jud. Admin.*
[6] *See* Rule 2.140(b)(1), *Fla. R. Jud. Admin.*
[7] *See* Rule 2.140(b)(2) , (3), *Fla. R. Jud. Admin.*
[8] *See* Rule 2.140(b)(4), *Fla. R. Jud. Admin.*
[9] *See* Rule 2.140(b)(5), (6), (7), *Fla. R. Jud. Admin.*

The bill creates section 43.45, F.S., to provide that no court rule may abridge, enlarge or modify any substantive right.[11] It provides that court rules of practice and procedure shall not conflict with general law.

The bill further provides that no local rule, administrative order, form, or jury instruction may abridge, enlarge or modify any substantive right.

The Judicial Conference

The bill creates a judicial conference within the judicial branch and provides that the Chief Justice of the Florida Supreme Court is the chair of the conference. The judicial conference is administratively housed in the state courts system. The other members of the conference are the five chief judges of the district courts of appeal and one circuit judge[12] from each appellate district. The circuit judges are chosen for duty on the judicial conference by the chief judge of the appellate district where the circuit judge resides. For reference, there is a Judicial Conference of the United States that similarly has the Chief Justice as chair, and that includes the chief judges of the intermediate appellate courts and a trial court judge from each appellate district.

The judicial conference ("conference") is tasked with studying the operation and effect of rules of practice and procedure in all state courts. The conference must recommend amendments of existing rules or addition of new rules to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." The recommended rules must not be inconsistent with general law. The conference makes its recommendations to the Florida Supreme Court.

The judicial conference must also create, revise and implement forms for use in court proceedings, approve local rules of court, approve form jury instructions, and any other task or duty prescribed by law or designated by the Chief Justice of the Florida Supreme Court.

The chief justice is required to submit an annual report to the Speaker of the House of Representatives and the President of the Senate of the proceedings of the judicial conference. The report must contain proposed rule amendments and adoptions, and recommendations for legislation respecting general rules of practice and procedure before the state courts.

The bill requires the conference to create advisory committees and subcommittees to assist the conference in performing its duties. One of the committees must be a standing committee on court rules ("rules committee"). The rules committee shall make recommendations on rule amendments and adoptions. The rules committee must have, at a minimum, advisory subcommittees in each of these areas:

- appellate court rules;
- civil procedure rules;
- code & rules of evidence;
- criminal procedure rules;
- family law rules;
- probate rules;
- juvenile court rules;
- rules of judicial administration;
- small claims rules; and

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[10] This statute was written in 1957 as part of an implementing bill related to the 1957 adoption of a revised art. V of the state constitution. A prior statute had provided that only rules applicable to the Supreme Court (which would only encompass the appellate rules) would control over any statute in conflict. See prior s. 25.03(5), F.S. (repealed in 1957).

[11] This provision is model after the federal Rules Enabling Act, 28 U.S.C. s. 2072 ("Such rules shall not abridge, enlarge or modify any substantive right").

[12] Florida is divided into five appellate districts and 20 judicial circuits. *See* ss. 26.01, 35.01, F.S.

- traffic court rules.

For reference, in the federal court system there is a rules advisory committee and subject matter subcommittees.

The chief justice appoints the chair and members of advisory committees and subcommittees. Advisory committees and subcommittees must be chaired by a state court judge currently in office and must include practicing attorneys, legal academics, and at least one member of the general public who is not an attorney or an academic. Any justice or judge who has been impeached by the House of Representatives or is awaiting disposition after a finding of probable cause by the Judicial Qualifications Commission is disqualified from serving on the conference or any advisory committee of the conference.

All meetings of the judicial conference, the rules committee, or a subcommittee must be open to the public.

The conference must be given a prominent link on the web page of the state courts system. The conference shall maintain a group of connected web pages on the website of the state courts system dedicated to its work, the work of the advisory committees, and the court rulemaking process. The website must include a fillable form by which any member of the public can suggest a rule adoption or change and must include contact information or forms for members of the public to comment on rule proposals. All rule proposals, subcommittee and committee agendas, and subcommittee and committee reports must be published on the website. The website must allow any person to receive email notifications relating to the work of the conference. Access to the website must be free of charge.

Creation and Amendment of Court Rules of Practice and Procedure

The bill provides a procedure for the creation and amendment of court rules. It requires the supreme court to recommend general rules[13] of practice and procedure in all courts. Recommended rules may be adopted, amended or rejected by the legislature. Any court may create administrative orders[14] and forms[15] that apply in that court and in inferior courts, subject to any limitation in general law and subject to the administrative authority of the supreme court.

The bill requires the conference to prescribe and publish the procedures for the consideration of proposed rules, local rules,[16] forms and jury instructions.[17] The administrative process for changes to court rules must include at a minimum the following procedures:

Actions by an Advisory Subcommittee

Any member of an advisory subcommittee may sponsor a proposed rule adoption or amendment for consideration. Suggestions from the general public must be referred to the chair of the appropriate subcommittee. If the chair believes the suggestion has merit, the chair shall request a member of the subcommittee to sponsor it.

An advisory subcommittee must publish an agenda at least 20 days prior to its meeting setting forth all initial proposals scheduled by the chair for consideration. If the advisory subcommittee determines by a majority vote that a proposal has merit, the subcommittee may place the proposal on the next agenda for consideration. The subcommittee must create an explanatory note on the proposed rule, together

[13] The bill defines "rule" or "court rule" as a rule of practice or procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys. A rule has statewide impact.
[14] The bill defines "administrative order" as a directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules.
[15] The bill defines "form" as a form created for use by the parties in a court action.
[16] The bill defines "local rule" as a rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application.
[17] The bill defines "jury instruction" as a standard suggested instruction to juries on the law of a case.

with a fiscal estimate of the cost of the rule to the state, the cost to local government, and to the general public before the next meeting. The explanatory note and fiscal estimate must be published on the judicial conference webpage at least 30 days prior to the subcommittee meeting at which the proposal will be considered.

At a meeting in which a proposal is up for final subcommittee consideration, the subcommittee will consider the proposal and the draft report. By majority vote, the subcommittee may reject, adopt, or amend the proposal or the explanatory note or fiscal estimates. The subcommittee may also move consideration of the proposal to the next meeting of the subcommittee.

If the subcommittee adopts the proposal, the subcommittee must prepare a report to the rules committee indicating the majority view and the fiscal estimates. Any member of the subcommittee may object to the proposal, the explanatory note, or the fiscal estimates by filing a minority report with the rules committee and sending the report rules committee within 20 days of subcommittee adoption.

Actions by the Rules Committee

The chair of the rules committee sets the agenda for the rules committees. The agenda shall be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by a subcommittee at least 60 days prior to the committee meeting. The rules committee may adopt, amend, reject, continue to another meeting, or return to the subcommittee for further consideration any proposal. Any member of the rules committee may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference within 20 days of committee adoption.

Action by the Judicial Conference

The chief justice sets the agenda for the judicial conference. The agenda must be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by the rules committee at least 120 days prior to the judicial conference meeting. The judicial conference may adopt, amend, reject, continue to another meeting, or return to the rules committee for further consideration any proposal. Any member of the judicial conference may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference within 20 days of judicial conference adoption. The conference must submit proposed changes to general rules of court to the supreme court annually no later than August 1.

Action by the Florida Supreme Court

The Florida Supreme Court may adopt, modify or reject any recommendation of the conference. The court must submit to the Speaker of the House of Representatives and the President of the Senate not later than the first business day of December of the year preceding the year in which a rule prescribed under this section is to become effective. Such proposed rule shall take effect July 1 of the following year unless otherwise provided by law.

Summary of the Process Created by the Bill

The bill contemplates a deliberative process by the conference, the rules committee, and the advisory subcommittees. An initial proposal must be placed on an agenda at least 20 days before the advisory subcommittee considers it. Once the subcommittee finds the proposal has merit, it must create an explanatory note and fiscal estimate. Once that report is complete, it must be placed on the internet site for 30 days before the subcommittee may consider the proposal and report. Once the subcommittee approves the proposal, the rules committee cannot consider the report until at least 60 days after subcommittee approval. The conference cannot consider the proposal from the rules committee until at least 120 days after the rules committee approves it. All proposals from the conference must be submitted to the Florida Supreme Court by August 1 in order for the court to include the proposal in its recommendation to the Legislature. The court's recommendation must be filed by December 1.

Action by the Legislature

Rules recommended to the Legislature by the supreme court do not have the force of law and are not effective unless:

the Legislature affirmatively approves the rule, with or without legislative amendment; or

the Legislature meets in regular session subsequent to the submission of the rule to the presiding offices and adjourned sine die without enacting legislation rejecting or amending the proposed rule.

The bill provides that (1) no rule of evidence shall be effective unless the Legislature affirmatively adopts the rule in general law, (2) no rule shall require the payment of any court cost or fee unless the Legislature affirmatively adopts the cost or fee in general law, and (3) if the Legislature passes a bill amending or rejecting a recommended rule and the governor vetoes the bill, the recommended rule is not adopted. If, however, the Legislature overrides the veto then the rule shall be as provided in the act.

Further, matters related to the admissibility of evidence may only be enacted by general law. However, a court may prohibit the admission of certain evidence for failure to comply with a court rule and a court may prohibit admission of certain evidence in a case for failure to comply with a court order that is specific to that case.

The bill provides that the Florida Supreme Court may fix the extent to which rules, once effective, apply to proceedings pending before courts, except that the Florida Supreme Court must not require the application of such rule to further proceedings to the extent that, in the opinion of the court in which such proceedings are pending, the application of the new rule in such proceedings would not be feasible or would work injustice. In such a case, the former rule applies to the case.

Local Rules, Administrative Orders, and Jury Instructions

The bill provides that local rules, administrative orders, forms, and jury instructions are not required to be affirmed by the Legislature, but may be repealed or amended by general law. Forms are subordinate to rules and to administrative orders, and administrative orders are subordinate to rules. Once repealed or amended, they may not be re-amended or re-adopted unless in conformity with the general law.

The bill provides that local rules may be promulgated by inferior courts if permitted by the conference and the Florida Supreme Court. No local rule may abridge, enlarge or modify any substantive right or conflict with general law. No local rule may require parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

The bill provides that administrative orders may be promulgated by inferior courts if permitted by the conference and the Florida Supreme Court. Administrative orders are not required to be approved by the Legislature. No administrative order may abridge, enlarge or modify any substantive right or conflict with general law. No rule of court may be enacted in the form of an administrative order. No administrative order may require parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

Advisory committees may recommend forms for use by the courts. Forms are not required to be approved by the Legislature. No form may abridge, enlarge or modify any substantive right or conflict with general law. Advisory committees may recommend jury instructions for use by the courts. Jury instructions are not required to be approved by the Legislature. No jury instruction may abridge, enlarge or modify any substantive right or conflict with general law.

By these limits, the courts will not be able to create a general rule of court under the guise of an administrative order, local rule, form, or jury instruction. By these limits, the legislature can require a change should any administrative order, local rule, form, or jury instruction violate general law.

Exceptions

The bill provides that some areas where the Florida Supreme Court currently adopts rules are not covered under the recommendation/approval process used for most procedural rules. Specifically, rules regulating the admission of persons to the practice of law and the discipline of persons admitted, provided such rules are consistent with art. V, s. 15 of the state constitution, rules related to interrnal operating procedures of a court, including personnel rules and personnel actions, provided such procedures and actions are consistent with general law, and administrative orders, policies and procedures related to the assignment of a case or cases to a judge or panel are not subject to the provisions relating to the judicial conference, the rules committee, the advisory subcommittees, and the legislative approval process. Similarly, rules, local rules, or administrative orders that are limited to creation of an advisory committee are not subject to provisions relating to the judicial conference, the rules committee, the advisory subcommittees, and the legislative approval process.

Adoption of Existing Rules on the Effective Date

In general, sections 6 and 7 of the bill adopt existing rules of court as of the effective date of the bill. This adoption should provide for continuity in court operations.

The bill provides explanation of legislative intent. First, it provides that the Legislature intends that court rules as they read on the effective date of the bill are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of the state constitution has the effect of implied repeal of all court rules, then the Legislature provides that Rules of Judicial Administration 2.410, 2.420, 2.430, 2.440, and 2.450[18] unless repealed or amended by general law. The bill further provides legislative intent that all public records laws affecting the courts, including those grandfathered in at the adoption of art. I, s. 24 of the state constitution, shall remain in effect unless amended or repealed by general law enacted after the effective date of this act. The referenced Rules of Judicial Administration are related to the possession and retention of court records and to public access to court records.

The bill further provides that the Legislature intends that all court rules as they read on the effective date of this bill are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of the state constitution has the effect of implied repeal of all court rules, then the Legislature intends all court rules, local rules, administrative orders, forms and jury instructions that were in effect on the day before the effective date of this act and that are not otherwise in conflict with general law shall be deemed adopted, shall have full force and effect, and shall remain in effect unless subsequently repealed or amended by general law.

Effective Date

The bill takes effect on the effective date of the joint resolution in PCB CVJS 11-01, or a similar joint resolution if such a joint resolution is approved by the voters in the 2012 general election.

B. SECTION DIRECTORY:

Section 1 amends s. 25.371, F.S., relating to effect of rules.

Section 2 creates s. 43.45, F.S., relating to court rules of practice and procedure.

Section 3 creates s. 43.46, F.S., relating to the judicial conference.

[18] These rules provide for the records of the courts, and include some of the public records exemptions applicable to the courts.

Section 4 creates s. 43.47, F.S., relating to creation and amendment of court rules of practice and procedure, local rules, administrative orders, forms, and jury instructions.

Section 5 creates s. 43.48, F.S., relating to exceptions.

Section 6 provides legislative intent.

Section 7 provides legislative intent.

Section 8 provides a conditional effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   This proposed committee bill may require recurring funding commencing in FY 2012-13 for the administrative costs related to court rulemaking. Funding would likely be from the General Revenue Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Today, much of the lower level committee work on rulemaking is done by volunteer committees associated with the Florida Bar, with assistance from existing staff of the state courts system. There is nothing in the bill prohibiting the chief justice from continuing the court's longstanding reliance on Florida Bar members for this committee work. Indeed, it is anticipated that the court would probably continue to have a close relationship with Florida Bar committees in the early stages of rulemaking. Should this reliance continue, the fiscal impact of this bill should be minimal.

By eliminating litigation over procedure versus substance, the court system might realize a positive recurring fiscal impact on expenditures. There is no measure of the current cost to the system for such litigation, and so there is no means to quantify the possible savings.

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:

The bill does not provide for terms of the members of the conference or terms of the members of the advisory committee and subcommittees. It implies that the members serve at the pleasure of the chief justice by giving the chief justice the power to appoint the members.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to court rules of process and procedure; amending s. 25.371, F.S.; providing that statutes supersede court rules; creating s. 43.45, F.S.; providing that no court rule may conflict with general law; creating s. 43.46, F.S.; creating a judicial conference; designating a chairman; providing membership of the judicial conference; providing for the duties of the judicial conference; requiring an annual report; requiring creation of an advisory committee and subcommittees; providing for appointments; limiting membership on the judicial conference; providing that the judicial conference is administratively housed in the state courts system; requiring that the judicial conference establish a website; creating s. 43.47, F.S.; providing a process for creation and adoption of court rules, administrative orders, forms and jury instructions; providing definitions; prohibiting rules, local rules, administrative orders, forms and jury instructions from conflicting with general law; requiring the judicial conference to publish procedures for adoption and review of proposed rules, local rules, administrative orders, forms and jury instructions; creating a process for rule adoption; requiring proposed rules to be published and heard before a subcommittee, the rules committee, and the judicial conference before being submitted to the legislature; providing that rules go into effect if the legislature does not act; providing exceptions; creating

s. 43.48, F.S.; providing exceptions; providing for adoption of certain specific court rules in effect on the effective date of this act; providing conditional adoption of existing court rules, local rules, administrative orders, forms and jury instructions in effect prior to the effective date of this act; providing a conditional effective date.

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

Section 1. Section 25.371, Florida Statutes, is amended to read:

25.371 Effect of rules.—When a rule is adopted by the supreme court concerning practice and procedure, and such rule conflicts with a statute, the statutory provision ~~rule~~ supersedes the rule ~~statutory provision~~.

Section 2. Section 43.45, Florida Statutes, is created to read:

43.45 Court rules of practice and procedure.—No court rule may abridge, enlarge or modify any substantive right. Court rules of practice and procedure shall not conflict with general law.

Section 3. Section 43.46, Florida Statutes, is created to read:

43.46 The judicial conference.—

(1) There is hereby created within the judicial branch a judicial conference. The chief justice of the supreme court shall be the chair of the judicial conference.

(2) The members of the judicial conference are:

(a) The chief justice.

(b) The chief judge of each of the district courts.

(c) One circuit judge from each of the appellate districts, chosen by the chief judge of the district.

(3) The judicial conference shall carry on a continuous study of the operation and effect of rules of practice and procedure in all state courts. Such amendments of existing rules or addition of new rules as the judicial conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, the elimination unjustifiable expense and delay, when not inconsistent with general law, shall be recommended by the judicial conference to the supreme court for its consideration and adoption, modification or rejection, in accordance with law. The judicial conference shall also create, revise and implement forms for use in court proceedings, approve local rules of court, approve form jury instructions, and any other task or duty prescribed by law or designated by the chief justice.

(4) On the first business day of December of every year the chief justice shall submit to the Speaker of the House of Representatives and the President of the Senate an annual report of the proceedings of the judicial conference, proposed rule amendments and adoptions, and recommendations for legislation respecting general rules of practice and procedure before the state courts.

(5) The judicial conference shall create advisory committees and subcommittees to assist the judicial conference

in the performance of its duties. The judicial conference shall create a standing committee on court rules, which committee shall make recommendations on rule amendments and adoptions. The committee on court rules shall have, at a minimum, advisory subcommittees in each of these areas: appellate court rules, civil procedure rules, code & rules of evidence, criminal procedure rules, family law rules, probate rules, juvenile court rules, rules of judicial administration, small claims rules, traffic court rules.

(6) The chief justice shall appoint the chair and members of advisory committees and subcommittees. Advisory committees and subcommittees must be chaired by a state court judge currently in office. Advisory committees and subcommittees shall include practicing attorneys, legal academics, and at least one member of the general public who is not an attorney or an academic.

(7) Any justice or judge who has been impeached by the House of Representatives or is awaiting disposition after a finding of probable cause by the Judicial Qualifications Commission is disqualified from serving on the judicial conference or any advisory committee of the judicial conference.

(8) The judicial conference shall be administratively housed in the state courts system.

(9) The judicial conference shall be given a prominent link on the primary web page of the state courts system. The judicial conference shall maintain a group of connected web pages on the website of the state courts system dedicated to the work of the judicial conference, the work of the advisory committees, and

the court rulemaking process. The website shall include a fillable form by which any member of the public can suggest a rule adoption or change, and shall include contact information or forms by which members of the public may comment on rule proposals. All rule proposals, subcommittee and committee agendas, and subcommittee and committee reports shall be published on the website. The website shall allow any interested person to receive email notifications of the work of any subcommittee, committee, or the judicial conference. Access to the website shall be free of charge.

Section 4. Section 43.47, Florida Statutes, is created to read:

43.47 Creation and amendment of court rules of practice and procedure, local rules, administrative orders, forms and jury instructions.—

(1) The supreme court shall recommend general rules of practice and procedure in all courts. Recommended rules may be adopted, amended or rejected by the legislature as provided by this section. Any court may create administrative orders and forms that apply in that court and in inferior courts, subject to any limitation in general law and subject to the administrative authority of the supreme court.

(2) For purposes of ss. 43.45, 43.46 and this section, the term:

(a) "Rule" or "court rule" means a rule of practice or procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys. A rule has statewide impact.

(b) "Local rule" means a rule of practice or procedure for circuit or county application only that, because of local conditions, supplies an omission in or facilitates application of a rule of statewide application.

(c) "Administrative order" means a directive necessary to administer properly the court's affairs but not inconsistent with the constitution or with court rules.

(d) "Form" means a form created for use by the parties in a court action.

(e) "Jury instruction" means a standard suggested instruction to juries on the law of a case.

(3) No rule, local rule, administrative order, form or jury instruction may abridge, enlarge or modify any substantive right.

(4) Forms are subordinate to rules and to administrative orders, and administrative orders are subordinate to rules. All rules, local rules, administrative orders, forms and jury instructions are subordinate to general law.

(5) The judicial conference shall prescribe and publish the procedures for the consideration of proposed rules, local rules, forms and jury instructions under this section. The administrative process for changes to court rules shall include the minimum following procedures:

(a) Suggestions from the general public shall be referred to the chair of the appropriate subcommittee. If the chair believes the suggestion has merit, the chair shall request a member of the subcommittee to sponsor it.

(b) Any member of an advisory subcommittee may sponsor a proposed rule adoption or amendment for consideration. The judicial conference shall establish a uniform numbering system for proposals.

(c) An advisory subcommittee shall publish an agenda at least 20 days prior to its meeting that sets forth all initial proposals scheduled by the chair for consideration.

(d) If the advisory subcommittee determines by a majority vote that a proposal has merit, the subcommittee may place the proposal on the next agenda for consideration. Before the next meeting, the subcommittee shall create an explanatory note on the proposed rule, together with a fiscal estimate of the cost of the rule to the state, to local government, and to the general public. The explanatory note and fiscal estimate must be published on the judicial conference webpage at least 30 days prior to any subcommittee meeting at which the proposal will be voted on.

(e) At a meeting in which a proposal is up for final subcommittee consideration, the subcommittee shall consider the proposal and the draft report. By majority vote, the subcommittee may reject, adopt, or amend the proposal or the explanatory note or fiscal estimates. Alternatively, the subcommittee may move consideration of the proposal to the next meeting of the subcommittee.

(f) If the subcommittee adopts the proposal, the subcommittee shall prepare a report to the rules committee indicating the majority view and the fiscal estimates. Any member of the subcommittee may object to the proposal, the

explanatory note, or the fiscal estimates by filing a minority report with the rules committee, which must be sent to the rules committee within 20 days of subcommittee adoption.

(g) The chair of the rules committee shall set the agenda for the rules committee. The agenda shall be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by a subcommittee at least 60 days prior to the committee meeting. The rules committee may adopt, amend, reject, continue to another meeting, or return to the subcommittee for further consideration any proposal. Any member of the rules committee may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference, which must be sent to the rules committee within 20 days of committee adoption.

(h) The chief justice shall set the agenda for the judicial conference. The agenda shall be published at least 20 days prior to a meeting. No proposal may be heard unless it was passed by the rules committee at least 120 days prior to the judicial conference meeting. The judicial conference may adopt, amend, reject, continue to another meeting, or return to the rules committee for further consideration any proposal. Any member of the judicial conference may object to a proposal, the explanatory note, or the fiscal estimates by filing a minority report with the judicial conference, which must be filed within 20 days of judicial conference adoption.

(i) All meetings of the judicial conference, the rules committee, or a subcommittee shall be open to the public.

(6) The judicial conference shall submit proposed changes to general rules of court to the supreme court annually no later than August 1. The supreme court may adopt, modify or reject any recommendation of the judicial conference. The supreme court shall submit to the Speaker of the House of Representatives and the President of the Senate not later than the first business day of December of the year preceding the year in which a rule prescribed under this section is to become effective. Such proposed rule shall take effect July 1 of the following year unless otherwise provided by law.

(7) Rules recommended by the supreme court do not have the force of law and are not effective unless affirmatively approved by the legislature with or without legislative amendment or the legislature having met in regular session subsequent to the submission of the rule to the presiding officers, adjourned sine die without enacting legislation rejecting or amending the proposed rule. The supreme court may fix the extent to which rules, once effective, shall apply to proceedings then pending, except that the supreme court shall not require the application of such rule to further proceedings to the extent that, in the opinion of the court in which such proceedings are pending, the application of the new rule in such proceedings would not be feasible or would work injustice in which event the former rule applies. However:

(a) No rule of evidence shall be effective unless the legislature shall have affirmatively adopted the same in general law.

(b) No rule shall require the payment of any court cost or fee unless the legislature affirmatively adopts the cost or fee in general law.

(c) If the legislature passes a bill amending or rejecting a recommended rule, and the governor vetoes the bill, the recommended rule shall not be adopted. Should the legislature override the veto, however, then the rule shall be as provided in the act.

(8) Local rules, administrative orders, forms and jury instructions are not required to be affirmed by the legislature, but may be repealed or amended by general law. Once repealed or amended, they shall not be re-amended or re-adopted unless in conformity with the general law. Additionally:

(a) Local rules may be promulgated by inferior courts if permitted by the judicial conference and the supreme court. No local rule may abridge, enlarge or modify any substantive right. No local rule may conflict with general law. No local rule may require parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

(b) Administrative orders may be promulgated by inferior courts if permitted by the judicial conference and the supreme court. Administrative orders are not required to be submitted to the legislature or approved under this subsection. No administrative order of any court may abridge, enlarge or modify any substantive right. No administrative order may conflict with general law. No rule of court may be enacted in the form of an administrative order. No administrative order may require

parties or attorneys to pay or incur any cost or fee unless such cost or fee is authorized by general law.

(c) Advisory committees may recommend forms for use by the courts. Forms are not required to be submitted to the legislature or approved under this subsection. No form may abridge, enlarge or modify any substantive right. No form may conflict with general law.

(d) Advisory committees may recommend jury instructions for use by the courts. Jury instructions are not required to be submitted to the legislature or approved under this subsection. No jury instruction may abridge, enlarge or modify any substantive right. No jury instruction may conflict with general law.

(9) Matters related to the admissibility of evidence may only be enacted by general law. Notwithstanding the foregoing, a rule of court may prohibit the admission of certain evidence for failure to comply with a court rule and a court may prohibit admission of certain evidence in a case for failure to comply with a court order that is specific to that case.

Section 5. Section 43.48, Florida Statutes, is created to read:

43.48 Exceptions.—Provided they do not conflict with the constitution or with general law, and subject to the administrative supervision power of the supreme court, the following areas are not prohibited or limited by ss. 43.45, 43.46 or 43.47:

(1) Rules regulating the admission of persons to the practice of law and the discipline of persons admitted, provided

such rules are consistent with art. V, s. 15 of the state constitution.

(2) Internal operating procedures of a court, including personnel rules and personnel actions, provided such procedures and actions are consistent with general law.

(3) Administrative orders, policies and procedures related to the assignment of a case or cases to a judge or panel.

(4) Rules, local rules, or administrative orders that are limited to creation of an advisory committee.

Section 6. It is the legislative intent that court rules as they read on the effective date of this act are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of the state constitution has the effect of implied repeal of all court rules, then the legislature hereby, as of the effective date of this act, provides that the following court rules as they read on the day before the effective date of this act are specifically adopted, shall have full force and effect, and shall remain in effect unless subsequently repealed or amended by general law: Rules of Judicial Administration 2.410, 2.420, 2.430, 2.440, and 2.450. It is the intent of the legislature by this section that all public records laws affecting the courts, including those grandfathered in at the adoption of art. I, s. 24 of the state constitution, shall remain in effect unless amended or repealed by general law enacted after the effective date of this act.

Section 7. It is the legislative intent that court rules as they read on the effective date of this act are presumed valid. If a court determines that the amendment to art. V, s. 2(a) of

the state constitution has the effect of implied repeal of all court rules, then the legislature hereby provides, as of the effective date of this act, other than those rules specified in section 6, that all court rules, local rules, administrative orders, forms and jury instructions that were in effect on the day before the effective date of this act and that are not otherwise in conflict with general law shall be deemed adopted, shall have full force and effect, and shall remain in effect unless subsequently repealed or amended by general law.

Section 8. This act shall take effect on the effective date of House Joint Resolution _____, or a similar joint resolution having substantially the same specific intent and purpose, if that joint resolution is approved by the electors at the general election to be held in November 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CVJS 11-03 Terms of Court
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Bond MB	Bond MB

SUMMARY ANALYSIS

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

This proposed committee bill repeals statutory requirements for terms of court and makes conforming changes.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

At one time, circuit court judges literally "rode the circuit," travelling from one county seat to the next for the purpose of conducting court. In a day of difficult travel and slow communications, it was important that the circuit judge show up on a date certain to conduct the court's business.[1] Terms of court were developed to fill that need, and were required by the state constitution[2] until Article V was substantially rewritten in 1957. Current law creates two or more terms of court in each of the counties. See ss. 26.22-.365, F.S.

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

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

Today, terms of court are an archaic concept. It does not appear that any of the courts formally open a term of court with the traditional ceremony. Circuit judges come and go from each of the counties as needed and far more often than once every six months. Only one of the five district courts of appeal is known to regularly travel the district for the purpose of conducting oral argument. Nobody knows when the last time a circuit judge was fined for nonappearance at the first day of a term.

Terms of court are still used for two purposes: designating the terms of grand juries and limiting withdrawal of an appellate mandate.

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

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

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

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

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

[3] Section 26.39, F.S.

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

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

Effect of Bill

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

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

This PCB creates two new conforming statutes. Those new sections:

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

B. SECTION DIRECTORY:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to the judiciary; repealing s. 25.051, F.S., relating to regular terms of the Supreme Court; repealing s. 26.21, F.S., relating to terms of the circuit courts; repealing s. 26.22, F.S., relating to terms of the First Judicial Circuit; repealing s. 26.23, F.S., relating to terms of the Second Judicial Circuit; repealing s. 26.24, F.S., relating to terms of the Third Judicial Circuit; repealing s. 26.25, F.S., relating to terms of the Fourth Judicial Circuit; repealing s. 26.26, F.S., relating to terms of the Fifth Judicial Circuit; repealing s. 26.27, F.S., relating to terms of the Sixth Judicial Circuit; repealing s. 26.28, F.S., relating to terms of the Seventh Judicial Circuit; repealing s. 26.29, F.S., relating to terms of the Eighth Judicial Circuit; repealing s. 26.30, F.S., relating to terms of the Ninth Judicial Circuit; repealing s. 26.31, F.S., relating to terms of the Tenth Judicial Circuit; repealing s. 26.32, F.S., relating to terms of the Eleventh Judicial Circuit; repealing s. 26.33, F.S., relating to terms of the Twelfth Judicial Circuit; repealing s. 26.34, F.S., relating to terms of the Thirteenth Judicial Circuit; repealing s. 26.35, F.S., relating to terms of the Fourteenth Judicial Circuit; repealing s. 26.36, F.S., relating to terms of the Fifteenth Judicial Circuit; repealing s. 26.361, F.S., relating to terms of the Sixteenth Judicial Circuit; repealing s. 26.362, F.S., relating to terms of the Seventeenth Judicial Circuit; repealing s. 26.363, F.S.,

relating to terms of the Eighteenth Judicial Circuit; repealing s. 26.364, F.S., relating to terms of the Nineteenth Judicial Circuit; repealing s. 26.365, F.S., relating to terms of the Twentieth Judicial Circuit; repealing s. 26.37, F.S., relating to requiring a judge to attend the first day of each term of the circuit court; repealing s. 26.38, F.S., relating to requiring a judge to state a reason for nonattendance; repealing s. 26.39, F.S., relating to penalty for nonattendance of judge; repealing s. 26.40, F.S., relating to adjournment of the circuit court upon nonattendance of the judge; repealing s. 26.42, F.S., relating to calling all cases on the docket at the end of each term; repealing s. 35.10, F.S., relating to regular terms of the district courts of appeal; repealing s. 35.11, F.S., relating to special terms of the district courts of appeal; repealing s. 907.05, F.S., relating to a requirement that criminal trials be heard in the term of court prior to civil cases; repealing s. 907.055, F.S., relating to a requirement that persons in custody be arraigned and tried in the term of court unless good cause is shown; amending s. 26.46, F.S.; removing reference to terms of court in statute on temporary assignment of judges; amending s. 30.12, F.S.; removing reference to terms of court in statute relating to the power of the court to appoint an interim sheriff; amending s. 30.15, F.S.; removing reference to terms of court in statute relating to the duties of the sheriff; creating s. 43.43, F.S.; allowing the Supreme Court to set

terms of court for the Supreme Court, district courts of appeal, and circuit courts; creating s. 43.44, F.S.; providing that appellate courts may withdraw a mandate within 120 days of its issuance; amending s. 831.17, F.S.; removing reference to terms of court in statute on counterfeit coins; amending s. 877.08, F.S.; removing reference to terms of court in statute on coin-operated vending machines and parking meters; amending s. 903.32, F.S.; removing reference to terms of court in statute on appearance bonds; amending s. 905.01, F.S.; providing for terms of the grand juries; amending s. 905.09, F.S.; removing reference to terms of court in statute on discharge of a grand jury; amending s. 905.095, F.S.; removing reference to terms of court in statute on extending the term of a grand jury; amending s. 914.03, F.S.; removing reference to terms of court in statute on appearance of a witness; providing an effective date.

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

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

Section 2. Section 26.46, Florida Statutes, is amended to read:

26.46 Jurisdiction of resident judge after assignment.—

When a circuit judge is assigned to another circuit, none of the circuit judges in such other circuit shall, because of such assignment, be deprived of or affected in his or her jurisdiction other than to the extent essential so as not to conflict with the authority of the temporarily assigned circuit judge as to the particular case or cases or class of cases~~, or in presiding at the particular term or part of term named or specified in the assignment~~.

Section 3. Section 30.12, Florida Statutes, is amended to read:

30.12 Power to appoint sheriff.—Whenever any sheriff in the state shall fail to attend, in person or by deputy, ~~any term of~~ the circuit court or county court of the county, from sickness, death, or other cause, the judge attending said court may appoint an interim ~~a~~ sheriff, who shall assume all the responsibilities, perform all the duties, and receive the same compensation as if he or she had been duly appointed sheriff~~,~~ for only the ~~said~~ term of nonattendance ~~court~~ and no longer.

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

30.15 Powers, duties, and obligations.—

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

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

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

43.43 Terms of courts.—The Supreme Court may establish terms of court for the Supreme Court, the district courts of appeals and the circuit courts, may provide that district courts and circuit courts may establish their own terms of court, or may dispense with terms of court.

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

43.44 Mandate of a appeals court.—An appellate court has the jurisdiction and power, as the circumstances and justice of the case may require, to reconsider, revise, reform, or modify its own judgments for the purpose of making the same accord with law and justice. Accordingly, an appellate court has the power to recall its own mandate for the purpose of enabling it to exercise such jurisdiction and power in a proper case. No mandate may be recalled more than 120 days after it is filed with the lower tribunal.

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

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

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

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

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

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

903.32 Defects in bond.—

(2) If no day, or an impossible day, is stated in a bond for the defendant's appearance before a trial court judge for a hearing or trial, the defendant shall be bound to appear 10 days after receipt of notice to appear by the defendant, the defendant's counsel, or any surety on the undertaking. ~~If no day, or an impossible day, is stated in a bond for the defendant's appearance for trial, the defendant shall be bound to appear on the first day of the next term of court that will commence more than 3 days after the undertaking is given.~~

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

905.01 Number and procurement of grand jury; replacement of member; term of grand jury.—

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

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

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

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

905.095 Extension of grand jury term.—Upon petition of the state attorney or the foreperson of the grand jury acting on behalf of a majority of the grand jurors, the circuit court may extend the term of a grand jury impaneled under this chapter beyond the term ~~of court~~ in which it was originally impaneled. A grand jury whose term has been extended as provided herein shall have the same composition and the same powers and duties it had during its original term. In the event the term of the grand jury is extended under this section, it shall be extended for a time certain, not to exceed a total of 90 days, and only for the purpose of concluding one or more specified investigative matters initiated during its original term.

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

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

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