Judiciary Committee

Thursday, March 19, 2015
12:30 PM – 2:30 PM
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

Charles McBurney
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time:	Thursday, March 19, 2015 12:30 pm
End Date and Time:	Thursday, March 19, 2015 02:30 pm
Location:	Sumner Hall (404 HOB)
Duration:	2.00 hrs

Consideration of the following proposed committee bill(s):

PCB JDC 15-01 -- Mental Health Services in the Criminal Justice System

Consideration of the following bill(s):

CS/HB 149 Rights of Grandparents by Children, Families & Seniors Subcommittee, Rouson
CS/HB 305 Unlawful Detention by a Transient Occupant by Civil Justice Subcommittee, Harrison
CS/CS/HB 453 Timeshares by Government Operations Appropriations Subcommittee, Civil Justice Subcommittee, Eisnaugle
CS/HB 503 Family Law by Civil Justice Subcommittee, Spano
HB 633 Informed Patient Consent by Sullivan
CS/HB 717 No Contact Orders by Criminal Justice Subcommittee, Raschein

NOTICE FINALIZED on 03/17/2015 16:02 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 149 Rights Of Grandparents and Great-Grandparents
SPONSOR(S): Children, Families & Seniors Subcommittee; Rouson and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 368

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N	Malcolm	Bond
2) Children, Families & Seniors Subcommittee	10 Y, 0 N, As CS	Tuszynski	Brazzell
3) Judiciary Committee		Malcolm	Havlicak RH

SUMMARY ANALYSIS

Chapter 752, F.S., states that grandparents and great-grandparents may petition for visitation rights with their minor grandchildren and great-grandchildren; however, the Florida Supreme Court and other Florida District Courts have declared much of this law unconstitutional.

This bill repeals the unconstitutional language from chapter 752, F.S., and creates a limited grandparent visitation statute. It allows a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state to petition the court for visitation. A grandparent may also petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. The bill requires the grandparent to make a preliminary showing of parental unfitness or significant harm to the child.

The bill requires that grandparents first attempt mediation. If that is ineffective, the court may, if it deems necessary, appoint a guardian ad litem for the child. The bill lists factors for the court to consider in its final determination, including the previous relationship the grandparent had with the child, the findings of a guardian ad litem, the potential disruption to the family, the consistency of values between the grandparent and the parent, and the reasons visitation ended.

The bill places a limit on the number of times a grandparent can file for visitation, absent a real, substantial and unanticipated change of circumstances.

This bill appears to have no fiscal impact on state or local government.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Grandparent Visitation Rights in Florida

Currently, section 752.01(1), F.S., provides that a grandparent or great-grandparent may petition for visitation rights with their grandchildren or great-grandchildren when visitation is in the best interest of the minor child, and:

- The marriage of the child's parents has been dissolved;[1]
- A parent has deserted the child; or
- The child was born out of wedlock and not later determined to have been born within wedlock.[2]

However, two of current the statutory grounds for awarding grandparent visitation have been ruled unconstitutional: when the marriage of the child's parents has been dissolved[3] and when the child was born out of wedlock.[4] Yet these two provisions remain in the statute.

The decisions finding these two provisions unconstitutional were based on a consistent line of Florida Supreme Court decisions that struck down as unconstitutional, "statutes that have attempted to compel visitation or custody with a grandparent based solely on the best interest of the child, without the required showing of harm to the child . . . ."[5] The Florida Supreme Court has held that grandparent visitation when either of the child's parents prohibited a relationship between the child and grandparent, was unconstitutional, explaining that the state "may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."[6]

The Florida Supreme Court has also held that privacy is a fundamental right and any statute that infringes on that right is subject to the "compelling state interest" test, the highest standard of review. It concluded that current statute that allowed for grandparent visitation when one or both parents of the child are deceased but did not evaluate harm to the child failed that test because the circuit court must order visitation based on the "best interest" of the child, and cannot award such visitation "without first requiring proof of demonstrable harm to the child."[7]

At the same time, in the context of those cases, the court has provided a framework within which a statute creating grandparents' visitation rights might be enacted. Those opinions state that a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state may petition the court for visitation. Likewise, a grandparent may petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. However, the grandparent must make a preliminary showing of parental unfitness or significant harm to the child.

The bill is drafted to address these constitutional concerns, including language that the grandparent must make a preliminary showing of parental unfitness or significant harm to the child, and the specific instances in which a petition can be filed conforming with case law.

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[1] s. 752.01(1)(b), F.S.
[2] s. 752.01(1)(d), F.S.
[3] *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d DCA 1999); *Belair v. Drew*, 776 So. 2d 1105 (Fla. 5th DCA 2005).
[4] *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000).
[5] *Sullivan v. Sapp*, 866 So. 2d 28, 37 (Fla. 2004).
[6] *Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996).*
[7] *Von Eiff v. Azicri, 720 So. 2d 510 (Fla.1998).*

Remarriage or Adoption

Currently, s. 752.07, F.S., provides that in the event of a remarriage by a parent (when the other parent is deceased) or if there is an adoption by a stepparent, any existing visitation order in favor of a grandparent is unaffected, unless the grandparent has notice and an opportunity to be heard.

Effect of the Bill

Grandparent Visitation Rights

The bill repeals s. 752.01, F.S., and creates s. 752.011, F.S. This new section allows a grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state to petition the court for visitation. A grandparent may also petition for visitation if there are two parents, one of whom is deceased, missing, or in a permanent vegetative state and the other has been convicted of a felony or an offense of violence. The grandparent must make a preliminary showing that the remaining parent is unfit or that there has been significant harm to the child; if made, the court must direct the family to mediation and move toward a final hearing.

At the final hearing, the grandparent must show by clear and convincing evidence that the parent is unfit or there has been significant harm to the child. If the grandparent meets that burden, the court may grant visitation only if it is in the best interest of the child and will not harm the parent-child relationship. The bill requires the court to consider the totality of circumstances and lists multiple factors the court must consider in determining the best interest of the child. Some of those factors are:

- The love, affection, and other emotional ties existing between the child and the grandparent;
- The length and quality of the previous relationship between the child and the grandparent;
- Whether the grandparent established ongoing personal contact with the child;
- The reasons that the surviving parent cited to end contact;
- The existence or threat to the child of mental injury;
- The present mental, physical, and emotional health of the child and the grandparent;
- The recommendations of the child's guardian ad litem, if one is appointed;
- The results of any psychological evaluation of the child;
- The preference of the child;
- A written testamentary statement by the deceased parent regarding visitation with the grandparent; and
- Such other factors as the court considers necessary in making its determination.

In determining harm to the parent-child relationship, the court must consider:

- Whether there have been previous disputes between the grandparent and the parent over childrearing or other matters related to the care and upbringing of the child;
- Whether visitation would interfere with or compromise parental authority;
- Whether visitation can be arranged in a manner that does not detract from the parent-child relationship, including the quantity of time available for enjoyment of the parent-child relationship, and any other consideration related to disruption of the schedule and routine of the parent and the child;
- Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the child with the intent that the child benefit from the relationship;
- Whether the requested visitation would expose the child to conduct, moral standards, experiences, or other factors that are inconsistent with influences provided by the parent;
- The nature of the relationship between the parent and the grandparent;
- The reasons that the parent made the decision to end contact or visitation between the child and the grandparent which was previously allowed by the parent;

- The psychological toll of visitation disputes on the child; and
- Such other factors as the court considers necessary in making its determination.

An order granting grandparent visitation may be modified if a substantial change of circumstances has occurred and the modification is in the best interest of the child.

A grandparent can only file an original action for visitation once in a two-year period, unless a real, substantial and unanticipated change of circumstances has occurred.

The bill also addresses other statutes that govern child custody and visitation:

- The bill clarifies that Part II of ch. 61, F.S., the Uniform Child Custody Jurisdiction and Enforcement Act,[8] applies to custody actions brought under the provisions of s. 752.011, F.S. (the grandparent visitation statute created by the bill).
- Courts are encouraged to consolidate actions pending under s. 61.13, F.S.,[9] with those brought under s. 752.011, F.S.

Remarriage or Adoption

The bill repeals s. 752.07, F.S., and creates s. 752.071, F.S. The new section provides that after adoption of a child by a stepparent or close relative, the adoptive parent may petition to terminate a previous order granting grandparent visitation. The burden is on the grandparent to show satisfaction of the criteria that would satisfy an original petition for visitation.

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1: Repeals s. 752.01, F.S., relating to actions by grandparent for right of visitation and when a petition shall be granted.
Section 2: Creates s. 752.011, F.S., relating to petitions for grandparent visitation of a minor child.
Section 3: Repeals s. 752.07, F.S., relating to effect of adoption of child by stepparent on right of visitation and when a right may be terminated.
Section 4: Creates s. 752.071, F.S., relating to effect of adoption by stepparent or close relative.
Section 5: Amends s. 752.015, F.S., relating to mediation of visitation disputes.
Section 6: Provides an effective date of July 1, 2015.

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:

[8] The Uniform Child Custody Jurisdiction and Enforcement act governs multi-state child custody disputes.
[9] Section 61.13, F.S., governs child support obligations and custodial arrangements for minor children in a dissolution proceeding.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

The United States Supreme Court has recognized the fundamental liberty interest parents have in the 'care, custody and management' of their children.[10] The Florida Supreme Court has likewise recognized that decisions relating to child rearing and education are clearly established as fundamental rights within the Fourteenth Amendment of the United States Constitution and that the fundamental liberty interest in parenting is specifically protected by the privacy provision in the Florida Constitution.[11] Consequently, any statute that infringes these rights is subject to the highest level of scrutiny and must serve a compelling state interest through the least intrusive means necessary.[12]

The Florida Supreme Court has consistently held that the imposition, by the State, of grandparental visitation rights implicates a parent's privacy rights under the Florida Constitution.[13] The Court has held that because the current provisions in the grandparent visitation statute did not require a finding of demonstrable harm to the child, it did not satisfy the compelling state interest standard.[14] The Court has consistently held that there must be a showing of demonstrable harm, not simply best interest of the child, to satisfy the compelling state interest standard.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[10] *E.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982).

[11] *Beagle*, 678 So. 2d at 1275. Art. I, s. 23, Fla. Const. provides "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

[12] *See, e.g., Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So. 2d 633, 637 (Fla. 1980); *Belair v. Drew*, 776 So. 2d 1105, 1107 (Fla. 5th DCA 2001); *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

[13] *Beagle*, 678 So. 2d at 1275-76;

[14] *Id.*; *Von Eiff*, 720 So. 2d 510; *Saul*, 753 So. 2d 26 (Fla. 2000); *Sullivan*, 866 So. 2d 28.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Children, Families & Seniors Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment made the following changes:

- Removes all sections that added "great-grandparents" to statutes referencing "grandparents",
- Changes the requirement of awarding reasonable attorney fees from "shall" to "may",
- Changes the prima facie evidence required in a Petition for Grandparent Visitation from '. . . there is danger of significant harm . . .' to '. . . there is significant harm. . .', and
- Makes technical language changes for clarity.

The analysis is drafted to the committee substitute as passed by the Children, Families & Seniors Subcommittee.

A bill to be entitled

An act relating to the rights of grandparents; repealing s. 752.01, F.S., relating to actions by a grandparent for visitation rights; creating s. 752.011, F.S.; authorizing the grandparent of a minor child to petition a court for visitation under certain circumstances; requiring a preliminary hearing; providing for the payment of attorney fees and costs by a petitioner who fails to make a prima facie showing of harm; authorizing grandparent visitation if the court makes specified findings; providing factors for court consideration; providing applicability of the Uniform Child Custody Jurisdiction and Enforcement Act; encouraging the consolidation of certain concurrent actions; providing for modification of an order awarding grandparent visitation; limiting the frequency of actions seeking visitation; limiting applicability to a minor child placed for adoption; providing for venue; repealing s. 752.07, F.S., relating to the effect of adoption of a child by a stepparent on grandparent visitation rights; creating s. 752.071, F.S.; providing conditions under which a court may terminate a grandparent visitation order upon adoption of a minor child by a stepparent or close relative; amending s. 752.015, F.S.; conforming provisions and cross-references to changes made by the

act; providing an effective date.

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

Section 1. Section 752.01, Florida Statutes, is repealed.

Section 2. Section 752.011, Florida Statutes, is created to read:

752.011 Petition for grandparent visitation of a minor child.—A grandparent of a minor child whose parents are deceased, missing, or in a permanent vegetative state, or whose one parent is deceased, missing, or in a permanent vegetative state and whose other parent has been convicted of a felony or an offense of violence, may petition the court for court-ordered visitation with the grandchild under this section.

(1) Upon the filing of a petition by a grandparent for visitation, the court shall hold a preliminary hearing to determine whether the petitioner has made a prima facie showing of parental unfitness or significant harm to the child. Absent such a showing, the court shall dismiss the petition and may award reasonable attorney fees and costs to be paid by the petitioner to the respondent.

(2) If the court finds that there is prima facie evidence that a parent is unfit or that there is significant harm to the child, the court shall proceed with a final hearing, may appoint a guardian ad litem, and shall refer the matter to family mediation as provided in s. 752.015.

(3) After conducting a final hearing on the issue of visitation, the court may award reasonable visitation to the grandparent with respect to the minor child if the court finds by clear and convincing evidence that a parent is unfit or that there is significant harm to the child, that visitation is in the best interest of the minor child, and that the visitation will not materially harm the parent-child relationship.

(4) In assessing the best interest of the child under subsection (3), the court shall consider the totality of the circumstances affecting the mental and emotional well-being of the minor child, including:

(a) The love, affection, and other emotional ties existing between the minor child and the grandparent, including those resulting from the relationship that had been previously allowed by the child's parent.

(b) The length and quality of the previous relationship between the minor child and the grandparent, including the extent to which the grandparent was involved in providing regular care and support for the child.

(c) Whether the grandparent established ongoing personal contact with the minor child before the death of the parent.

(d) The reasons cited by the surviving parent in ending contact or visitation between the minor child and the grandparent.

(e) Whether there has been significant and demonstrable mental or emotional harm to the minor child as a result of the

disruption in the family unit, whether the child derived support and stability from the grandparent, and whether the continuation of such support and stability is likely to prevent further harm.

(f) The existence or threat to the minor child of mental injury as defined in s. 39.01.

(g) The present mental, physical, and emotional health of the minor child.

(h) The present mental, physical, and emotional health of the grandparent.

(i) The recommendations of the minor child's guardian ad litem, if one is appointed.

(j) The result of any psychological evaluation of the minor child.

(k) The preference of the minor child if the child is determined to be of sufficient maturity to express a preference.

(l) A written testamentary statement by the deceased parent regarding visitation with the grandparent. The absence of a testamentary statement is not deemed to provide evidence that the deceased parent would have objected to the requested visitation.

(m) Other factors that the court considers necessary to making its determination.

(5) In assessing material harm to the parent-child relationship under subsection (3), the court shall consider the totality of the circumstances affecting the parent-child relationship, including:

(a) Whether there have been previous disputes between the grandparent and the parent over childrearing or other matters related to the care and upbringing of the minor child.

(b) Whether visitation would materially interfere with or compromise parental authority.

(c) Whether visitation can be arranged in a manner that does not materially detract from the parent-child relationship, including the quantity of time available for enjoyment of the parent-child relationship and any other consideration related to disruption of the schedule and routine of the parent and the minor child.

(d) Whether visitation is being sought for the primary purpose of continuing or establishing a relationship with the minor child with the intent that the child benefit from the relationship.

(e) Whether the requested visitation would expose the minor child to conduct, moral standards, experiences, or other factors that are inconsistent with influences provided by the parent.

(f) The nature of the relationship between the child's parent and the grandparent.

(g) The reasons cited by the parent in ending contact or visitation between the minor child and the grandparent which was previously allowed by the parent.

(h) The psychological toll of visitation disputes on the minor child.

(i) Other factors that the court considers necessary in making its determination.

(6) Part II of chapter 61 applies to actions brought under this section.

(7) If actions under this section and s. 61.13 are pending concurrently, the courts are strongly encouraged to consolidate the actions in order to minimize the burden of litigation on the minor child and the other parties.

(8) An order for grandparent visitation may be modified upon a showing by the person petitioning for modification that a substantial change in circumstances has occurred and that modification of visitation is in the best interest of the minor child.

(9) An original action requesting visitation under this section may be filed by a grandparent only once during any 2-year period, except on good cause shown that the minor child is suffering, or may suffer, significant and demonstrable mental or emotional harm caused by a parental decision to deny visitation between a minor child and the grandparent, which was not known to the grandparent at the time of filing an earlier action.

(10) This section does not provide for grandparent visitation with a minor child placed for adoption under chapter 63 except as provided in s. 752.071 with respect to adoption by a stepparent or close relative.

(11) Venue shall be in the county where the minor child primarily resides, unless venue is otherwise governed by chapter

39, chapter 61, or chapter 63.

Section 3. Section 752.07, Florida Statutes, is repealed.

Section 4. Section 752.071, Florida Statutes, is created to read:

752.071 Effect of adoption by stepparent or close relative.—After the adoption of a minor child by a stepparent or close relative, the stepparent or close relative may petition the court to terminate an order granting grandparent visitation under this chapter which was entered before the adoption. The court may terminate the order unless the grandparent is able to show that the criteria of s. 752.011 authorizing the visitation continue to be satisfied.

Section 5. Section 752.015, Florida Statutes, is amended to read:

752.015 Mediation of visitation disputes.—It is ~~shall be~~ the public policy of this state that families resolve differences over grandparent visitation within the family. It is ~~shall be~~ the further public policy of this state that, when families are unable to resolve differences relating to grandparent visitation, ~~that~~ the family participate in any formal or informal mediation services that may be available. If ~~When~~ families are unable to resolve differences relating to grandparent visitation and a petition is filed pursuant to s. 752.011 ~~s. 752.01~~, the court shall, if such services are available in the circuit, refer the case to family mediation in accordance with the Florida Family Law Rules of Procedure ~~rules~~

~~promulgated by the Supreme Court~~.

Section 6. This act shall take effect July 1, 2015.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Rouson offered the following:

Amendment (with title amendment)

Remove lines 31-52 and insert:

Section 1. Section 752.001, Florida Statutes, is amended to read:

752.001 Definitions.—As used in ~~For purposes of~~ this chapter, the term:

(1) "Grandparent" shall include great-grandparent.

(2) "Missing" means a person whose whereabouts are unknown for a period of no less than 90 days and who cannot be located after a diligent search and inquiry. Such search and inquiry must include, at a minimum, inquiries of all relatives of the person who can reasonably identified by the petitioner, inquiries of hospitals in the areas where the person last resided, inquiries of the person's recent employers, inquiries

of state and federal agencies likely to have information about the person, inquiries of appropriate utility and postal providers, a thorough search of at least one electronic database specifically designed for locating persons, and inquiries of appropriate law enforcement agencies.

(3) "Persistent vegetative state" has the same meaning as provided in s. 765.101(12).

Section 2. Section 752.01, Florida Statutes, is repealed.

Section 3. Section 752.011, Florida Statutes, is created to read:

752.011 Petition for grandparent visitation of a minor child.—A grandparent of a minor child whose parents are deceased, missing, or in a persistent vegetative state, or whose one parent is deceased, missing, or in a persistent vegetative state and whose other parent has been convicted of a felony or an offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare, may petition the court for court-ordered visitation with the grandchild under this section.

(1) Upon the filing of a petition by a grandparent for visitation, the court shall hold a preliminary hearing to determine whether the petitioner has made a prima facie showing of parental unfitness or significant harm to the child. Absent such a showing, the court shall dismiss the petition and may award reasonable attorney fees and costs to be paid by the petitioner to the respondent.

(2) If the court finds that there is prima facie evidence that a parent is unfit or that there is significant harm to the child, the court may appoint a guardian ad litem and shall refer the matter to family mediation as provided in s. 752.015. If family mediation does not successfully resolve the issue of grandparent visitation, the court shall proceed with a final hearing.

T I T L E A M E N D M E N T

Remove line 3 and insert:

amending s. 752.001, F.S., providing definitions; repealing s. 752.01, F.S., relating to actions by a

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 149 (2015)

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Rouson offered the following:

Amendment

Remove lines 73-74 and insert:

contact with the minor child before the death of the parent, before the onset of the parent's persistent vegetative state, or before the parent was missing.

(d) The reasons cited by the respondent parent in ending

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 149 (2015)

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Rouson offered the following:

Amendment

Remove line 97 and insert:

the deceased or missing parent or parent in a persistent vegetative state would have objected to the requested

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 305 Unlawful Detention by a Transient Occupant
SPONSOR(S): Civil Justice Subcommittee; Harrison and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Robinson	Bond
2) Judiciary Committee		Robinson	Havlicak

SUMMARY ANALYSIS

Florida residential property owners commonly allow relatives, friends, or acquaintances to temporarily reside in their home as guests. These residencies are often terminated when the guest voluntarily vacates the property at the time agreed or, when the guest is no longer welcome, at the direction of the property owner. However, the process of removing an unwanted guest who refuses to leave can be frustrating and costly for property owners. In the absence of a crime, where a person has established even a temporary residence in residential property, law enforcement frequently will not force the person to surrender possession of the premises without a court order.

The bill authorizes law enforcement officers to direct certain guests to surrender possession of residential property without a court order upon the filing of a sworn affidavit by the person entitled to possession of the property. Failing to surrender possession at the direction of law enforcement constitutes a criminal trespass.

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

The bill takes effect July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida residential property owners commonly allow relatives, friends, or acquaintances to temporarily reside in their home as guests. These residencies are often terminated when the guest voluntarily vacates the property at the time agreed or, when the guest is no longer welcome, at the direction of the property owner. However, the process of removing an unwanted guest who refuses to leave can be frustrating and costly for property owners. In the absence of a crime, where a person has established a temporary residence in residential property, law enforcement frequently will not force the person to surrender possession of the premises without a court order, even where there are no indicators of the intent to create a permanent residency.[1]

A property owner seeking a court order for removal of a guest must file an action for possession in county or civil court. If the owner prevails in the action, the clerk of court will issue a writ of possession to the Sheriff describing the premises and commanding the Sheriff to put the owner in possession of the property.[2]

Actions for Possession

Property owners possess three separate, yet somewhat overlapping, judicial remedies for removing an unwanted guest from their home.

Eviction

Part II of ch. 83, F.S., the "Florida Residential Landlord and Tenant Act" (FRLATA), governs the relationship between landlords and tenants under a residential lease agreement. A rental agreement includes any written or oral agreement regarding the duration and conditions of a tenant's occupation of a dwelling unit.[3] Section 83.57, F.S., provides that a tenancy without a specific term may be terminated upon written notice of either party. The amount of notice required may range from 7 to 60 days.[4] A landlord may recover possession of a dwelling unit if the tenant does not vacate the premises after the rental agreement is terminated by filing an action for possession.[5] The FRLATA may apply to situations in which an invited guest made some minor contributions for the purchase of household goods or the payment of household expenses while residing in the property with the consent of the owner if a court decides that such an arrangement is a residential tenancy based on an agreement to pay "rent" in exchange for occupancy. However, if the court determines that possession is not based on residential tenancy (a landlord-tenant relationship), eviction is not the proper remedy and procedures under FRLATA not available.[6]

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[1] For instance, a property appraiser considers all of the following factors in making his or her determination as to the intent of a person claiming a homestead exemption to establish a permanent residence: proof of payment of utilities at the property, address of record for purposes of voting and driver licenses, the location where bank statements and checking accounts are registered, and the address listed on a federal tax return. Section 196.015, F.S.

[2] ss. 66.021(3), 82.091, and 83.62(1), F.S.

[3] s. 83.43(7), F.S. ("A rental agreement "means any written ... or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises.")

[4] s. 83.57, F.S.

[5] s. 83.59, F.S.

[6] *Grimm v. Huckabee*, 891 So. 2d 608 (Fla. 1st DCA 2005).

Unlawful Detainer

An unlawful detainer action can be filed to remove an unwanted guest who occupied residential property with the consent of the owner but has overstayed their welcome and has refused to leave upon the request of the property owner.[7] The person unlawfully detaining the property is not a tenant and claims no other right or interest in the property.

Ejectment

An ejectment action can be filed to eject an unwanted guest who once may have had permission to live upon the property, but subsequently claimed that they had a legal right to be there and refused to leave when asked by the property owner. To prevail in an ejectment action, the plaintiff must prove that he or she has good title to the property and has been deprived of its possession by the unwanted guest.[8]

While these actions may certainly be similar in some respects, a number of their pleading requirements differ, as may the forum in which the property owner is required file the appropriate complaint. An eviction or unlawful detainer action must be filed in county court[9] and is entitled to the summary procedure of s. 51.011, F.S., which provides that a defendant must answer the action within 5 days.[10] Thus, an action for possession based upon eviction or unlawful detainer may only take several weeks before entry of a judgment. Ejectment actions, however, are subject to the exclusive original jurisdiction of the circuit court[11] and governed by the Florida Rules of Civil Procedure which results in a longer court process before a property owner may obtain a judgment for possession.

Fees and Costs Associated with an Action for Possession

In addition to the delay caused by the time it takes to obtain and serve a writ of possession pursuant to one of the above actions for possession, property owners must also pay a number of fees and costs, including, but not limited to:

- Filing fees - $180 (county court)[12] or $395 (civil court).[13]
- Service charge for issuance of each summons - $10.[14]
- Service of each summons by the Sheriff - $40.[15]
- Service and execution of the writ of possession by Sheriff - $90.[16]
- Fees charged by the Sheriff to stand by and to keep the peace in an action for possession - Varies.[17]
- Attorney Fees - Varies.

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[7] s. 82.04, F.S.
[8] s. 66.021, F.S.
[9] s. 34.011(2), F.S.
[10] ss. 82.04(1) and 83.59(2), F.S.; Under the summary procedure of. s. 51.011, F.S., all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.
[11] s. 26.012(2)(f), F.S.
[12] s. 34.041(1)(a)7., F.S.
[13] s. 28.241(1)(a)1.a., F.S.
[14] ss. 28.241(1)(d) and 34.041(1)(d), F.S.
[15] s. 30.231(1)(a), F.S.
[16] s. 30.231, F.S.
[17] s. 30.231(2), F.S.; For example, the Miami-Dade Police Department charges $57.94 per hour, http://www.miamidade.gov/police/fees-procedure.asp, the Jacksonville Sheriff's Office charges $46.00 per hour, http://www.coj.net/departments/sheriffs-office/civil-process-unit/writ-of-possession-procedures.aspx, and the Sarasota County Sheriff's Office charges $31 per hour, http://www.sarasotasheriff.org/services/civil-procedures.html.

Effect of Proposed Changes

The bill creates s. 82.045, F.S., to provide an additional remedy in ch. 82, F.S. for the unlawful detention of residential property by "transient occupants."

The bill defines a transient occupant as a person whose residency in residential property has been for a brief period of time, the residency is not pursuant to a written lease, and the residency was intended as temporary. Factors that establish whether a person is a transient occupant include:

- The absence of an ownership or financial interest in the property entitling the person to occupancy of the property.
- No utility subscriptions at the property.
- Failure to use the property as the address of record with governmental agencies.
- Failure to receive mail at the property.
- A minimal amount of personal belongings at the property, if any.
- Payment of minimal, if any, rent.
- Lack of a designated personal space, such as a private room, at the property.
- An apparent permanent residence elsewhere.

Similar factors indicate the lack of intent to establish a permanent residence under current law.[18] Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses do not establish residency for the purposes of determining a transient occupancy.

If an unwanted guest refuses to leave residential property at the direction of the person entitled to possession of the property, which may be the owner or lessee of the property, such person may file a sworn affidavit with any law enforcement officer that the unwanted guest is a transient occupant and unlawfully detaining the property. A knowingly false statement in the sworn affidavit constitutes perjury, a first degree misdemeanor.[19]

Upon receipt of the sworn affidavit the law enforcement officer may direct the guest to surrender possession of the residential property. A person who fails to comply with the direction of the officer violates s. 810.08, F.S., and commits a criminal trespass in a structure or conveyance. In any prosecution of a violation of s. 810.08, F.S, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense. A person who is wrongfully removed by law enforcement as a transient occupant has a civil action for wrongful removal against the property owner, and, if acting in bad faith, against the law enforcement officer and the agency employing the officer.

The bill also provides that the person entitled to possession of the property may bring an action against the transient occupant for unlawful detainer pursuant to ch. 82, F.S. Additionally, the bill specifies that unlike the notices required under ch. 83, F.S. to a tenant prior to filing an eviction action, a transient occupant is not entitled to any notice of non-compliance prior to the property owner or lessee filing an action for unlawful detainer. The filing fee for an unlawful detainer action against a transient occupant is the fee established in s. 34.041(1)(a)7. for the removal of a tenant which is currently $180.

If the court determines the defendant is not a transient occupant but a tenant of residential property governed by part II of ch. 83, F.S., the court may not dismiss the action without first allowing the plaintiff to give the defendant the pre-eviction notices required by that chapter and thereafter amend the complaint to pursue eviction.

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[18] *See e.g.* s. 196.015, F.S.
[19] s. 837.012, F.S.

B. SECTION DIRECTORY:

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

Section 2 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

In each of the following cases, a Florida residential property owner sought help from law enforcement to remove an unwanted guest from his or her home but was required to pursue a civil action at his or her own expense for eviction, unlawful detainer, or ejectment, even though the unwanted guests

admitted there was not an agreement to pay rent and claimed no other ownership interest in the property:

- Brother of property owner moved into property owner's home without permission under the pretext of serving as a companion to the property owner during an illness three years prior and thereafter refused to leave. The brother periodically made minor contributions to the household of $100.[20]

- Property owner allowed an old college friend, as well as the friend's three children, to move into her home temporarily while the friend searched for a place to live. After 7 months, the owner requested the friend leave and the friend refused stating that "you can't find a place overnight."[21]

- Property owner allowed a mother and daughter, both adults, to move into his home after the women become unemployed. They refused to leave the home when requested by the owner after 3 months. The owner left the home and moved into his office. Public records showed the women were habitual squatters.[22]

- A military veteran invited a homeless man to move into his home for a few months until he could find permanent housing. The man refused to leave when requested by the owner over a year later, stating "you'll have to have me carried out of here."[23]

- A couple invited the homeless mother of their grandchild to live in their home. After she lost custody of the child, the couple requested that she leave and the woman refused. The couple alleged the woman wrote fraudulent checks from the couple's account and stole $32,000 in jewelry from a safe in the home while they were away on vacation. After an investigation, a warrant was issued for the woman's arrest on charges of grand theft, dealing in stolen property and defrauding a pawnbroker.[24]

Certain tenancies that are currently considered landlord-tenant relationships governed by the protections and procedures of the FRLATA may be considered transient occupancies if the bill goes into effect. For instance, oral week-to-week or month-to-month, rental agreements, which by their very nature may be intended as temporary, may be considered transient occupancies if the amount of rent agreed to by the parties is considered "minimal", and the person fails to use the address for government records or for the purpose of receiving mail.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 11, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Removing the exclusion of transient occupancies in a dwelling unit or premises from the Florida Residential Landlord and Tenant Act, and instead specifying when a transient occupant unlawfully detains residential real property.

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[20] Marcus Franklin, *Law slanted in favor of unwelcome guests*, St. Petersburg Times, February 17, 2004, http://www.sptimes.com/2004/02/17/Tampabay/Law_slanted_in_favor_.shtml.
[21] *Id.*
[22] Eileen Schulte, *Charity backfires on landlord,* The Columbus Dispatch, January 23, 2009, http://www.dispatch.com/content/stories/insight/2009/01/23/squatters.html.
[23] Shannon Behnken, *Only court order will rid you of unwanted house guest*, The Tampa Tribune, September 7, 2011, http://tbo.com/news/business/only-court-order-will-rid-you-of-unwanted-house-guest-255859.
[24] Ben Montgomery, *Hospitality cost couple dearly when guest refused to leave*, Tampa Bay Times, August 25, 2011, http://www.tampabay.com/features/humaninterest/hospitality-cost-couple-dearly-when-guest-refused-to-leave/1187810.

- Authorizing law enforcement to direct a transient occupant unlawfully detaining residential real property to surrender possession upon the filing of a sworn affidavit by the person entitled to possession and providing that failure to surrender possession constitutes a criminal trespass.
- Revising the factors that determine whether a person is a transient occupant.
- Creating a civil cause of action for persons wrongfully removed as a transient occupant.
- Specifying that a civil unlawful detainer action applies to the removal of transient occupants unless a court determines that the residency is governed by the FRLATA, in which case the defendant is entitled to the protections of ch. 83, F.S. A court must allow the plaintiff an opportunity to comply with the FRLATA before dismissing the unlawful detainer action.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

A bill to be entitled

An act relating to unlawful detention by a transient occupant; creating s. 82.045, F.S.; defining the term "transient occupant"; providing factors that establish a transient occupancy; providing for removal of a transient occupant by a law enforcement officer; providing a cause of action for wrongful removal; limiting actions for wrongful removal; providing a civil action for removal of a transient occupant; providing an effective date.

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

Section 1. Section 82.045, Florida Statutes, is created to read:

82.045 Remedy for unlawful detention by a transient occupant of residential property.—

(1) As used in this section, the term "transient occupant" means a person whose residency in a dwelling intended for residential use has occurred for a brief length of time, is not pursuant to a written lease, and whose occupancy was intended as transient in nature.

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

1. The person does not have ownership or financial interest in the property entitling him or her to occupancy of

the property.

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

3. The person does not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections.

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

5. The person pays minimal or no rent for his or her stay at the property.

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

7. The person has minimal, if any, personal belongings at the property.

8. The person has an apparent permanent residence elsewhere.

(b) Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses, do not establish residency.

(2) A transient occupant unlawfully detains a residential property if the transient occupant remains in occupancy of the residential property after the party entitled to possession of the property has directed the transient occupant to leave.

(3) Any law enforcement officer may, upon receipt of a sworn affidavit of the party entitled to possession that a person who is a transient occupant is unlawfully detaining

residential property, direct a transient occupant to surrender possession of residential property. A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the status as a permanent resident is not an affirmative defense. A person wrongfully removed pursuant to this subsection has a cause of action for wrongful removal against the person who requested the removal, and may recover injunctive relief and compensatory damages. However, a wrongfully removed person does not have a cause of action against the law enforcement officer or the agency employing the law enforcement officer absent a showing of bad faith by the law enforcement officer.

(4) A party entitled to possession of a dwelling has a cause of action for unlawful detainer and removal of a transient occupant. The party entitled to possession is entitled to the summary procedure of s. 51.011 to remove a transient occupant. The party entitled to possession is not required to notify the transient occupant before filing the action. If the court finds that the defendant is a transient occupant the court shall order the clerk to issue a writ of possession placing the plaintiff in possession of the premises, and may award compensatory damages. If the court finds the defendant is not a transient occupant but

is instead a tenant of residential property entitled to the protections of part II of chapter 83, the court may not dismiss the action without first allowing the plaintiff to give notice required by that part and to thereafter amend the complaint to pursue eviction under that part. County courts have jurisdiction over actions authorized under this subsection. The filing fee for an action under this subsection is the fee established in s. 34.041(1)(a)7. for removal of a tenant.

Section 2. This act shall take effect July 1, 2015.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 305 (2015)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Harrison offered the following:

Amendment

Remove line 21 and insert:

pursuant to a lease, and whose occupancy was intended as

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 305 (2015)

Amendment No. 1a

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Wood offered the following:

Amendment to Amendment (554545) by Representative Harrison

Remove line 6 of the amendment and insert:

pursuant to a lease or other written authorization by the owner or landlord of the dwelling, and whose occupancy was intended as

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Harrison offered the following:

Amendment

Remove lines 50-86 and insert:

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

(a) A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was

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

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 453 Timeshares
SPONSOR(S): Government Operations Appropriations Subcommittee; Civil Justice Subcommittee; Eisnaugle
TIED BILLS: None **IDEN./SIM. BILLS:** SB 932

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Malcolm	Bond
2) Government Operations Appropriations Subcommittee	10 Y, 0 N, As CS	Topp	Topp
3) Judiciary Committee		Malcolm	Havlicak

SUMMARY ANALYSIS

The Florida Vacation Plan and Timesharing Act (Act) establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers. Authority to implement these regulations has been granted to the Division of Florida Condominiums, Timeshares and Mobile Homes (Division) within the Department of Business and Professional Regulation. The bill makes the following changes to the Florida Vacation Plan and Timesharing Act:

- Provides that an ownership interest in a condominium or cooperative unit or a beneficial interest in a timeshare trust is required for such interests to qualify as timeshare estates;
- Expands the definitions of nonspecific and specific multisite timeshare plans provide that the plans may include interests other than timeshare licenses or personal property timeshare interests;
- Limits the required disclosure of public offering statements and amendments to timeshare instruments for component sites located in this state;
- Expands the limitation on liability for developers who, in good faith, attempt to and substantially comply with all the provisions of the Act;
- Requires the disclosure of unexpired lease terms in timeshare trusts;
- Repeals the requirement for judicial approval of transactions involving timeshare trust property;
- Creates a procedure of the extension or termination of certain timeshare plans;
- Creates new procedure for the transfer of reservation system and owner data when a managing entity is terminated;
- Requires all multisite timeshare plans to disclose the term of each component site plan and prominently disclose the term of component sites that are shorter than the term of the plan;
- Excludes component site common expenses and ad valorem expenses from the cap on annual increases in common expense assessments;
- Allows for substitute and replacement accommodations that are better than the existing accommodations; and
- Revises the limitations on substitute accommodations.

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

The bill provides and effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Chapter 721, F.S., the Florida Vacation Plan and Timeshare Act, governs vacation plans and timesharing. The purposes of the chapter are to: 1) recognize real and personal property timeshare plans in the state; 2) establish procedures for the creation, sale, exchange, promotion and operation of timeshare plans; 3) provide full and fair disclosure to the purchasers and prospective purchasers of timeshare plans; 4) require every timeshare plan in the state to be subjected to the provisions of the chapter; 5) require full and fair disclosure of terms, conditions, and services by resale service providers; and 6) recognize that a uniform and consistent method of regulation is necessary in order to safeguard Florida's tourism industry and the state's economic well-being.[1]

A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods[2] or a condominium unit in which timeshare estates have been created.[3] A timeshare plan is any arrangement, plan, or similar device in which a purchaser gives consideration for ownership rights in, or a right to use, any accommodations and facilities for less than a full year during any given year, but not necessarily for consecutive years.[4]

Definition of "Timeshare Estate"

A "timeshare estate" is currently defined in s. 721.05(34), F.S., as a right to occupy a timeshare unit coupled with a freehold estate or an estate for years with a future interest in a timeshare property. The term includes an interest in a condominium unit, a cooperative unit, or a direct or indirect interest in a timeshare trust, provided that the trust does not contain any personal property timeshare interests. A timeshare estate is considered to be real property under Florida law.

The bill modifies the definition of "timeshare estate" in s. 721.05(34), F.S., to provide that an *ownership* interest in a condominium or cooperative unit or a *beneficial* interest in a timeshare trust coupled with a right to occupy a timeshare unit is required for such interest to qualify as a timeshare estate. The bill also provides that a beneficial trust in a qualifying multisite timeshare trust is also a timeshare estate.

Definitions of "Nonspecific Multisite Timeshare Plan" and "Specific Multisite Timeshare Plan"

A "nonspecific multisite timeshare plan" is defined as a multisite timeshare plan[5] containing timeshare licenses[6] or personal property timeshare interests[7], in which a purchaser receives a right to use all of the accommodations and facilities of the multisite timeshare plan through the reservation system, but no specific right to use any particular accommodations and facilities.[8]

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[1] Section 721.02, F.S.
[2] Section 721.05(41), F.S.
[3] Section 718.103(26), F.S.
[4] Section 721.05(39), F.S.
[5] "Multisite timeshare plan" means any method, arrangement, or procedure with respect to which a purchaser obtains a recurring right to use and occupy accommodations or facilities of more than one component site, only through use of a reservation system, whether or not the purchaser is able to elect to cease participating in the plan. Section 721.52(4), F.S.
[6] "Timeshare license" means a right to occupy a timeshare unit, which right is not a personal property timeshare interest or a timeshare estate. Section 721.05(37), F.S.
[7] "Personal property timeshare interest" means a right to occupy an accommodation located on or in or comprised of personal property that is not permanently affixed to real property, whether or not coupled with a beneficial or ownership interest in the accommodations or personal property. *Id.* at (28).
[8] Section 721.52(5), F.S.

A "specific multisite timeshare plan" is defined as a multisite timeshare plan containing timeshare licenses or personal property timeshare interests, in which a purchaser receives a specific right to use accommodations and facilities at one component site[9] of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan.[10]

The bill amends the definitions of nonspecific and specific multisite timeshare plans to remove the requirement that the plans contain timeshare licenses or personal property timeshare interests.

Public Offering Statement

Prior to offering any timeshare plan, a developer must submit a public offering statement, which must include certain information and disclosures, to the Division.[11] Any amendment to an approved offering statement must be filed with the Division for approval prior to becoming effective.[12]

Currently, ss. 721.07(3) and 721.551(2), F.S., provide that public offering statements and amendments to timeshare instruments for component sites located in this state are not required to be provided to purchasers who do not receive a timeshare estate or an interest in a specific multisite timeshare plan in that component site.

The bill amends ss. 721.07(3) and 721.551(2), F.S., to provide that public offering statements and amendments to timeshare instruments for component sites located in this state are only required to be delivered to purchasers who receive a specific interest in that component site.

Currently, ss. 721.07(5) and 721.55(5), F.S., provide a limitation on liability for nonmaterial errors or omissions for any developer who, in good faith, attempts to comply with the requirements of ss. 721.07 or 721.55, F.S., related to public offering statements, if, in fact, he or she has substantially complied with the disclosure requirements of ch. 721, F.S.

The bill amends ss. 721.07(5) and 721.55(5), F.S., to expand the limitation on liability for developers who, in good faith attempted to and substantially complied with all the provisions of ch. 721, F.S., not just ss. 721.07 or 721.55, F.S. Any nonmaterial errors, omissions, or violations of ch. 721, F.S., for which a developer has limited liability under this section, are not considered violations of ch. 721, F.S., and do not give rise to any purchaser cancellation rights.

Leasehold Accommodations in a Timeshare Trust

Currently, ss. 721.08(2)(c) and 721.53(1)(e), F.S., which regulate timeshare trusts, are silent as to whether leasehold accommodations may be included in a timeshare trust and how they should be disclosed in a public offering statement or to interestholders.

The bill amends ss. 721.08(2)(c) and 721.53(1)(e), F.S., to provide that if the accommodations or facilities of a single-site timeshare trust plan are subject to a lease, the unexpired term of the lease must be disclosed as the term of the timeshare plan.

Disposition of Timeshare Trust Property

Currently ss. 721.08(2)(c) and 721.53(1)(e), F.S., require that any transfer or encumbrance of timeshare trust property approved by the voting interests of the timeshare plan must be approved by a

[9] "Component site" means a specific geographic site where a portion of the accommodations and facilities of the multisite timeshare plan are located. Section 721.52, F.S.
[10] Section 721.52(7), F.S.
[11] Sections 721.07 and 721.55, F.S.
[12] Section 721.07(3)(a)1., F.S.

court, and in the case of single site timeshare plans, the Division has standing to advise the court on its decision.

The bill deletes the requirement for judicial approval in ss. 721.08(2)(c) and 721.53(1)(e), F.S., and deletes the provision granting the Division standing in proceedings involving single site timeshare plans.

The bill also provides that subject to the statutory provisions regulating changes to component site accommodations or facilities in s. 721.552, F.S., a vote of the voting interests of the timeshare plan is not required for substitution or automatic deletion of accommodations or facilities in timeshare trusts.

Extension or Termination of Timeshare Plans

Chapter 721, F.S., does not currently contain any provision addressing timeshare plans that are silent as to when the plan is terminated or when it can be extended.

The bill creates s. 721.125, F.S., to provide a statutory default provision for timeshare instruments that have been in existence for at least 25 years and are silent as to how the plan terminates or is extended. A vote or written consent of 60 percent of all the voting interests in the timeshare plan is required to extend or terminate the term of a timeshare plan.

If the term of a timeshare plan is extended, all rights, privileges, duties, and obligations created under applicable law or the timeshare instrument continue in full force. If a timeshare plan is terminated, the termination has immediate effect pursuant to applicable law and the timeshare instrument.

A termination, extension vote or consent proposed for a component site of a multisite timeshare plan located in this state is effective only if the person authorized to make additions or substitutions approves.

Transfer of Reservation System Following Discharge of Managing Entity

Currently, s. 721.56(5), F.S., provides that the reservation system of a nonspecific multisite timeshare plan is considered a facility of the timeshare plan. In the event that the managing entity of the timeshare plan is terminated, it must comply with statutory procedures that ensure the continued operation of the reservation system during the transition to a new reservation system by the new managing entity. In cases where the managing entity of a timeshare estate or specific multisite timeshare plan is terminated, the managing entity must transfer all relevant data from its reservation system to the managing entity of each component site.

Current law, s. 721.14, F.S., does not address what a managing entity of a single-site timeshare plan must do with the reservation system and owner data if the managing entity is terminated.

The bill deletes the provisions in s. 721.56(5), F.S., related to the transfer of reservation system and owner data for multisite timeshare plans and provides a new procedure in s. 721.14(4), F.S., for the transfer of reservation system and owner data from the managing entity to the owners' association. The new procedures apply to terminations of managing entities of single site or multisite timeshare plans.

If there is no agreement between the owners' association and managing entity that covers the transfer of relevant owner data and reservation system information, then the managing entity must transfer the information to the owners' association within 90 days of receiving notice of the termination vote. Within 10 days after the completed transfer of the data, the timeshare plan must reimburse the managing entity for all reasonable costs incurred in effecting the transfer of information.

Term of Multisite Timeshare Plans

Section 721.54, F.S., prohibits a person from representing to a purchaser of a nonspecific multisite timeshare plan that the term of the plan for that purchaser is longer than the shortest term of availability of any of the accommodations included in the plan at the time of purchase. However, for other types of multisite timeshare plans, s. 721.55(4)(a), F.S., only requires that the term of each component site within the timeshare plan be disclosed.

The bill deletes the prohibition in s. 721.54, F.S., and amends s. 721.55(4)(a), F.S., to require all multisite timeshare plans to disclose the term of each component site within the timeshare plan and disclose, in conspicuous type, the term of each component site that is shorter than the term of the timeshare plan.

Exceptions to the Limitation on Common Expense Assessments

Current law, s. 721.55(4)(h), F.S., caps the annual increase in common expense assessments for multisite timeshare plans in a given year at 125 percent of the previous year. There are currently no exceptions to the cap.

The bill amends s. 721.55(4)(h), F.S., to exclude component site common expenses and ad valorem expenses from the 125 percent cap on increases in common expense assessments for multisite timeshare plans.

Substitutions and Deletions for Multisite Timeshare Plans

Section 721.552(2), F.S., currently only allows substitutions of accommodations and facilities for nonspecific multisite timeshare plans that are "substantially similar" to the existing accommodations and facilities. Substitutions are limited to no more than 25 percent of the available accommodations at a given component site per year. Before a substitution occurs, notice must be provided to all the purchasers of the timeshare plan. However, under limited circumstances, a managing entity may substitute all accommodations in a given year if a written plan of substitution has been provided to each purchaser of the timeshare plan and approved by a majority of purchasers and a majority of the board of administration.

The bill amends s. 721.552(2), F.S., to allow for substitute accommodations that are better than the existing accommodations. It also modifies the notice required before a substitution will occur to include a statement that purchasers have the right to object to the proposed substitution. The 25 percent limitation on substitutions is repealed and replaced with the following provisions:

- If the developer is authorized to make substitutions, the developer is annually limited to substitution of 10 percent of the annual use availability in the multisite timeshare plan;
- If the managing entity is authorized to make substitutions, and the managing entity is under common ownership or control with the developer, the managing entity is annually limited to substitution of 10 percent of the annual use availability in the multisite timeshare plan;
- If the managing entity is authorized to make substitutions, and the managing entity is not under common ownership or control with the developer, the managing entity is annually limited to substitution of 25 percent of the annual use availability in the multisite timeshare plan; and
- If at least 10 percent of purchasers in the timeshare plan object to a proposed substitution, a meeting of the purchasers must be held. Unless the substitution is rejected by a majority of purchasers voting, it is deemed approved.

The bill replaces the provision in s. 721.552(2), F.S., that allows a managing entity to substitute all accommodations pursuant to a plan approved by a majority of purchasers and a majority of the board, with a provision that allows for unlimited substitutions by any authorized person if the proposed substitution is approved in advance by a majority of voting purchasers, provided at least 25 percent of purchasers vote.

Currently, s. 721.552(3), F.S., allows for the automatic deletion of component sites only if a sufficient number of purchasers of the plan will also be deleted to maintain a one-to-one right to use ratio. The bill amends this provision to also allow for automatic deletions if replacement accommodations that are substantially similar to or better than the deleted accommodations are provided.

Other Effects of the Bill

The bill makes the procedures in s. 721.14, F.S., related to the discharge of a managing entity, applicable to personal property timeshare plans.

The bill makes a number of conforming changes to ch. 721, F.S., due to the change to the definitions of nonspecific and specific multisite timeshare plans in the bill.

The bill amends s. 721.57, F.S., to provide for timeshare estates in specific multisite timeshare plans.

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 721.05, F.S., related to definitions.

Section 2 amends s. 721.07, F.S., related to public offering statements.

Section 3 amends s. 721.08, F.S., related to escrow accounts, nondisturbance instruments, alternate security arrangements, and transfers of legal title.

Section 4 creates s. 721.125, F.S., related to the extension or termination of timeshare plans.

Section 5 amends s. 721.14, F.S., related to the discharge of a managing entity.

Section 6 amends s. 721.52, F.S., related to definitions.

Section 7 amends s. 721.53, F.S., related to subordination instruments and alternate security arrangements.

Section 8 repeals s. 721.54, F.S., related to terms of nonspecific timeshare plans.

Section 9 amends s. 721.55, F.S., related to multisite timeshare plan public offering statements.

Section 10 amends s. 721.551, F.S., related to the delivery of multisite timeshare plan purchaser public offering statements.

Section 11 amends s. 721.552, F.S., related to additions, substitutions or deletions of component site accommodations or facilities, and purchaser remedies for violations.

Section 12 amends s. 712.56, F.S., related to the management of multisite timeshare plans, reservation systems, and demand balancing.

Section 13 amends s. 712.57, F.S., related to the offering of timeshare estates in specific multisite timeshare plans and the required provisions in the timeshare instrument.

Section 14 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to increase costs on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 17, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Providing that the required delivery of public offering statements and amendments to timeshare instruments for component sites located in this state only applies to those filings subject to Part II of ch. 721, F.S.;
- Deleting a section of the bill that would have limited the time share solicitation advertising notice to only advertising material that required a mandatory tour or attendance at a timeshare presentation;
- Increasing from a simple majority to 60 percent of all voting interests the required vote for the extension or termination of a timeshare plan;
- Providing that the provision related to the required vote for the extension or termination of a timeshare plan only applies to plans in existence for at least 25 years;
- Retaining language that provides that the offering of timeshare estates in a specific multisite timeshare plan that do not comply with statutory requirements is deemed to be an offering of a timeshare license; and
- Making technical and drafting corrections.

On March 10, 2015, the Government Operations Appropriations Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. Specifically,

- The two amendments deleted sections 6 and 15 from the bill removing language related to the annual managing fee and thereby removing any negative fiscal impact from the bill.

This analysis is drafted to the CS/CS/HB 453 as passed by the Government Operations Appropriations Subcommittee.

A bill to be entitled

An act relating to timeshares; amending s. 721.05, F.S.; revising a definition; amending s. 721.07, F.S.; revising requirements for amendments made to a timeshare instrument; revising requirements for public offering statements; amending s. 721.08, F.S.; revising compliance requirements for the release of certain escrow funds; creating s. 721.125, F.S.; providing for the extension or termination of timeshare plans under certain conditions; providing applicability; amending s. 721.14, F.S.; authorizing an owners' association and a managing entity to agree to certain conditions related to the discharge of the managing entity; providing for the transfer of specified reservation system data upon the termination of the managing entity; providing that reasonable costs incurred by the terminated managing entity in effecting the transfer of certain information shall be reimbursed as a common expense; amending s. 721.52, F.S.; revising definitions; amending s. 721.53, F.S.; revising requirements with respect to subordination instruments; deleting a requirement relating to court approval of trustee dispositions of multisite timeshare trust property; providing that a vote of the voting interests of a multisite timeshare plan is not required for substitution or automatic deletion of

multisite timeshare trust property; repealing s. 721.54, F.S., relating to terms of nonspecific multisite timeshare plans; amending s. 721.55, F.S.; revising disclosure requirements for a multisite timeshare plan public offering statement; amending s. 721.551, F.S.; revising disclosure requirements for multisite timeshare plan purchaser public offering statements; amending s. 721.552, F.S.; revising requirements relating to substitutions and deletions of component site accommodations or facilities; amending s. 721.56, F.S.; deleting provisions relating to the transfer of specified reservation system data upon the termination of managing entity and costs incurred by the terminated managing entity; amending s. 721.57, F.S.; revising language with respect to timeshare estates in multisite timeshare plans; providing an effective date.

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

Section 1. Subsection (34) of section 721.05, Florida Statutes, is amended to read:

721.05 Definitions.—As used in this chapter, the term:

(34) "Timeshare estate" means a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a

specified portion thereof, or coupled with~~. The term includes~~ an ownership interest in a condominium unit pursuant to s. 718.103, an ownership interest in a cooperative unit pursuant to s. 719.103, or a direct or indirect beneficial interest in a trust that complies in all respects with ~~the provisions of~~ s. 721.08(2)(c)4. or s. 721.53(1)(e), provided that the trust does not contain any personal property timeshare interests. A timeshare estate is a parcel of real property under the laws of this state.

Section 2. Paragraph (a) of subsection (3) and paragraph (gg) of subsection (5) of section 721.07, Florida Statutes, are amended to read:

721.07 Public offering statement.—Prior to offering any timeshare plan, the developer must submit a filed public offering statement to the division for approval as prescribed by s. 721.03, s. 721.55, or this section. Until the division approves such filing, any contract regarding the sale of that timeshare plan is subject to cancellation by the purchaser pursuant to s. 721.10.

(3)(a)1. Any change to an approved public offering statement filing shall be filed with the division for approval as an amendment prior to becoming effective. The division shall have 20 days after receipt of a proposed amendment to approve or cite deficiencies in the proposed amendment. If the division fails to act within 20 days, the amendment will be deemed approved. If the proposed amendment adds a new component site to

an approved multisite timeshare plan, the division's initial period in which to approve or cite deficiencies is 45 days. If the developer fails to adequately respond to any deficiency notice within 30 days, the division may reject the amendment. Subsequent to such rejection, a new filing fee pursuant to subsection (4) and a new division initial review period pursuant to this paragraph shall apply to any refiling or further review of the rejected amendment.

2. For filings only subject to this part, each approved amendment to the approved purchaser public offering statement, other than an amendment made only for the purpose of the addition of a phase or phases to the timeshare plan in the manner described in the timeshare instrument or any amendment that does not materially alter or modify the offering in a manner that is adverse to a purchaser, shall be delivered to a purchaser no later than 10 days prior to closing. For filings made under part II, each approved amendment to the multisite timeshare plan purchaser public offering statement, other than an amendment made only for the purpose of the addition, substitution, or deletion of a component site pursuant to part II or the addition of a phase or phases to a component site of a multisite timeshare plan in the manner described in the timeshare instrument or any amendment that does not materially alter or modify the offering in a manner that is adverse to a purchaser, shall be delivered to a purchaser no later than 10 days prior to closing.

3. For filings subject only to part II of this chapter, amendments made to a timeshare instrument for a component site located in this state are ~~not~~ required only to be delivered to purchasers who ~~do not~~ receive ~~a timeshare estate or~~ an interest in a specific multisite timeshare plan in that component site. Amendments made to a timeshare instrument for a component site not located in this state are not required to be delivered to purchasers.

(5) Every filed public offering statement for a timeshare plan which is not a multisite timeshare plan shall contain the information required by this subsection. The division is authorized to provide by rule the method by which a developer must provide such information to the division.

(gg)1. Such other information as is necessary to fairly, meaningfully, and effectively disclose all aspects of the timeshare plan, including, but not limited to, any disclosures made necessary by the operation of s. 721.03(8). ~~However,~~

2. If a developer has, in good faith, attempted to comply with ~~the requirements of~~ this chapter ~~section~~, and if, in fact, the developer ~~he or she~~ has substantially complied with ~~the disclosure requirements of~~ this chapter, nonmaterial errors or omissions are ~~shall~~ not ~~be~~ actionable, are not violations of this chapter, and do not give rise to any purchaser cancellation right.

Section 3. Paragraph (c) of subsection (2) of section 721.08, Florida Statutes, is amended to read:

721.08 Escrow accounts; nondisturbance instruments; alternate security arrangements; transfer of legal title.—

(2) One hundred percent of all funds or other property which is received from or on behalf of purchasers of the timeshare plan or timeshare interest prior to the occurrence of events required in this subsection shall be deposited pursuant to an escrow agreement approved by the division. The funds or other property may be released from escrow only as follows:

(c) Compliance with conditions.—

1. Timeshare licenses.—If the timeshare plan is one in which timeshare licenses are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

(IV) Either:

(A) Execution, delivery, and recordation by each interestholder of the nondisturbance and notice to creditors instrument, as described in this section; or

(B) Transfer by the developer of legal title to the subject accommodations and facilities, or all use rights therein, into a trust satisfying the requirements of

subparagraph 4. and the execution, delivery, and recordation by each other interestholder of the nondisturbance and notice to creditors instrument, as described in this section.

b. A certified copy of each recorded nondisturbance and notice to creditors instrument.

c. One of the following:

(I) A copy of a memorandum of agreement, as defined in s. 721.05, together with satisfactory evidence that the original memorandum of agreement has been irretrievably delivered for recording to the appropriate official responsible for maintaining the public records in the county in which the subject accommodations and facilities are located. The original memorandum of agreement must be recorded within 180 days after the date on which the purchaser executed her or his purchase agreement.

(II) A notice delivered for recording to the appropriate official responsible for maintaining the public records in each county in which the subject accommodations and facilities are located notifying all persons of the identity of an independent escrow agent or trustee satisfying the requirements of subparagraph 4. that shall maintain separate books and records, in accordance with good accounting practices, for the timeshare plan in which timeshare licenses are to be sold. The books and records shall indicate each accommodation and facility that is subject to such a timeshare plan and each purchaser of a timeshare license in the timeshare plan.

2. Timeshare estates.—If the timeshare plan is one in which timeshare estates are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

b. If the timeshare estate is sold by agreement for deed, a certified copy of the recorded nondisturbance and notice to creditors instrument, as described in this section.

c. Evidence that each accommodation and facility:

(I) Is free and clear of the claims of any interestholders, other than the claims of interestholders that, through a recorded instrument, are irrevocably made subject to the timeshare instrument and the use rights of purchasers made available through the timeshare instrument;

(II) Is the subject of a recorded nondisturbance and notice to creditors instrument that complies with subsection (3) and s. 721.17; or

(III) Has been transferred into a trust satisfying the requirements of subparagraph 4.

d. Evidence that the timeshare estate:

(I) Is free and clear of the claims of any

interestholders, other than the claims of interestholders that, through a recorded instrument, are irrevocably made subject to the timeshare instrument and the use rights of purchasers made available through the timeshare instrument; or

(II) Is the subject of a recorded nondisturbance and notice to creditors instrument that complies with subsection (3) and s. 721.17.

3. Personal property timeshare interests.—If the timeshare plan is one in which personal property timeshare interests are to be sold and no cancellation or default has occurred, the escrow agent may release the escrowed funds or other property to or on the order of the developer upon presentation of:

a. An affidavit by the developer that all of the following conditions have been met:

(I) Expiration of the cancellation period.

(II) Completion of construction.

(III) Closing.

b. If the personal property timeshare interest is sold by agreement for transfer, evidence that the agreement for transfer complies fully with s. 721.06 and this section.

c. Evidence that one of the following has occurred:

(I) Transfer by the owner of the underlying personal property of legal title to the subject accommodations and facilities or all use rights therein into a trust satisfying the requirements of subparagraph 4.; or

(II) Transfer by the owner of the underlying personal

property of legal title to the subject accommodations and facilities or all use rights therein into an owners' association satisfying the requirements of subparagraph 5.

d. Evidence of compliance with the provisions of subparagraph 6., if required.

e. If a personal property timeshare plan is created with respect to accommodations and facilities that are located on or in an oceangoing vessel, including a "documented vessel" or a "foreign vessel," as defined and governed by 46 U.S.C., chapter 301:

(I) In making the transfer required in sub-subparagraph c., the developer shall use as its transfer instrument a document that establishes and protects the continuance of the use rights in the subject accommodations and facilities in a manner that is enforceable by the trust or owners' association.

(II) The transfer instrument shall comply fully with the provisions of this chapter, shall be part of the timeshare instrument, and shall contain specific provisions that:

(A) Prohibit the vessel owner, the developer, any manager or operator of the vessel, the owners' association or the trustee, the managing entity, or any other person from incurring any liens against the vessel except for liens that are required for the operation and upkeep of the vessel, including liens for fuel expenditures, repairs, crews' wages, and salvage, and except as provided in sub-sub-subparagraphs 4.b.(III) and 5.b.(III). All expenses, fees, and taxes properly incurred in

connection with the creation, satisfaction, and discharge of any such permitted lien, or a prorated portion thereof if less than all of the accommodations on the vessel are subject to the timeshare plan, shall be common expenses of the timeshare plan.

(B) Grant a lien against the vessel in favor of the owners' association or trustee to secure the full and faithful performance of the vessel owner and developer of all of their obligations to the purchasers.

(C) Establish governing law in a jurisdiction that recognizes and will enforce the timeshare instrument and the laws of the jurisdiction of registry of the vessel.

(D) Require that a description of the use rights of purchasers be posted and displayed on the vessel in a manner that will give notice of such rights to any party examining the vessel. This notice must identify the owners' association or trustee and include a statement disclosing the limitation on incurring liens against the vessel described in sub-sub-sub-subparagraph (A).

(E) Include the nondisturbance and notice to creditors instrument for the vessel owner and any other interestholders.

(F) The owners' association created under subparagraph 5. or trustee created under subparagraph 4. shall have access to any certificates of classification in accordance with the timeshare instrument.

(III) If the vessel is a foreign vessel, the vessel must be registered in a jurisdiction that permits a filing evidencing

the use rights of purchasers in the subject accommodations and facilities, offers protection for such use rights against unfiled and inferior claims, and recognizes the document or instrument creating such use rights as a lien against the vessel.

(IV) In addition to the disclosures required by s. 721.07(5), the public offering statement and purchase contract must contain a disclosure in conspicuous type in substantially the following form:

The laws of the State of Florida govern the offering of this timeshare plan in this state. There are inherent risks in purchasing a timeshare interest in this timeshare plan because the accommodations and facilities of the timeshare plan are located on a vessel that will sail into international waters and into waters governed by many different jurisdictions. Therefore, the laws of the State of Florida cannot fully protect your purchase of an interest in this timeshare plan. Specifically, management and operational issues may need to be addressed in the jurisdiction in which the vessel is registered, which is (insert jurisdiction in which vessel is registered). Concerns of purchasers may be sent to (insert name of applicable regulatory agency and address).

4. Trust.—

a. If the subject accommodations or facilities, or all use rights therein, are to be transferred into a trust in order to comply with this paragraph, such transfer shall take place

pursuant to this subparagraph. If the accommodations or facilities included in such transfer are subject to a lease, the unexpired term of the lease must be disclosed as the term of the timeshare plan pursuant to s. 721.07(5)(f)4.

b. Prior to the transfer ~~by each interestholder~~ of the subject accommodations and facilities, or all use rights therein, to a trust, any lien or other encumbrance against such accommodations and facilities, or use rights therein, shall be made subject to a nondisturbance and notice to creditors instrument pursuant to subsection (3). No transfer pursuant to this subparagraph shall become effective until the trustee accepts such transfer and the responsibilities set forth herein. A trust established pursuant to this subparagraph shall comply with the following provisions:

(I) The trustee shall be an individual or a business entity authorized and qualified to conduct trust business in this state. Any corporation authorized to do business in this state may act as trustee in connection with a timeshare plan pursuant to this chapter. The trustee must be independent from any developer or managing entity of the timeshare plan or any interestholder of any accommodation or facility of such plan.

(II) The trust shall be irrevocable so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare plan.

(III) The trustee shall not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion

any interest in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy unless the timeshare plan is terminated pursuant to the timeshare instrument, or such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by a vote of two-thirds of all voting interests of the timeshare plan. Subject to s. 721.552, a vote of the voting interests of the timeshare plan is not required for substitution or automatic deletion of accommodations or facilities. ~~and such decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan. The trustee shall notify the division in writing within 10 days after receiving notice of the filing of any petition relating to obtaining such a court order. The division shall have standing to advise the court of the division's interpretation of the statute as it relates to the petition.~~

(IV) All purchasers of the timeshare plan or the owners' association of the timeshare plan shall be the express beneficiaries of the trust. The trustee shall act as a fiduciary to the beneficiaries of the trust. The personal liability of the trustee shall be governed by ss. 736.08125, 736.08163, 736.1013, and 736.1015. The agreement establishing the trust shall set forth the duties of the trustee. The trustee shall be required to furnish promptly to the division upon request a copy of the complete list of the names and addresses of the owners in the timeshare plan and a copy of any other books and records of the

timeshare plan required to be maintained pursuant to s. 721.13 that are in the possession, custody, or control of the trustee. All expenses reasonably incurred by the trustee in the performance of its duties, together with any reasonable compensation of the trustee, shall be common expenses of the timeshare plan.

(V) The trustee shall not resign upon less than 90 days' prior written notice to the managing entity and the division. No resignation shall become effective until a substitute trustee, approved by the division, is appointed by the managing entity and accepts the appointment.

(VI) The documents establishing the trust arrangement shall constitute a part of the timeshare instrument.

(VII) For trusts holding property in a timeshare plan located outside this state, the trust and trustee holding such property shall be deemed in compliance with the requirements of this subparagraph if such trust and trustee are authorized and qualified to conduct trust business under the laws of such jurisdiction and the agreement or law governing such trust arrangement provides substantially similar protections for the purchaser as are required in this subparagraph for trusts holding property in a timeshare plan in this state.

(VIII) The trustee shall have appointed a registered agent in this state for service of process. In the event such a registered agent is not appointed, service of process may be served pursuant to s. 721.265.

5. Owners' association.—

a. If the subject accommodations or facilities, or all use rights therein, are to be transferred into an owners' association in order to comply with this paragraph, such transfer shall take place pursuant to this subparagraph.

b. Before ~~Prior to~~ the transfer ~~by each interestholder~~ of the subject accommodations and facilities, or all use rights therein, to an owners' association, any lien or other encumbrance against such accommodations and facilities, or use rights therein, shall be made subject to a nondisturbance and notice to creditors instrument pursuant to subsection (3). No transfer pursuant to this subparagraph shall become effective until the owners' association accepts such transfer and the responsibilities set forth herein. An owners' association established pursuant to this subparagraph shall comply with the following provisions:

(I) The owners' association shall be a business entity authorized and qualified to conduct business in this state. Control of the board of directors of the owners' association must be independent from any developer or managing entity of the timeshare plan or any interestholder.

(II) The bylaws of the owners' association shall provide that the corporation may not be voluntarily dissolved without the unanimous vote of all owners of personal property timeshare interests so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare

plan.

(III) The owners' association shall not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interest in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy, unless the timeshare plan is terminated pursuant to the timeshare instrument, or unless such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by a vote of two-thirds of all voting interests of the association and such decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan. The owners' association shall notify the division in writing within 10 days after receiving notice of the filing of any petition relating to obtaining such a court order. The division shall have standing to advise the court of the division's interpretation of the statute as it relates to the petition.

(IV) All purchasers of the timeshare plan shall be members of the owners' association and shall be entitled to vote on matters requiring a vote of the owners' association as provided in this chapter or the timeshare instrument. The owners' association shall act as a fiduciary to the purchasers of the timeshare plan. The articles of incorporation establishing the owners' association shall set forth the duties of the owners' association. All expenses reasonably incurred by the owners' association in the performance of its duties, together with any

reasonable compensation of the officers or directors of the owners' association, shall be common expenses of the timeshare plan.

(V) The documents establishing the owners' association shall constitute a part of the timeshare instrument.

(VI) For owners' associations holding property in a timeshare plan located outside this state, the owners' association holding such property shall be deemed in compliance with the requirements of this subparagraph if such owners' association is authorized and qualified to conduct owners' association business under the laws of such jurisdiction and the agreement or law governing such arrangement provides substantially similar protections for the purchaser as are required in this subparagraph for owners' associations holding property in a timeshare plan in this state.

(VII) The owners' association shall have appointed a registered agent in this state for service of process. In the event such a registered agent cannot be located, service of process may be made pursuant to s. 721.265.

6. Personal property subject to certificate of title.—If any personal property that is an accommodation or facility of a timeshare plan is subject to a certificate of title in this state pursuant to chapter 319 or chapter 328, the following notation must be made on such certificate of title pursuant to s. 319.27(1) or s. 328.15(1):

The further transfer or encumbrance of the property subject to

this certificate of title, or any lien or encumbrance thereon, is subject to the requirements of section 721.17, Florida Statutes, and the transferee or lienor agrees to be bound by all of the obligations set forth therein.

7. If the developer has previously provided a certified copy of any document required by this paragraph, she or he may for all subsequent disbursements substitute a true and correct copy of the certified copy, provided no changes to the document have been made or are required to be made.

8. In the event that use rights relating to an accommodation or facility are transferred into a trust pursuant to subparagraph 4. or into an owners' association pursuant to subparagraph 5., all other interestholders, including the owner of the underlying fee or underlying personal property, must execute a nondisturbance and notice to creditors instrument pursuant to subsection (3).

Section 4. Section 721.125, Florida Statutes, is created to read:

721.125 Extension or termination of timeshare plans.—

(1) Unless the timeshare instrument provides otherwise, the vote or written consent, or both, of 60 percent of all voting interests in a timeshare plan may extend or terminate the term of the timeshare plan at any time. If the term of a timeshare plan is extended pursuant to this section, all rights, privileges, duties, and obligations created under applicable law or the timeshare instrument continue in full force to the same

extent as if the extended termination date of the timeshare plan were the original termination date of the timeshare plan. If a timeshare plan is terminated pursuant to this section, the termination has immediate effect pursuant to applicable law and the timeshare instrument as if the effective date of the termination were the original date of termination.

(2) If a termination or extension vote or consent pursuant to subsection (1) is proposed for a component site of a multisite timeshare plan located in this state, the proposed termination or extension is effective only if the person authorized to make additions or substitutions of accommodations and facilities pursuant to the timeshare instrument also approves the termination or extension.

(3) This section applies only to a timeshare plan that has been in existence for at least 25 years as of the effective date of the termination or extension vote or consent required by subsection (1).

Section 5. Subsection (4) of section 721.14, Florida Statutes, is amended to read:

721.14 Discharge of managing entity.—

(4)(a) An owners' association and a manager or management firm may, in the management contract or other written document, agree to the transition procedures and related time periods to be followed in the event the manager or management firm is discharged pursuant to this section. If there is no written agreement between the parties that covers the matters set forth

in paragraphs (b) and (c), the provisions of paragraphs (b) and (c) shall apply.

(b) Within 90 days after the date that the manager or management firm is notified by the owners' association of a successful termination vote pursuant to subsection (1), the terminated managing entity shall transfer to the owners' association or new manager or management firm all relevant data held by the managing entity and related to any reservation system for the timeshare plan, including, but not limited to:

1. The names, addresses, and reservation status of all accommodations.

2. The names and addresses of all purchasers of timeshare interests.

3. All outstanding confirmed reservations and reservation requests.

4. Such other records and information as is necessary to permit the uninterrupted operation and administration of the timeshare plan. However, the information required to be transferred does not include private information of the terminated managing entity that is not directly related to operation and management of the timeshare plan.

(c) All reasonable costs incurred by the terminated managing entity in effecting the transfer of information required by this subsection shall be reimbursed to the terminated managing entity as a common expense of the timeshare plan within 10 days after the completed transfer of the data

described in paragraph (b). ~~This section shall not apply to personal property timeshare plans.~~

Section 6. Subsections (5) and (7) of section 721.52, Florida Statutes, are amended to read:

721.52 Definitions.—As used in this chapter, the term:

(5) "Nonspecific multisite timeshare plan" means a multisite timeshare plan ~~containing timeshare licenses or personal property timeshare interests,~~ with respect to which a purchaser receives a right to use all of the accommodations and facilities, if any, of the multisite timeshare plan through the reservation system, but no specific right to use any particular accommodations and facilities for the remaining term of the multisite timeshare plan in the event that the reservation system is terminated for any reason prior to the expiration of the term of the multisite timeshare plan.

(7) "Specific multisite timeshare plan" means a multisite timeshare plan ~~containing timeshare licenses or personal property timeshare interests,~~ with respect to which a purchaser receives a specific right to use accommodations and facilities, if any, at one component site of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan created by or acquired through the reservation system.

Section 7. Paragraph (e) of subsection (1) of section 721.53, Florida Statutes, is amended to read:

721.53 Subordination instruments; alternate security

arrangements.—

(1) With respect to each accommodation or facility of a multisite timeshare plan, the developer shall provide the division with satisfactory evidence that one of the following has occurred with respect to each interestholder prior to offering the accommodation or facility as a part of the multisite timeshare plan:

(e) The interestholder has transferred the subject accommodation or facility or all use rights therein to a trust that complies with this paragraph. <u>If the accommodation or facility included in such transfer is subject to a lease, the unexpired term of the lease must be disclosed as the term of that component site pursuant to s. 721.55(4)(a).</u> Prior to such transfer, any lien or other encumbrance against such accommodation or facility shall be made subject to a nondisturbance and notice to creditors instrument pursuant to paragraph (a) or a subordination and notice to creditors instrument pursuant to paragraph (b). No transfer pursuant to this paragraph shall become effective until the trust accepts such transfer and the responsibilities set forth herein. A trust established pursuant to this paragraph shall comply with the following provisions:

1. The trustee shall be an individual or a business entity authorized and qualified to conduct trust business in this state. Any corporation authorized to do business in this state may act as trustee in connection with a timeshare plan pursuant

to this chapter. The trustee must be independent from any developer or managing entity of the timeshare plan or any interestholder of any accommodation or facility of such plan. The same trustee may hold the accommodations and facilities, or use rights therein, for one or more of the component sites of the timeshare plan.

2. The trust shall be irrevocable so long as any purchaser has a right to occupy any portion of the timeshare property pursuant to the timeshare plan.

3. The trustee shall not convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber in any fashion any interests in or portion of the timeshare property with respect to which any purchaser has a right of use or occupancy unless the timeshare plan is terminated pursuant to the timeshare instrument, or the timeshare property held in trust is deleted from a multisite timeshare plan pursuant to s. 721.552(3), or such conveyance, hypothecation, mortgage, assignment, lease, transfer, or encumbrance is approved by vote of two-thirds of all voting interests of the timeshare plan. Subject to s. 721.552, a vote of the voting interests of the timeshare plan is not required for substitution or automatic deletion of accommodations or facilities ~~and such decision is declared by a court of competent jurisdiction to be in the best interests of the purchasers of the timeshare plan~~.

4. All purchasers of the timeshare plan or the owners' association of the timeshare plan shall be express beneficiaries

of the trust. The trustee shall act as a fiduciary to the beneficiaries of the trust. The personal liability of the trustee shall be governed by ss. 736.08125, 736.08163, 736.1013, and 736.1015. The agreement establishing the trust shall set forth the duties of the trustee. The trustee shall be required to furnish promptly to the division upon request a copy of the complete list of the names and addresses of the owners in the timeshare plan and a copy of any other books and records of the timeshare plan required to be maintained pursuant to s. 721.13 that are in the possession of the trustee. All expenses reasonably incurred by the trustee in the performance of its duties, together with any reasonable compensation of the trustee, shall be common expenses of the timeshare plan.

5. The trustee shall not resign upon less than 90 days' prior written notice to the managing entity and the division. No resignation shall become effective until a substitute trustee, approved by the division, is appointed by the managing entity and accepts the appointment.

6. The documents establishing the trust arrangement shall constitute a part of the timeshare instrument.

7. For trusts holding property in component sites located outside this state, the trust holding such property shall be deemed in compliance with the requirements of this paragraph, if such trust is authorized and qualified to conduct trust business under the laws of such jurisdiction and the agreement or law governing such trust arrangement provides substantially similar

protections for the purchaser as are required in this paragraph for trusts holding property in a component site located in this state.

8. The trustee shall have appointed a registered agent in this state for service of process. In the event such a registered agent is not appointed, service of process may be served pursuant to s. 721.265.

Section 8. Section 721.54, Florida Statutes, is repealed.

Section 9. Paragraphs (a) and (h) of subsection (4), subsection (5), and paragraph (l) of subsection (7) of section 721.55, Florida Statutes, are amended to read:

721.55 Multisite timeshare plan public offering statement.—Each filed public offering statement for a multisite timeshare plan shall contain the information required by this section and shall comply with the provisions of s. 721.07, except as otherwise provided therein. The division is authorized to provide by rule the method by which a developer must provide such information to the division. Each multisite timeshare plan filed public offering statement shall contain the following information and disclosures:

(4) A text, which shall include, where applicable, the information and disclosures set forth in paragraphs (a)-(l).

(a) A description of the multisite timeshare plan, including its term, legal structure, ~~and~~ form of ownership, and~~.~~ ~~For multisite timeshare plans in which the purchaser will receive a timeshare estate pursuant to s. 721.57 and for~~

~~specific multisite timeshare plans, the description must also include~~ the term of each component site within the multisite timeshare plan. The term of each component site that is shorter than the term of the multisite timeshare plan must be disclosed in conspicuous type.

(h) A description of the purchaser's liability for common expenses of the multisite timeshare plan, including the following:

1. A description of the common expenses of the plan, including the method of allocation and assessment of such common expenses, whether component site common expenses and real estate taxes are included within the total common expense assessment of the multisite timeshare plan, and, if not, the manner in which timely payment of component site common expenses and real estate taxes shall be accomplished.

2. A description of any cap imposed upon the level of common expenses payable by the purchaser.

a. In no event shall the total common expense assessment for the multisite timeshare plan in a given calendar year exceed 125 percent of the total common expense assessment for the plan in the previous calendar year.

b. Component site common expenses and ad valorem taxes shall not be included in calculating the total common expense assessment under sub-subparagraph a.

3. A description of the entity responsible for the determination of the common expenses of the multisite timeshare

plan, as well as any entity which may increase the level of common expenses assessed against the purchaser at the multisite timeshare plan level.

4. A description of the method used to collect common expenses, including the entity responsible for such collections, and the lien rights of any entity for nonpayment of common expenses. If the common expenses of any component site are collected by the managing entity of the multisite timeshare plan, a statement to that effect together with the identity and address of the escrow agent required by s. 721.56(3).

5. If the purchaser will receive an interest in a nonspecific multisite timeshare plan, a statement that a multisite timeshare plan budget is attached to the public offering statement as an exhibit pursuant to paragraph (7)(c). The multisite timeshare plan budget shall comply with the provisions of s. 721.07(5)(t).

6. If the developer intends to guarantee the level of assessments for the multisite timeshare plan, such guarantee must be based upon a good faith estimate of the revenues and expenses of the multisite timeshare plan. The guarantee must include a description of the following:

a. The specific time period, measured in one or more calendar or fiscal years, during which the guarantee will be in effect.

b. A statement that the developer will pay all common expenses incurred in excess of the total revenues of the

multisite timeshare plan, if the developer is to be excused from the payment of assessments during the guarantee period.

c. The level, expressed in total dollars, at which the developer guarantees the assessments. If the developer has reserved the right to extend or increase the guarantee level, a disclosure must be included to that effect.

7. If required under applicable law, the developer shall also disclose the following matters for each component site:

a. Any limitation upon annual increases in common expenses;

b. The existence of any bad debt or working capital reserve; and

c. The existence of any replacement or deferred maintenance reserve.

(5)(a) Such other information as the division determines is necessary to fairly, meaningfully, and effectively disclose all aspects of the multisite timeshare plan, including, but not limited to, any disclosures made necessary by the operation of s. 721.03(8). ~~However,~~

(b) If a developer has, in good faith, attempted to comply with ~~the requirements of~~ this chapter ~~section~~, and if, in fact, the developer has substantially complied with ~~the disclosure requirements of~~ this chapter, nonmaterial errors or omissions are not actionable, are not violations of this chapter, and do not give rise to any purchaser cancellation right ~~shall not be actionable~~.

(7) The following documents shall be included as exhibits to the filed public offering statement, if applicable:

(l)1. If the multisite timeshare plan contains any component sites located in this state, the information required by s. 721.07(5) pertaining to each such component site unless exempt pursuant to s. 721.03.

2. If the purchaser will receive ~~a timeshare estate pursuant to s. 721.57, or~~ an interest in a specific multisite timeshare plan~~, in a~~ component site located outside of this state but which is offered in this state, the information required by s. 721.07(5) pertaining to that component site, provided, however, that the provisions of s. 721.07(5)(t) shall only require disclosure of information related to the estimated budget for the timeshare plan and purchaser's expenses as required by the jurisdiction in which the component site is located.

Section 10. Paragraph (c) of subsection (2) of section 721.551, Florida Statutes, is amended to read:

721.551 Delivery of multisite timeshare plan purchaser public offering statement.—

(2) The developer shall furnish each purchaser with the following:

(c) If the purchaser will receive ~~a timeshare estate pursuant to s. 721.57, or~~ an interest in a specific multisite timeshare plan~~, in a~~ component site located in this state, the developer shall also furnish the purchaser with the information

required to be delivered pursuant to s. 721.07(6)(a) and (b) for that ~~the~~ component site ~~in which the purchaser will receive an estate or interest in a specific multisite timeshare plan~~.

Section 11. Subsection (2) and paragraph (c) of subsection (3) of section 721.552, Florida Statutes, are amended to read:

721.552 Additions, substitutions, or deletions of component site accommodations or facilities; purchaser remedies for violations.—Additions, substitutions, or deletions of component site accommodations or facilities may be made only in accordance with the following:

(2) SUBSTITUTIONS.—

(a) Substitutions are available only for nonspecific multisite timeshare plans. Specific multisite timeshare plans ~~or plans offering timeshare estates pursuant to s. 721.57~~ may not contain an accommodation substitution right.

(b) The timeshare instrument shall provide for the following:

1. The basis upon which new accommodations and facilities may be substituted for existing accommodations and facilities of the multisite timeshare plan; by whom substitutions may be made; and the basis upon which the determination may be made to cause such substitutions to occur.

2. The replacement accommodations and facilities must provide purchasers with an opportunity to enjoy a substantially similar or improved vacation experience as compared to ~~as was~~ the experience available at ~~with~~ the replaced accommodation or

facility. In determining whether the replacement accommodations and facilities will provide a substantially similar or improved vacation experience, all relevant factors must be considered, including, but not limited to, some or all of the following: size, capacity, furnishings, maintenance, location (geographic, topographic, and scenic), demand, and availability for purchaser use, and recreational capabilities.

3. The extent, if any, to which purchasers will have the right to consent to any proposed substitutions.

(c) No substitutions may be made during the first year after the developer begins to offer the multisite timeshare plan.

(d)1. If the timeshare instrument provides that the developer, acting unilaterally, is the person authorized to make substitutions, the developer may not substitute ~~No more than 25 percent of the~~ available accommodations in the multisite timeshare plan ~~at a given component site may undergo substitution~~ in a given calendar year pursuant to paragraph (e) if the amount of such substituted accommodations provides more than 10 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments ~~in which substitution is permitted~~. ~~This paragraph shall be interpreted to permit the substitution of an entire component site over a 4-year period.~~

2. If the timeshare instrument provides that the managing entity is the person authorized to make substitutions, and the

managing entity is under common ownership or control with the developer, the managing entity may not substitute available accommodations in the multisite timeshare plan in a given calendar year pursuant to paragraph (e) if the amount of such substituted accommodations provides more than 10 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments.

3. If the timeshare instrument provides that the managing entity is the person authorized to make substitutions, and the managing entity is not under common ownership or control with the developer, the managing entity may not substitute available accommodations in the multisite timeshare plan in a given calendar year pursuant to paragraph (e) if the amount of such substituted accommodations provides more than 25 percent of the total annual use availability in the multisite timeshare plan calculated in 7-day increments.

4. If the person authorized to make substitutions receives, within 21 days after the date of the notice of substitution required by paragraph (e), a written objection to the proposed substitution from at least 10 percent of all purchasers in the multisite timeshare plan, a meeting of the purchasers must be conducted by the managing entity within 30 days after the end of such 21-day period. The proposed substitution is ratified unless it is rejected by a majority of purchasers voting in person or by proxy at the meeting, provided that at least 25 percent of all purchasers cast votes. This

subparagraph does not apply if the timeshare instrument provides that purchasers do not have the right to consent to any proposed substitutions.

5. This paragraph does not apply if the proposed substitution is approved in advance pursuant to paragraph (f).

(e) The person authorized to make substitutions shall notify all purchasers of the multisite timeshare plan in writing of her or his intention to delete accommodations or facilities ~~at a given component site~~ and to substitute them with other specified accommodations or facilities pursuant to this subsection. This notice must be given at least 6 months in advance of the date that the proposed substitution will occur; must state the last day after the end of the 6-month period on which reservations will be accepted from purchasers for use of the accommodations to be deleted; and must state that purchasers shall have 21 days after the date of the notice of substitution to file a written objection with the person authorized to make substitutions~~, and the notice must inform the purchasers that they may reserve the use of the accommodations to be deleted during this 6-month period. At the end of the 6-month period,~~ The person authorized to make substitutions may delete accommodations for substitution only after such accommodations have no pending purchaser use reservations ~~to the extent that they were not reserved during the 6-month period~~.

(f) The person authorized to make substitutions may make unlimited substitutions ~~If the managing entity of a multisite~~

~~timeshare plan includes an owners' association composed of all purchasers or a corporation which owns or controls the accommodations and facilities of the plan, the board of administration of either of which is comprised of a majority of board members elected by purchasers other than the developer, and if such managing entity has the right to make substitutions pursuant to the timeshare instrument, all of the available accommodations at a given component site may undergo substitution~~ in a given year without compliance with paragraphs (d) and (e) if a proposed ~~a written plan of~~ substitution is ~~provided to each purchaser has been~~ approved in advance by a majority of purchasers of the multisite timeshare plan voting in person or by proxy at a meeting called for that purpose, provided that at least 25 percent of the total number of purchasers cast votes ~~of the board of administration and by a majority of all purchasers in the plan~~. ~~The plan of substitution must:~~

~~1. Specifically identify the component site being replaced and the proposed substitute component site.~~

~~2. Contain information regarding prior demand for purchaser use of the component site being replaced.~~

~~3. Provide the results of a survey of purchaser attitudes regarding the component site being replaced and the proposed substitute component site.~~

~~4. Explain the practical and business reasons for effecting a total substitution within the given calendar year.~~

~~5. Provide a plan for handling reservation requests during the substitution period for both the component site being replaced and the proposed substitute component site.~~

Substitutions made pursuant to this paragraph shall not be subject to the provisions of subparagraph (b)2.

(g) If the person authorized to make substitutions has fully complied with the applicable provisions of this subsection and the timeshare instrument, the trustee of a timeshare trust qualified under s. 721.53(1)(e) may convey title to any accommodations and facilities that have been designated or approved for substitution as and when directed by the person authorized to make substitutions without any further vote or other authorization of the purchasers of the multisite timeshare plan.

(h) ~~(g)~~ The person who is authorized by the timeshare instrument to make substitutions to the multisite timeshare plan pursuant to this subsection shall act as a fiduciary in such capacity in the best interests of the purchasers of the plan as a whole and shall adhere to the demand balancing standard set forth in s. 721.56(6) in connection with such substitutions. Substitutions that are otherwise permitted may be made only so long as a one-to-one use right to use night requirement ratio is maintained at all times.

(3) DELETIONS.—

(c) Automatic deletion.—The timeshare instrument may

provide that a component site will be automatically deleted upon the expiration of its term ~~in a timeshare plan other than a nonspecific multisite timeshare plan~~ or as otherwise provided in the timeshare instrument. However, the timeshare instrument must also provide that in the event a component site is deleted from the plan in this manner, a sufficient number of purchasers of the plan will also be deleted, or a sufficient number of replacement accommodations and facilities that comply with subparagraph (2)(b)2. will be substituted for the deleted accommodations and facilities, so as to maintain no greater than a one-to-one use right to use night requirement ratio.

Section 12. Subsection (5) of section 721.56, Florida Statutes, is amended to read:

721.56 Management of multisite timeshare plans; reservation systems; demand balancing.—

(5) ~~(a)1. The reservation system is a facility of any nonspecific multisite timeshare plan. The reservation system is not a facility of any specific multisite timeshare plan, nor is it a facility of any multisite timeshare plan in which timeshare estates are offered pursuant to s. 721.57.~~

~~2. The reservation system of any multisite timeshare plan shall include any computer software and hardware employed for the purpose of enabling or facilitating the operation of the reservation system.~~ Nothing contained in this part shall preclude a manager or management firm that is serving as managing entity of a multisite timeshare plan from providing in

its contract with the purchasers or owners' association of the multisite timeshare plan or in the timeshare instrument that the manager or management firm owns the reservation system and that the managing entity shall continue to own the reservation system in the event the purchasers discharge the managing entity pursuant to s. 721.14.

~~(b) In the event of a termination of a managing entity of a nonspecific multisite timeshare plan, which managing entity owns the reservation system, irrespective of whether the termination is voluntary or involuntary and irrespective of the cause of such termination, in addition to any other remedies available to purchasers in this part, the terminated managing entity shall, prior to such termination, establish a trust meeting the criteria set forth in this paragraph. It is the intent of the Legislature that this trust arrangement provide for an adequate period of continued operation of the reservation system of the multisite timeshare plan, during which period the new managing entity shall make provision for the acquisition of a substitute reservation system.~~

~~1. The trust shall be established with an independent trustee. Both the terminated managing entity and the new managing entity shall attempt to agree on an acceptable trustee. In the event they cannot agree on an acceptable trustee, they shall each designate a nominee, and the two nominees shall select the trustee.~~

~~2. The terminated managing entity shall take all steps~~

~~necessary to enable the trustee or the trustee's designee to operate the reservation system in the same manner as provided in the timeshare instrument and the public offering statement. The trustee may, but shall not be required to, contract with the terminated managing entity for the continued operation of the reservation system. In the event the trustee elects to contract with the terminated managing entity, that managing entity shall be required to operate the reservation system and shall be entitled to payment for that service. The payment shall in no event exceed the amount previously paid to the terminated managing entity for operation of the reservation system.~~

~~3. The trust shall remain in effect for a period of no longer than 1 year following the date of termination of the managing entity.~~

~~4. Nothing contained in this subsection shall abrogate or otherwise interfere with any proprietary rights in the reservation system that have been reserved by the discharged managing entity, in its management contract or otherwise, so long as such proprietary rights are not asserted in a manner that would prevent the continued operation of the reservation system as contemplated in this subsection.~~

~~(c) In the event of a termination of a managing entity of a timeshare estate or specific multisite timeshare plan, which managing entity owns the reservation system, irrespective of whether the termination is voluntary or involuntary and irrespective of the cause of such termination, in addition to~~

~~any other remedies available to purchasers in this part, the terminated managing entity shall, prior to such termination, promptly transfer to each component site managing entity all relevant data contained in the reservation system with respect to that component site, including, but not limited to:~~

~~1. The names, addresses, and reservation status of component site accommodations.~~

~~2. The names and addresses of all purchasers of timeshare interests at that component site.~~

~~3. All outstanding confirmed reservations and reservation requests for that component site.~~

~~4. Such other component site records and information as are necessary, in the reasonable discretion of the component site managing entity, to permit the uninterrupted operation and administration of the component site, provided that a given component site managing entity shall not be entitled to any information regarding other component sites or regarding the terminated multisite timeshare plan managing entity.~~

~~All reasonable costs incurred by the terminated managing entity in effecting the transfer of information required by this paragraph shall be reimbursed to the terminated managing entity on a pro rata basis by each component site, and the amount of such reimbursement shall constitute a common expense of each component site.~~

Section 13. Section 721.57, Florida Statutes, is amended

to read:

721.57 Offering of timeshare estates in specific multisite timeshare plans; required provisions in the timeshare instrument.—

(1) In addition to meeting all the requirements of part I, timeshare estates offered in a specific multisite timeshare plan must meet the requirements of subsection (2). Any offering of timeshare estates in a specific multisite timeshare plan that does not comply with these requirements shall be deemed to be an offering of a timeshare license.

(2) The timeshare instrument of a specific multisite timeshare plan in which timeshare estates are offered~~, other than a trust meeting the requirements of s. 721.08,~~ must contain or provide for all of the following matters:

(a) The purchaser will receive a timeshare estate as defined in s. 721.05 in one of the component sites of the specific multisite timeshare plan. The use rights in the other component sites of the multisite timeshare plan shall be made available to the purchaser through the reservation system pursuant to the timeshare instrument.

(b) In the event that the reservation system is terminated or otherwise becomes unavailable for any reason prior to the expiration of the term of the specific multisite timeshare plan:

1. The purchaser will be able to continue to use the accommodations and facilities of the component site in which she or he has been conveyed a timeshare estate in the manner

described in the timeshare instrument for that component site for the remaining term of the timeshare estate; and

2. Any use rights in that component site which had previously been made available through the reservation system to purchasers of the specific multisite timeshare plan who were not offered a timeshare estate at that component site will terminate when the reservation system is terminated or otherwise becomes unavailable for any reason.

Section 14. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 503 Family Law
SPONSOR(S): Civil Justice Subcommittee; Spano
TIED BILLS: None **IDEN./SIM. BILLS:** SB 462

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Robinson	Bond
2) Judiciary Committee		Robinson	Havlicak

SUMMARY ANALYSIS

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the issues, the adversarial parties are required to retain different attorneys for litigation. The process is intended to promote full and open disclosure. The concept requires extensive confidentiality and privileges to be created by statute, while the courts must develop rules of practice and procedure to conform.

The Uniform Law Commission (ULC) developed the Uniform Collaborative Law Rules/Act of 2009 (amended in 2010), which regulates the use of collaborative law. The Act has been adopted in 10 states and approved by three sections of the American Bar Association.

The bill creates the Collaborative Law Process Act based upon the Uniform Collaborative Law Rules/Act of 2009 to facilitate the settlement of dissolution of marriage and paternity actions. The bill does not actually create a collaborative law process in Florida. Rather, it provides a framework that will become effective should the Supreme Court of Florida adopt rules to enact a collaborative law process in Florida. The bill primarily serves to provide the grounds for beginning, concluding, and terminating a collaborative law process and to provide the necessary statutory privileges and confidentiality of communications required for the collaborative law process.

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

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Collaborative law is a non-adversarial alternative dispute resolution concept that, similar to mediation, promotes problem-solving and solutions in lieu of litigation. The process employs collaborative attorneys, mental health professionals, and financial specialists to help adversarial parties reach a consensus. Collaborative law is entirely voluntary, and counsel retained for the purpose of collaborative law may only be used in the collaborative law process. Should litigation ensue because the collaborative law process partially or completely failed to resolve the issues, the adversarial parties are required to retain different attorneys for litigation. The process is intended to promote full and open disclosure. The concept requires extensive confidentiality and privileges to be created by statute, while the courts must develop rules of practice and procedure to conform. [1]

The collaborative process purportedly hastens resolution of disputed issues and the total expenses of the parties are less than the parties would incur in traditional litigation. The International Academy of Collaborative Professionals (IACP) studied 933 divorce cases within the United States and Canada in which the parties agreed to the collaborative process. The IACP found that:

- Eighty percent of all collaborative cases resolved within 1 year;
- Eighty six percent of the cases studied were resolved with a formal agreement and no court appearances; and
- The average fees for all professionals totaled $24,185.[2]

Background

Collaborative Law

The collaborative law movement started in 1990, but began to significantly expand after 2000.[3] Today, collaborative law professionals are assisting disputing parties in every state of the United States, in every English-speaking country, as well as in a host of other foreign jurisdictions.[4] The International Academy of Collaborative Professionals has more than 4,000 members from 24 countries.[5]

In the United States, the Uniform Law Commission[6] established the Uniform Collaborative Law Rules/Act of 2009 (amended in 2010), which regulates the use of collaborative law. According to the UCLR/A:

> At its core Collaborative Law is a voluntary dispute-resolution process in which clients agree that, with respect to a particular matter in dispute, their named counsel will represent them solely for purposes of negotiation, and, if the matter is not settled out of court that new counsel will be retained for purposes of litigation. The parties and their

[1] See the Uniform Law Commission Collaborative Law Summary website for more information at http://www.uniformlaws.org/ActSummary.aspx?title=Collaborative Law Act (last visited March 5, 2015).
[2] Glen L. Rabenn, Marc R. Bertone, and Paul J. Toohey, *Collaborative Divorce – A Follow Up*, 55-APR Orange County Law 32, 36 (Apr. 2013), *available at* http://www.ocbar.org/AllNews/NewsView/tabid/66/ArticleId/1039/April-2013-Collaborative-Divorce-A-Follow-Up.aspx.
[3] John Lande and Forrest S. Mosten, *Family Lawyering: Past, Present, and Future*, 51 FAM. CT. REV. 20, 22 (Jan. 2013), *available at* http://www.mostenmediation.com/books/articles/Family_Lawyering_Past_Present_Future.pdf.
[4] Rabenn, *supra* note 2.
[5] *Id.*
[6] The Uniform Law Commission (ULC) develops model statutes that are designed to be consistent from state to state to create uniformity in the law between jurisdictions. Florida's commissioners to the ULC are appointed to 4-year terms by the Governor and confirmed by the Senate.

lawyers work together to find an equitable resolution of a dispute, retaining experts as necessary. The process is intended to promote full and open disclosure, and, as is the case in mediation, information disclosed in a collaborative process is privileged against use in any subsequent litigation.

Collaborative Law is currently being practiced in all American jurisdictions as well as in a number of foreign countries. In the U.S., Collaborative Law is governed by a patchwork of state laws, state Supreme Court rules, local rules, and ethic opinions. The Uniform Collaborative Law Rules/Act ("UCLR/A") is intended to create a uniform national framework for the use of Collaborative Law—one which includes important consumer protections and enforceable privilege provisions. Collaborative Law under the UCLR/A is strictly voluntary. Attorneys are not required to offer collaborative services, and parties cannot be compelled to participate.[7]

An essential component of the Uniform Collaborative Law Rules/Act (UCLR/A) is the mandatory disqualification of the collaborative attorneys if the parties fail to reach an agreement or intend to engage in contested litigation. Once both collaborative lawyers are disqualified from further representation, the parties must start again with new counsel. "The disqualification provision thus creates incentives for parties and Collaborative lawyers to settle."[8]

Ten states[9] plus Washington, D.C., have enacted the Uniform Collaborative Law Rules/Act, and a bill is pending this year in the Montana Legislature. Three sections of the American Bar Association have also approved the UCLR/A—the Section of Dispute Resolution, the Section of Individual Rights & Responsibilities, and the Family Law Section.[10]

At least 30,000 attorneys and family professionals In the United States have been trained in the collaborative process.[11]

Collaborative Law in Florida

Florida currently recognizes forms of alternative dispute resolution and is considered a leader among states in that regard.[12] Florida public policy favors arbitration[13] and "mediation and settlement of family law disputes is highly favored in Florida law."[14]

In the 1990s, the court system began to move towards establishing family law divisions and support services to accommodate families in conflict. In 2001, the Florida Supreme Court adopted the Model Family Court Initiative. This action by the Court combined all family cases, including dependency, adoption, paternity, dissolution of marriage, and child custody into the jurisdiction of a specially designated family court. The Court noted the need for these cases to have a "system that provide[s]

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[7] Uniform Law Commission, *Uniform Collaborative Law Rules/Act Short Summary*. http://www.uniformlaws.org/Shared/Docs/Collaborative_Law/UCLA%20Short%20Summary.pdf (last viewed March 5, 2015).

[8] Lande, *infra* note 6 at 429; Members of the ABA who objected to the UCLR/A have stated that the disqualification provision unfairly enables one party to disqualify the other party's attorney simply by terminating the collaborative process or initiating litigation. *See* Andrew J. Meyer, *The Uniform Collaborative Law Act: Statutory Framework and the Struggle for Approval by the American Bar Association*, 4 Y.B. ON ARB. & MEDIATION 212, 216 (2012).

[9] Alabama, Hawaii, Maryland, Michigan, Nevada, New Jersey, Ohio, Texas, Utah, and Washington.

[10] New Jersey Law Revision Commission, *Final Report Relating to New Jersey Family Collaborative Law Act*, 5 (Jul. 23, 2013), http://www.lawrev.state.nj.us/ucla/njfclaFR0723131500.pdf.

[11] John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 430 (2012), *available at* http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1254&context=facpubs.

[12] Fran L. Tetunic, *Demystifying Florida Mediator Ethics: the Good, the Bad, and the Unseemly*, 32 NOVA L. REV. 205, 244 (Fall 2007).

[13] *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456 (Fla. 2011).

[14] *Griffith v. Griffith*, 860 So. 2d 1069, 1073 (Fla. 1st DCA 2003).

nonadversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; ... and a system that facilitate[s] the process chosen by the parties."[15] The court also noted the need to fully staff a mediation program, anticipating that mediation can resolve a high percentage of disputes.[16]

In 2012, the Florida Family Law Rules committee proposed to the Florida Supreme Court a new rule 12.745, to be known as the Collaborative Process Rule.[17] In declining to adopt the rule, the court explained:

> Given the possibility of legislative action addressing the use of the collaborative law process and the fact that certain foundations, such as training or certification of attorneys for participation in the process, have not yet been laid, we conclude that the adoption of a court rule on the subject at this time would be premature.[18]

Although the Florida Supreme Court has not adopted rules on collaborative law, at least four judicial circuits in Florida have adopted local court rules on collaborative law. These are the 9th, 11th, 13th, and 18th judicial circuits. Each of these circuits that have adopted local court rules on collaborative law include the requirement that an attorney disqualify himself or herself if the collaborative process is unsuccessful. Other circuits have recognized the collaborative process in the absence of issuing a formal administrative order.

Effect of the Proposed Changes

The bill creates Part III of ch. 61, F.S., the Collaborative Law Process Act (Act), as a basic framework for the collaborative law process, for use in dissolution of marriage and paternity actions. The bill does not actually create a collaborative law process in Florida. Rather, it provides a framework that will become effective 30 days after the Supreme Court of Florida adopts rules of procedure and professional responsibility consistent with the collaborative law process.

The Legislature may not create rules or procedures relating to litigation, as this would violate the separation of powers and the Court's exclusive right to "adopt rules for the practice and procedure in all courts . . ."[19] However, should the Court decide to promulgate rules consistent with this bill and the uniform act, this bill provides substantive privileges and confidentiality for parties and nonparties involved in a collaborative law process. See the Constitutional Issues section below for a more detailed discussion.

Applicability of the Collaborative Law Process Act

The authority for the collaborative process provided in the bill is limited to issues governed by ch. 61, F.S. (Dissolution of Marriage; Support; Time-sharing) and ch. 742, F.S. (Determination of Parentage). More specifically, the following issues are subject to resolution through the collaborative law process:

- Marriage, divorce, dissolution, annulment, and marital property distribution;
- Child custody, visitation, parenting plan, and parenting time;
- Alimony, maintenance, child support;
- Parental relocation with a child;
- Premarital, marital, and postmarital agreements; and
- Paternity.

[15] *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 523 (Fla. 2001).
[16] *Id.* at 520.
[17] *In Re: Amendments to the Florida Family Law Rules of Procedure*, 84 So. 3d 257 (Fla. 2012).
[18] *Id.*
[19] Art. V, s. 2, FLA. CONST.

Definitions

The bill creates s. 61.56, F.S. to provide definitions applicable to the Act.

Beginning, Concluding, and Terminating a Collaborative Law Process

The bill creates s. 61.57, F.S., to provide conditions upon which a collaborative law process begins, concludes, and terminates. The bill provides that a tribunal may not order a party to participate in a collaborative law process over that party's objection and a party may terminate the collaborative law process with or without cause. The process begins when the parties enter into a collaborative participation agreement. If a legal proceeding is pending, the proceeding is put on hold while the collaborative law process is ongoing.

A collaborative law process is concluded in one of four ways. First, the parties may provide for a method by agreement. Second, the parties may sign a record providing a resolution of the matter. Third, the parties may sign a record indicating resolution of certain matters while leaving other matters unresolved. Fourth, the process is concluded by a termination of the process, evidenced when a party:

- Gives notice to other parties that the process is ended;
- Begins a legal proceeding related to a collaborative law matter without the agreement of all the parties;
- Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to the matter;
- Requests that the proceeding be put on the tribunal's active calendar in a pending proceeding related to the matter or takes a similar action requiring notice to be sent to the parties; or
- Discharges a collaborative lawyer or a collaborative lawyer withdraws.

A party's collaborative lawyer must give prompt notice to all other parties in a record of a discharge or withdrawal.

A collaborative law process may survive the discharge or withdrawal of a collaborative lawyer under the following conditions:

- The unrepresented party engages a successor collaborative lawyer;
- The parties consent in a signed record to continue the process;
- The agreement is amended to identify the successor collaborative lawyer; and
- The successor collaborative lawyer confirms representation in a signed record.

Confidentiality of Collaborative Law Communication

The bill creates s. 61.58, F.S., to provide that a collaborative law communication is confidential to the extent agreed upon by the parties in a signed record or as otherwise provided by law, with limitations as discussed below.

Privilege Against Disclosure for Collaborative Law Communications

The bill creates s. 61.58(1), F.S., to provide a privilege against disclosure for collaborative law communications, within limits provided in the bill. A collaborative law communication is not subject to discovery or admissible in evidence in a proceeding before a tribunal. Each party (including a party's attorney during the collaborative law process) has a privilege to refuse to disclose a collaborative law communication, and to prevent any other person from disclosing a communication. A nonparty to the collaborative law process (which is anybody other than the party or the party's attorney, in this context) may also refuse to disclose any communication or may prevent any other person from disclosing the nonparty's communication. Therefore, a party has an absolute privilege as to all communications, while the nonparty has a privilege for his or her own communications. However, evidence that would

otherwise be admissible does not become inadmissible or protected from discovery solely because it may have been a communication during a collaborative law process. The privilege does not apply if the parties agree in advance in a signed record or if all parties agree in a proceeding that all or part of a collaborative law process is not privileged, as long as the parties had actual notice before the communication was made.

Waiver and Preclusion of Privilege

The bill creates s. 61.58(2), F.S., to provide that a privilege may be expressly waived either orally or in writing during a proceeding if all the parties agree. If a nonparty has a privilege, the nonparty must also agree to waive the privilege. However, if a person makes a disclosure or representation about a collaborative law communication that prejudices another person during a proceeding before a tribunal, that person may not assert a privilege to the extent that it is necessary for the prejudiced person to respond.

Limits of Privilege

The bill creates s. 61.58(3), F.S., to provide that a privilege does not apply to a collaborative law communication that is:

- Available to the public under Florida's Public Records statutes in ch. 119, F.S.;
- Made during a collaborative law session that is open to the public or required by law to be open to the public;
- A threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- Intentionally used to plan or commit a crime, or conceal an ongoing crime or ongoing criminal activity; or
- In an agreement resulting from the collaborative process if there is a record memorializing the agreement, signed by all of the parties.

A privilege does not apply to the extent that the communication is sought or offered to prove or disprove:

- A claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or
- Abuse, neglect, abandonment, or exploitation of a child or adult, unless the Florida Department of Children and Families is a party or otherwise participates in the collaborative law process.

Only the portion of the communication needed for proof or disproof may be disclosed or admitted.

There are other limited circumstances where a privilege does not apply that requires the approval of the court. A party seeking discovery or a proponent of certain evidence may show that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the communication is either in a court proceeding involving a felony or a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or where a defense is asserted to avoid liability on the contract. Only the portion of the communication needed for evidence may be disclosed or admitted.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 directs the Division of Law Revision and Information to create part III of ch. 61, Florida Statutes, entitled the "Collaborative Law Process Act."

Section 3 creates s. 61.55, F.S., relating to the purpose of the Act.

Section 4 creates s. 61.56, F.S., relating to definitions.

Section 5 creates s. 61.57, F.S., relating to beginning, concluding, and terminating a collaborative law process.

Section 6 creates s. 61.58, F.S., relating to confidentiality of a collaborative law communication.

Section 7 directs that the Act is not effective until 30 days after the adoption of rules of procedure and professional responsibility by the Supreme Court.

Section 8 contains an effective date of July 1, 2015, except as otherwise expressly provided in the Act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The Office of the State Courts Administrator indicates that the bill could decrease judicial workload due to fewer filings, fewer hearings, and fewer contested issues in each case in which the collaborative law process is used. The precise decrease in workload is unknown, however, because it would depend on how many cases are resolved using the collaborative process. In addition, if the collaborative law process in a given case ultimately ends without agreement, the parties may avail themselves of the traditional adversarial system, thereby resulting in no decrease in judicial workload for that case. Some judicial workload might result from in camera hearings regarding whether certain collaborative communications are privileged pursuant to s. 61.58(3)(c), F.S.; however, the extent of this judicial labor is difficult to measure at this time. [20]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

[20] Office of the State Courts Administrator, Analysis of SB 462 (2015) (on file with the Civil Justice Subcommittee, Florida House of Representatives).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Article V, s. 2 of the Florida Constitution provides the Supreme Court with rulemaking authority for practice and procedure in all courts. This bill appears to present the Court with the opportunity to make rules to carry out the purpose of the bill. The bill does not direct the Court to make rules. The privileges and confidentiality portions of the bill appear to be substantive as they create rights that do not currently exist in the law.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 11, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provided a short title naming the bill the "Collaborative Law Process Act" and removed duplicative language regarding the purpose of the bill. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

A bill to be entitled

An act relating to family law; providing a short title; providing a directive to the Division of Law Revision and Information; creating s. 61.55, F.S.; providing a purpose; creating s. 61.56, F.S.; defining terms; creating s. 61.57, F.S.; providing that a collaborative law process commences when the parties enter into a collaborative law participation agreement; prohibiting a tribunal from ordering a party to participate in a collaborative law process over the party's objection; providing the conditions under which a collaborative law process concludes, terminates, or continues; creating s. 61.58, F.S.; providing for confidentiality of communications made during the collaborative law process; providing exceptions; providing that specified provisions do not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility; providing a contingent effective date; providing effective dates.

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

Section 1. This act may be cited as the "Collaborative Law Process Act."

Section 2. The Division of Law Revision and Information is

directed to create part III of chapter 61, Florida Statutes, consisting of ss. 61.55-61.58, to be entitled the "Collaborative Law Process Act."

Section 3. Section 61.55, Florida Statutes, is created to read:

61.55 Purpose.—The purpose of this part is to create a uniform system of practice for the collaborative law process in this state. It is the policy of this state to encourage the peaceful resolution of disputes and the early resolution of pending litigation through a voluntary settlement process. The collaborative law process is a unique nonadversarial process that preserves a working relationship between the parties and reduces the emotional and financial toll of litigation.

Section 4. Section 61.56, Florida Statutes, is created to read:

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

(1) "Collaborative attorney" means an attorney who represents a party in a collaborative law process.

(2) "Collaborative law communication" means an oral or written statement, including a statement made in a record, or nonverbal conduct that:

(a) Is made in the conduct of or in the course of participating in, continuing, or reconvening for a collaborative law process; and

(b) Occurs after the parties sign a collaborative law participation agreement and before the collaborative law process

is concluded or terminated.

(3) "Collaborative law participation agreement" means an agreement between persons to participate in a collaborative law process.

(4) "Collaborative law process" means a process intended to resolve a collaborative matter without intervention by a tribunal and in which persons sign a collaborative law participation agreement and are represented by collaborative attorneys.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding which is described in a collaborative law participation agreement and arises under this chapter or chapter 742, including, but not limited to:

(a) Marriage, divorce, dissolution, annulment, and marital property distribution.

(b) Child custody, visitation, parenting plans, and parenting time.

(c) Alimony, maintenance, and child support.

(d) Parental relocation with a child.

(e) Parentage and paternity.

(f) Premarital, marital, and postmarital agreements.

(6) "Law firm" means:

(a) One or more attorneys who practice law in a partnership, professional corporation, sole proprietorship, limited liability company, or association; or

(b) One or more attorneys employed in a legal services organization, the legal department of a corporation or other organization, or the legal department of a governmental entity, subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative attorney, who participates in a collaborative law process.

(8) "Party" means a person who signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual; a corporation; a business trust; an estate; a trust; a partnership; a limited liability company; an association; a joint venture; a public corporation; a government or governmental subdivision, agency, or instrumentality; or any other legal or commercial entity.

(10) "Proceeding" means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and posthearing motions, conferences, and discovery.

(11) "Prospective party" means a person who discusses with a prospective collaborative attorney the possibility of signing a collaborative law participation agreement.

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

(13) "Related to a collaborative matter" means involving

the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record, to:

(a) Execute or adopt a tangible symbol; or

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

(15) "Tribunal" means a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

Section 5. Section 61.57, Florida Statutes, is created to read:

61.57 Beginning, concluding, and terminating a collaborative law process.—

(1) The collaborative law process commences, regardless of whether a legal proceeding is pending, when the parties enter into a collaborative law participation agreement.

(2) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(3) A collaborative law process is concluded by any of the following:

(a) Resolution of a collaborative matter as evidenced by a signed record;

(b) Resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the collaborative matter will not be resolved in the collaborative law process; or

(c) Termination of the collaborative law process.

(4) A collaborative law process terminates when a party:

(a) Gives notice to the other parties in a record that the collaborative law process is concluded;

(b) Begins a proceeding related to a collaborative matter without the consent of all parties;

(c) Initiates a pleading, motion, order to show cause, or request for a conference with a tribunal in a pending proceeding related to a collaborative matter;

(d) Requests that the proceeding be put on the tribunal's active calendar in a pending proceeding related to a collaborative matter;

(e) Takes similar action requiring notice to be sent to the parties in a pending proceeding related to a collaborative matter; or

(f) Discharges a collaborative attorney or a collaborative attorney withdraws from further representation of a party, except as otherwise provided in subsection (7).

(5) A party's collaborative attorney shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(6) A party may terminate a collaborative law process with

or without cause.

(7) Notwithstanding the discharge or withdrawal of a collaborative attorney, the collaborative law process continues if, not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative attorney required by subsection (5) is sent to the parties:

(a) The unrepresented party engages a successor collaborative attorney;

(b) The parties consent to continue the collaborative law process by reaffirming the collaborative law participation agreement in a signed record;

(c) The collaborative law participation agreement is amended to identify the successor collaborative attorney in a signed record; and

(d) The successor collaborative attorney confirms his or her representation of a party in the collaborative law participation agreement in a signed record.

(8) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of a collaborative matter or any part thereof as evidenced by a signed record.

(9) A collaborative law participation agreement may provide additional methods for concluding a collaborative law process.

Section 6. Section 61.58, Florida Statutes, is created to read:

61.58 Confidentiality of a collaborative law communication.—Except as provided in this section, a collaborative law communication is confidential to the extent agreed by the parties in a signed record or as otherwise provided by law.

(1) PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.—

(a) Subject to subsections (2) and (3), a collaborative law communication is privileged as provided under paragraph (b), is not subject to discovery, and is not admissible into evidence.

(b) In a proceeding, the following privileges apply:

1. A party may refuse to disclose, and may prevent another person from disclosing, a collaborative law communication.

2. A nonparty participant may refuse to disclose, and may prevent another person from disclosing, a collaborative law communication of a nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

(2) WAIVER AND PRECLUSION OF PRIVILEGE.—

(a) A privilege under subsection (1) may be waived orally or in a record during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, if it is expressly waived by the nonparty

participant.

(b) A person who makes a disclosure or representation about a collaborative law communication that prejudices another person in a proceeding may not assert a privilege under subsection (1). This preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

(3) LIMITS OF PRIVILEGE.—

(a) A privilege under subsection (1) does not apply to a collaborative law communication that is:

1. Available to the public under chapter 119 or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

2. A threat, or statement of a plan, to inflict bodily injury or commit a crime of violence;

3. Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

4. In an agreement resulting from the collaborative law process, as evidenced by a record signed by all parties to the agreement.

(b) A privilege under subsection (1) for a collaborative law communication does not apply to the extent that such collaborative law communication is:

1. Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from

or related to a collaborative law process; or

2. Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult unless the Department of Children and Families is a party to or otherwise participates in the process.

(c) A privilege under subsection (1) does not apply if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

1. A court proceeding involving a felony; or

2. A proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense is asserted to avoid liability on the contract.

(d) If a collaborative law communication is subject to an exception under paragraph (b) or paragraph (c), only the part of the collaborative law communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under paragraph (b) or paragraph (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) A privilege under subsection (1) does not apply if the parties agree in advance in a signed record, or if a record of a

proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This paragraph does not apply to a collaborative law communication made by a person who did not receive actual notice of the collaborative law participation agreement before the communication was made.

Section 7. Sections 61.55-61.58, Florida Statutes, as created by this act, shall not take effect until 30 days after the Florida Supreme Court adopts rules of procedure and professional responsibility consistent with this act.

Section 8. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 633 Informed Patient Consent
SPONSOR(S): Sullivan
TIED BILLS: **IDEN./SIM. BILLS:** SB 724

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	9 Y, 4 N	McElroy	O'Callaghan
2) Judiciary Committee		Weber	Havlicak
3) Health & Human Services Committee			

SUMMARY ANALYSIS

Section 390.0111, F.S., currently requires a physician performing an abortion, or a referring physician, to obtain the woman's written and informed consent before performing the procedure. To obtain informed consent, the physician, or referring physician, must orally and in person, inform the woman of the nature and risks of undergoing or not undergoing the proposed procedure and the probable gestational age of the fetus.

HB 633 requires the physician performing the abortion, or the referring physician, to be present in the same room as the woman when providing information to obtain informed consent. The bill also requires this information to be provided to the woman at least 24 hours before the procedure is performed.

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

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Case Law on Abortion

Right to Abortion

In 1973, the foundation of modern abortion jurisprudence, *Roe v. Wade*[1], was decided by the U.S. Supreme Court. Using strict scrutiny, the Court determined that a woman's right to an abortion is part of a fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, the Court reasoned that state regulation limiting the exercise of this right must be justified by a compelling state interest and must be narrowly drawn.[2] In 1992, the fundamental holding of *Roe* was upheld by the U.S. Supreme Court in *Planned Parenthood v. Casey*.[3]

The Viability Standard

In *Roe v. Wade*, the U.S. Supreme Court established a rigid trimester framework dictating when, if ever, states can regulate abortion.[4] The Court held that states could not regulate abortions during the first trimester of pregnancy.[5] With respect to the second trimester, the Court held that states could only enact regulations aimed at protecting the mother's health, not the fetus's life. Therefore, no ban on abortions is permitted during the second trimester. The state's interest in the life of the fetus becomes sufficiently compelling only at the beginning of the third trimester, allowing it to prohibit abortions. Even then, the Court requires states to permit an abortion in circumstances necessary to preserve the health or life of the mother.[6]

The current viability standard is set forth in *Planned Parenthood v. Casey*.[7] Recognizing that medical advancements in neonatal care can advance viability to a point somewhat earlier than the third trimester, the U.S. Supreme Court rejected the trimester framework and, instead, limited the states' ability to regulate abortion pre-viability. Thus, while upholding the underlying holding in *Roe*, which authorizes states to "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother[,]"[8] the Court determined that the line for this authority should be drawn at "viability," because "there may be some medical developments that affect the precise point of viability . . . but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter."[9] Furthermore, the Court recognized that "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[10]

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Id.*
[3] *Casey*, 505 U.S. 833 (1992).
[4] *Roe*, 410 U.S. 113 (1973).
[5] *Id.* at 163-64.
[6] *Id.* at 164-165.
[7] *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).
[8] *See Roe*, 410 U.S. at 164-65.
[9] *See Casey*, 505 U.S. at 870.
[10] *Id.*

Undue Burden

In *Planned Parenthood v. Casey*, the U.S. Supreme Court established the undue burden standard for determining whether a law places an impermissible obstacle to a woman's right to an abortion. The Court held that health regulations which impose undue burdens on the right to abortion are invalid.[11] State regulation imposes an "undue burden" on a woman's decision to have an abortion if it has the purpose or effect of placing a substantial obstacle in the path of the woman who seeks the abortion of a nonviable fetus.[12] However, not every law, which makes the right to an abortion more difficult to exercise, is an infringement of that right.[13]

Informed Consent

A state may require informed consent prior to an abortion unless it creates an undue burden. The Court in *Casey* held that a state, in order to promote its profound interest in potential life throughout pregnancy, may enact measures to ensure that the woman's choice to have an abortion is informed.[14] However, these measures will only be valid as long as the state's purpose is to persuade the woman to choose childbirth over abortion and does not create an undue burden on her right to an abortion.[15]

The informed consent requirement at issue in *Casey* required a 24-hour period[16] between the provision of the information deemed necessary for informed consent and the abortion. The Court held that facially the waiting period was a reasonable measure to implement a state's interest in protecting the life of the unborn and does not amount to an undue burden.[17] Whether the waiting period created an undue burden in application was a question of fact. The Court, relying on the district court's findings, acknowledged that the 24-hour requirement would:[18]

- Require a woman seeking an abortion to make at least two visits[19] to the doctor. For a woman traveling long distances this could often result in a delay of greater than 24 hours;
- Increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic;"
- Be "particularly burdensome" for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others; and
- Limit a physician's discretion.

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[11] *Id.* at 878.
[12] *Id.* at 877.
[13] *Id.* at 873.
[14] *Id.* at 878.
[15] *Id.*
[16] Currently 25 states have waiting periods of 24 hours or greater. The states are: Alabama (Ala. C. §§ 26-23A-4); Arizona (Ariz. Rev. Stat. § 36-2153); Arkansas (Ark. C. § 20-16-903); Georgia (Ga. C. § 31-9A-3); Idaho (Id. C. §§ 18-604, 609); Kansas (Kan. Stat. § 65-6709); Kentucky (Ken. Rev. Stat. § 311.725); Louisiana (Louis. Rev. Stat. § 1299.35.6); Michigan (Mich. Compiled L. § 333.17015); Minnesota (Minn. Stat. § 145.4242); Mississippi (Miss. C. § 41-41-33); Missouri (§§ 188.027, 188.039); Nebraska (Neb. Rev. Stat. § 28-327); North Carolina (N. Car. Gen. Stat. § 90-21.82); North Dakota (N. Dak. C. §§ 14-02.1-02, 1-03); Ohio (Ohio Rev. C. § 2317.56); Oklahoma (Okl. Stat. 63 § 1-738.2); Pennsylvania (Penn. Stat. 18 § 3205); South Carolina (Cod. L. S. Car. § 44-41-330); South Dakota (S. Dak. Cod. L. § 34-23A-10.1); Texas (Tex. Health & Safety C. § 171.012); Utah (Utah Code Ann. 76-7-305); Virginia (Va. C. § 18.2-76); West Virginia (W. Va. C. § 16-2I-2); and, Wisconsin (Wis. Stat. § 253.10). However, 4 states have enjoined laws requiring a waiting period before performance or inducement of an abortion –Delaware (*Planned Parenthood of Del. v. Brady* (D. Del. 2003)); Massachusetts (*Planned Parenthood League of Mass. v. Bellotti* (1st Cir. 1981)); Montana; and Tennessee (*Planned Parenthood of Middle Tenn. v. Sundquist* (Tenn. 2000).
[17] *See Casey*, 505 U.S. at 885.
[18] *Id.* at 885-86.
[19] 11 states currently have waiting period requirements that necessitate two visits to the clinic. Arizona (Ariz. Rev. Stat. § 36-2153); Indiana (Ind. C. § 16-34-2-1.1); Louisiana (Louis. Rev. Stat. § 1299.35.6); Mississippi (Miss. C. § 41-41-33); Missouri (§§ 188.027, 188.039); Ohio (Ohio Rev. C. § 2317.56); South Dakota (§ 34-23A-10.1); Texas (Tex. Health & Safety C. § 171.012); Utah (Utah Code Ann. 76-7-305); Virginia (Va. C. § 18.2-76); and, Wisconsin (Wis. Stat. § 253.10).

The Court found that, although the waiting period has the effect of creating a particular burden by "increasing the cost and risk of delay of abortions," it does not constitute an undue burden.[20] The Court thus held that a 24-hour waiting period was permissible as it did not create an undue burden facially or in application based upon the record before it.[21]

The Medical Emergency Exception

In *Doe v. Bolton*, the U.S. Supreme Court was faced with determining, among other things, whether a Georgia statute criminalizing abortions (pre- and post-viability), except when determined to be necessary based upon a physician's "best clinical judgment," was unconstitutionally void for vagueness for inadequately warning a physician under what circumstances an abortion could be performed.[22] In its reasoning, the Court agreed with the district court decision that the exception was not unconstitutionally vague, by recognizing that:

> [T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.[23]

This broad interpretation of what constitutes a medical emergency was later tested in *Casey*[24], albeit in a different context. One question before the Supreme Court in *Casey* was whether the medical emergency exception to a 24-hour waiting period for an abortion was too narrow in that there were some potentially significant health risks that would not be considered "immediate."[25] The exception in question provided that a medical emergency is:

> [T]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.[26]

In evaluating the more objective standard under which a physician is to determine the existence of a medical emergency, the Court in *Casey* determined that the exception would not significantly threaten the life and health of a woman and imposed no undue burden on the woman's right to have an abortion.[27]

Florida Law on Abortion

Right to Abortion

Florida affords greater privacy rights to its citizens than those provided under the U.S. Constitution. While the federal Constitution traditionally shields enumerated and implied individual liberties from state or federal intrusion, the federal Court has long held that the state

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[20] *Casey*, 505 U.S. at 886-87.
[21] *Id.*
[22] *Doe*, 410 U.S. at 179 (1973). Other exceptions, such as in cases of rape and when, "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect." *Id.* at 183. *See also, U.S. v. Vuitich*, 402 U.S. 62, 71-72 (1971) (determining that a medical emergency exception to a criminal statute banning abortions would include consideration of the mental health of the pregnant woman).
[23] *Doe*, 410 U.S. at 192.
[24] *Casey*, 505. U.S. 833 (1992).
[25] *Id.* at 880.
[26] *Id.* at 879 (quoting 18 Pa. Cons. Stat. § 3203 (1990)).
[27] *Id.* at 880.

constitutions may provide even greater protections.[28] In 1980, Florida amended its Constitution to include Article I, s. 23 which creates an express right to privacy:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law. [29]

This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy and provides greater privacy rights then those implied by the federal Constitution.[30]

The Florida Supreme Court has recognized Florida's constitutional right to privacy "is clearly implicated in a woman's decision whether or not to continue her pregnancy."[31] In *In re T.W.,* the Florida Supreme Court ruled that:

> [P]rior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the state. Following this point, the state may impose significant restrictions only in the least intrusive manner designed to safeguard the health of the mother. Insignificant burdens during either period must substantially further important state interests . . . Under our Florida Constitution, the state's interest becomes compelling upon viability . . . Viability under Florida law occurs at that point in time when the fetus becomes capable of meaningful life outside the womb through standard medical measures. [32]

The court recognized that after viability, the state can regulate abortion in the interest of the unborn child if the mother's health is not in jeopardy.[33]

Abortion Regulation

In Florida, abortion is defined as the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[34] An abortion must be performed by a physician[35] licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[36]

Florida law prohibits abortions after viability, as well as during the third trimester, unless a medical exception exists. Section 390.01112(1), F.S., prohibits an abortion from being performed if a physician determines that, in reasonable medical judgment, the fetus has achieved viability. Viability is defined as the stage of fetal development when the life of a fetus is sustainable outside the womb through standard medical measures.[37] Section 390.0111, F.S., prohibits an abortion from being performed during the third trimester.[38] Exceptions to both of these prohibitions exist if:

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[28] *In re T.W.*, 551 So.2d 1186, 1191 (Fla. 1989).
[29] *Id.*
[30] *Id.* at 1191-92.
[31] *Id.* at 1192.
[32] *Id.* at 1193-94.
[33] *Id.* at 1194.
[34] Section 390.011(1), F.S.
[35] Section 390.0111(2), F.S.
[36] Section 390.011(8), F.S.
[37] Section 390.011(12), F.S.
[38] Section 390.011(11), F.S., defines the third trimester to mean the weeks of pregnancy after the 24th week of pregnancy.

- Two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition; or
- One physician certifies in writing that, in reasonable medical judgment, there is a medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the pregnant woman's life or avert a serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition, and another physician is not available for consultation.[39]

A physician must obtain an informed and voluntary consent for an abortion from a woman before an abortion is performed, unless an emergency exists. Consent is considered voluntary and informed if the physician who is to perform the procedure, or the referring physician, orally and in person, informs the woman of the nature and risks of undergoing or not undergoing the proposed procedure and the probable gestational age of the fetus at the time the termination of pregnancy is to be performed.[40] The probable gestational age must be verified by an ultrasound.[41] The woman must be offered the opportunity to view the images and hear an explanation of them.[42] If the woman refuses this right, she must acknowledge the refusal in writing.[43] The woman must acknowledge, in writing and prior to the abortion, that she has been provided with all information consistent with these requirements.[44]

Anyone who violates laws applicable to an abortion during viability or in the third trimester commits a third degree felony.[45] Additionally, any health care practitioner who fails to comply with such laws is subject to disciplinary action under the applicable practice act and under s. 456.072, F.S.[46]

The Agency for Health Care Administration (AHCA) licenses and regulates abortion clinics in the state, pursuant to ch. 390, F.S., and part II of ch. 408, F.S.[47] All abortion clinics and physicians performing abortions are subject to the following requirements:

- An abortion may only be performed in a validly licensed hospital, abortion clinic, or in a physician's office;[48]
- An abortion clinic must be operated by a person or public body with a valid and current license;[49]
- An abortion performed during viability or in the third trimester may only be performed in a hospital;[50]
- If a termination of pregnancy is performed in the third trimester, the physician performing the termination of pregnancy must exercise the same degree of professional skill, care, and diligence to preserve the life and health of the fetus which the physician would be required to exercise in order to preserve the life and health of a fetus intended to be born

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[39] Sections 390.0111(1)(a) and (b) and 390.01112(1)(a) and (b), F.S.
[40] Section 390.0111(3)(a), F.S. This requirement applies except in the case of a medical emergency.
[41] Section 390.0111(3)(a)1.b.II, F.S.
[42] Section 390.0111(3)(a)1.b.III, F.S.
[43] Section 390.0111(3)(a)(3), F.S.
[44] *Id.*
[45] Section 390.0111(10)(a), F.S.
[46] Section 390.0111(13), F.S. The Department of Health and its professional boards regulate health care practitioners under ch. 456, F.S., and various individual practice acts. The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.
[47] Section 408.802(3) provides for the applicability of the Health Care Licensing Procedures Act to abortion clinics.
[48] Section 797.03 (1), F.S.; this section provides an exception for an emergency care situation.
[49] Section 797.03 (2), F.S.
[50] Section 797.03(3), F.S. Per s. 797.03(4), F.S., the violation of any of these provisions results in a second degree misdemeanor.

and not aborted, unless doing so conflicts with preserving the life and health of the pregnant woman;[51]
- Experimentation on a live fetus is prohibited prior to or subsequent to any termination of pregnancy procedure;[52]
- Except when there is a medical emergency, an abortion may only be performed after a patient has given voluntary and written informed consent;[53]
- Consent includes verification of the probable gestational age via ultrasound imaging;[54]
- Fetal remains are to be disposed of in a sanitary and appropriate manner;[55] and
- Actual notice[56] must be given 48 hours before performing an abortion on a minor or constructive notice[57] must be given at least 72 hours before performing an abortion on a minor, unless waived by a parent or otherwise ordered by a judge. [58]

In addition, pursuant to s. 390.012, F.S., AHCA must prescribe standards for clinics that perform or claim to perform abortions after the first trimester that include:

- Adequate private space for interviewing, counseling, and medical evaluations;
- Dressing rooms for staff and patients;
- Appropriate lavatory areas;
- Areas for preprocedure hand washing;
- Private procedure rooms;
- Adequate lighting and ventilation for procedures;
- Surgical or gynecological examination tables and other fixed equipment;
- Postprocedure recovery rooms that are equipped to meet the patients' needs;
- Emergency exits to accommodate a stretcher or gurney;
- Areas for cleaning and sterilizing instruments;
- Adequate areas for the secure storage of medical records and necessary equipment and supplies; and
- Conspicuous display of the clinic's current license issued by AHCA.[59]

AHCA has the authority to impose a fine against clinics that are in violation of ch. 390, part II of ch. 408, or agency rules.[60]

Florida Abortion Statistics

In 2014, DOH reported that there were 220,138 live births in the state of Florida.[61] In the same year, AHCA reported that there were 72,073 abortion procedures[62] performed in the state.[63] Of those performed:

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[51] Section 390.0111(4), F.S.
[52] Section 390.0111(6), F.S.
[53] Section 390.0111(3), F.S. A physician violating this provision is subject to disciplinary action.
[54] Section 390.0111(3)(a)1.b., F.S.
[55] Section 390.0111(7), F.S. A person who improperly disposes of fetal remains commits a second degree misdemeanor.
[56] Section 390.01114(2)(a), F.S., defines "actual notice as" notice that is given directly, in person or by telephone, to a parent or legal guardian of a minor, by a physician, at least 48 hours before the inducement or performance of a termination of pregnancy, and documented in the minor's files.
[57] Section 390.01114(2)(c), F.S., defines "constructive notice" as notice that is given in writing, signed by the physician, and mailed at least 72 hours before the inducement or performance of the termination of pregnancy, to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested, and delivery restricted to the parent or legal guardian. After the 72 hours have passed, delivery is deemed to have occurred.
[58] Section 390.01114(3), F.S. A physician who violates this provision is subject to disciplinary action.
[59] Section 390.012(3)(a)1., F.S. Rules related to abortion are found in ch. 59A-9, F.A.C.
[60] Section 390.018, F.S.
[61] Correspondence from the Department of Health to the House of Representatives Health Quality Subcommittee dated February 26, 2015, on file with Health Quality Subcommittee Staff.

- 65,902 were performed in the first trimester (12 weeks and under);
- 6,171 were performed in the second trimester (13 to 24 weeks); and
- None were performed in the third trimester (25 weeks and over).[64]

The majority of the procedures (65,210) were elective.[65] The remainder of the abortions were performed due to:

- Emotional or psychological health of the mother (76);
- Physical health of the mother that was not life endangering (158);
- Life endangering physical condition (69);
- Rape (749);
- Serious fetal genetic defect, deformity, or abnormality (560); and
- Social or economic reasons (5,115).[66]

Effect of Proposed Changes

HB 633 requires the physician performing the abortion, or the referring physician, to be physically present in the same room as the pregnant woman when providing information to obtain informed consent. The bill also requires this information to be provided to the woman by the physician while the physician is physically present in the same room as the woman at least 24 hours before the termination of pregnancy is performed.

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1: Amends s. 390.0111, F.S., relating to termination of pregnancies.
Section 2: Provides for an effective date of July 1, 2015.

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:

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[62] There are currently 65 licensed abortion clinics in Florida, of which 44 (67.7%) are licensed to provide both 1st and 2nd trimester abortions and 21 (32.3%) are licensed to provide only 1st trimester abortions. *Id.*
[63] Section 390.0112(1), F.S., currently requires the director of any medical facility in which any pregnancy is terminated to submit a monthly report to AHCA that contains the number of procedures performed, the reason for same, the period of gestation at the time such procedures were performed, and the number of infants born alive during or immediately after an attempted abortion.
[64] Reported Induced Terminations of Pregnancy (ITOP) by Reason, By Weeks of Gestation for Calendar Year 2014, AHCA, on file with the Health Quality Subcommittee Staff.
[65] *Id.*
[66] *Id.*

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The 24-hour waiting period could have an indeterminable negative fiscal impact on women seeking abortions associated with traveling to the clinic on separate occasions.

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 informed patient consent; amending s. 390.0111, F.S.; revising conditions for the voluntary and informed consent to a termination of pregnancy; reenacting s. 390.012(3)(d), F.S., relating to Agency for Health Care Administration rules regarding medical screening and evaluation of abortion clinic patients, to incorporate the amendment made by this act to s. 390.0111, F.S., in a reference thereto; providing an effective date.

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

Section 1. Paragraph (a) of subsection (3) of section 390.0111, Florida Statutes, is amended to read:

390.0111 Termination of pregnancies.—

(3) CONSENTS REQUIRED.—A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian.

(a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, <u>while physically present in the same room, and at least 24 hours before the</u>

procedure ~~in person~~, informed the woman of:

a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

b. The probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed.

(I) The ultrasound must be performed by the physician who is to perform the abortion or by a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed by rule and who is working in conjunction with the physician.

(II) The person performing the ultrasound must offer the woman the opportunity to view the live ultrasound images and hear an explanation of them. If the woman accepts the opportunity to view the images and hear the explanation, a physician or a registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant working in conjunction with the physician must contemporaneously review and explain the images to the woman before the woman gives informed consent to having an abortion procedure performed.

(III) The woman has a right to decline to view and hear the explanation of the live ultrasound images after she is informed of her right and offered an opportunity to view the

images and hear the explanation. If the woman declines, the woman shall complete a form acknowledging that she was offered an opportunity to view and hear the explanation of the images but that she declined that opportunity. The form must also indicate that the woman's decision was not based on any undue influence from any person to discourage her from viewing the images or hearing the explanation and that she declined of her own free will.

(IV) Unless requested by the woman, the person performing the ultrasound may not offer the opportunity to view the images and hear the explanation and the explanation may not be given if, at the time the woman schedules or arrives for her appointment to obtain an abortion, a copy of a restraining order, police report, medical record, or other court order or documentation is presented which provides evidence that the woman is obtaining the abortion because the woman is a victim of rape, incest, domestic violence, or human trafficking or that the woman has been diagnosed as having a condition that, on the basis of a physician's good faith clinical judgment, would create a serious risk of substantial and irreversible impairment of a major bodily function if the woman delayed terminating her pregnancy.

c. The medical risks to the woman and fetus of carrying the pregnancy to term.

2. Printed materials prepared and provided by the department have been provided to the pregnant woman, if she

chooses to view these materials, including:

a. A description of the fetus, including a description of the various stages of development.

b. A list of entities that offer alternatives to terminating the pregnancy.

c. Detailed information on the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care.

3. The woman acknowledges in writing, before the termination of pregnancy, that the information required to be provided under this subsection has been provided.

Nothing in this paragraph is intended to prohibit a physician from providing any additional information which the physician deems material to the woman's informed decision to terminate her pregnancy.

Section 2. For the purpose of incorporating the amendment made by this act to section 390.0111, Florida Statutes, in a reference thereto, paragraph (d) of subsection (3) of section 390.012, Florida Statutes, is reenacted to read:

390.012 Powers of agency; rules; disposal of fetal remains.—

(3) For clinics that perform or claim to perform abortions after the first trimester of pregnancy, the agency shall adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter, including the following:

(d) Rules relating to the medical screening and evaluation of each abortion clinic patient. At a minimum, these rules shall require:

1. A medical history including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history.

2. A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa.

3. The appropriate laboratory tests, including:

a. Urine or blood tests for pregnancy performed before the abortion procedure.

b. A test for anemia.

c. Rh typing, unless reliable written documentation of blood type is available.

d. Other tests as indicated from the physical examination.

4. An ultrasound evaluation for all patients. The rules shall require that if a person who is not a physician performs an ultrasound examination, that person shall have documented evidence that he or she has completed a course in the operation of ultrasound equipment as prescribed in rule. The rules shall require clinics to be in compliance with s. 390.0111.

5. That the physician is responsible for estimating the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age as defined in rule and shall write the estimate in the patient's medical history.

The physician shall keep original prints of each ultrasound examination of a patient in the patient's medical history file.

Section 3. This act shall take effect July 1, 2015.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 633 (2015)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Moskowitz offered the following:

Amendment

Remove line 76 and insert:

the pregnancy to term.

The 24-hour notification requirement of this subparagraph may be waived in cases in which the pregnancy is a result of rape or incest or there is a severe fetal anomaly or a risk to the woman's health.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 717 No Contact Orders
SPONSOR(S): Criminal Justice Subcommittee; Raschein and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 342

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Cox	Cunningham
2) Judiciary Committee		Cox	Havlicak

SUMMARY ANALYSIS

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges. With some exceptions, every person charged with a crime is entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

When pretrial release is granted, s. 903.047, F.S., requires the court to impose a condition specifying that the defendant must "refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure." Currently, s. 903.047, F.S., does not specify what actions are encompassed by the phrase "any contact of any type with the victim." As such, it is unclear what type of contact is prohibited.

The bill amends s. 903.047, F.S., clarifying that an order of no contact is effective immediately and enforceable for the duration of the pretrial release or until modified by the court. The bill also provides that, unless otherwise specified by the court, the term "no contact" includes:

- Communicating orally or in any written form, either in person, telephonically, electronically, or in any other manner, either directly or indirectly through a third person, with the victim or any other person named in the order;
- Having physical or violent contact with the victim or other named person or his or her property;
- Being within 500 feet of the victim's or other named person's residence, even if the defendant and the victim or other named person share the residence; and
- Being within 500 feet of the victim's or other named person's vehicle, place of employment, or a specified place frequented regularly by such person.

The bill requires the defendant to receive a copy of the order of no contact specifying the applicable prohibited acts before being released from custody on pretrial release.

The Office of the State Courts Administrator (OSCA) anticipates that the bill may cause a temporary increase in the number of contempt proceedings or prosecutions for violations of conditions of release. However, OSCA does anticipate that the impact of the bill will be manageable within its existing resources. Additionally, to the extent the bill results in more defendants violating their conditions of pretrial release and being detained, it could have a negative jail bed impact.

The bill is effective on October 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Pretrial Release

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges.[1] Article I, section 14, of the Florida Constitution provides, with some exceptions, that every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions.[2] If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.[3]

When determining whether to release a defendant on pretrial release, and what the conditions of pretrial release should be, the court must consider:

- The nature and circumstances of the offense charged;
- The weight of the evidence against the defendant;
- The defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition;
- The defendant's past and present conduct (e.g., record of convictions, previous flight to avoid prosecution, failure to appear at court proceedings);
- The nature and probability of danger which the defendant's release poses to the community;
- The source of funds used to post bail or procure an appearance bond;[4]
- Whether the defendant is already on release pending resolution of another criminal proceeding or on probation, parole, or other release pending completion of a sentence;
- The street value of any drug or controlled substance involved in the criminal charge;
- Whether there is probable cause to believe that the defendant committed a new crime while on pretrial release;
- Any other facts that the court considers relevant;
- Whether the crime charged is a violation of ch. 874, F.S. (relating to criminal gangs), or alleged to be subject to enhanced punishment under ch. 874, F.S.; and
- Whether the defendant is required to register as a sexual offender or a sexual predator.[5]

Generally, pretrial release is granted in one of three ways - by releasing a defendant on their own recognizance, by requiring the defendant to post bail, and/or by requiring the defendant to participate in a pretrial release program.[6] In each instance, s. 903.047, F.S., requires the court to impose a condition specifying that the defendant must "refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure."[7]

The court may detain a defendant if it finds a substantial probability, based on a defendant's past and present patterns of behavior, the criteria described above, and any other relevant facts, that the defendant has violated a condition of pretrial release and the violation, in the discretion of the court,

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[1] Report No. 14-13, *"County Pretrial Release Programs: Calendar Year 2013,"* Office of Program Policy Analysis & Government Accountability, December 2014.

[2] The conditions of pretrial release are determined at a defendant's first appearance hearing. FLA. R. CRIM. PROC. 3.130(d).

[3] FLA. CONST. art. I, s. 14, FLA. R. CRIM. PROC. 3.131(a).

[4] Particularly whether the proffered funds, real property, property, or any proposed collateral or bond premium may be linked to or derived from the crime alleged to have been committed or from any other criminal or illicit activities. s. 903.046(2)(f), F.S.

[5] s. 903.046(2), F.S.

[6] Report No. 14-13, *"County Pretrial Release Programs: Calendar Year 2013,"* Office of Program Policy Analysis & Government Accountability, December 2014.

[7] Upon motion by the defendant, the court may modify this conditions if good cause is shown and the interests of justice so require. The victim has the right to be heard at such a proceeding, and the state attorney must notify the victim of the pendency of any such proceeding. s. 903.047(2), F.S.

supports a finding that no conditions of release can reasonably protect the community from risk of physical harm to persons or assure the presence of the accused at trial.[8]

Effect of the Bill

As noted above, when a defendant is granted pretrial release, s. 903.047, F.S., requires the court to impose a condition specifying that the defendant must "refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure."

Section 903.047, F.S., does not specify what actions are encompassed by the phrase "any contact of any type with the victim." As such, it is unclear what type of contact is prohibited.

The bill amends s. 903.047, F.S., clarifying that an order of no contact is effective immediately and enforceable for the duration of the pretrial release or until modified by the court. The bill also provides that, unless otherwise specified by the court, the term "no contact" includes:

- Communicating orally or in any written form, either in person, telephonically, electronically, or in any other manner, either directly or indirectly through a third person, with the victim or any other person named in the order;
- Having physical or violent contact with the victim or other named person or his or her property;
- Being within 500 feet of the victim's or other named person's residence, even if the defendant and the victim or other named person share the residence; and
- Being within 500 feet of the victim's or other named person's vehicle, place of employment, or a specified place frequented regularly by such person.

The bill requires the defendant to receive a copy of the order of no contact specifying the applicable prohibited acts before being released from custody on pretrial release.

The bill also reenacts ss. 741.29, 784.046, and 901.15, F.S., for purposes of incorporating the changes made to s. 903.047, F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 903.047, F.S., relating to conditions of pretrial release.

Section 2. Reenacts s. 741.29, F.S., relating to domestic violence; investigation of incidents; notice to victims of legal rights and remedies; reporting.

Section 3. Reenacts s. 784.046, F.S., relating to action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.

Section 4. Reenacts s. 901.15, F.S., relating to when arrest by officer without warrant is lawful.

Section 5. Provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

[8] s. 907.041(4)(c), F.S.

2. Expenditures:

The Office of the State Courts Administrator (OSCA) anticipates that the bill may cause a temporary increase in the number of contempt proceedings or prosecutions for violations of conditions of release, but OSCA cannot accurately determine the fiscal impact of the legislation due to the unavailability of data needed to determine its impact on judicial workloads.[9] Nevertheless, OSCA anticipates that the impact of the bill will be manageable within its existing resources.[10]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill clarifies what types of contact are prohibited during pretrial release. To the extent this results in more defendants violating their conditions of pretrial release and being detained, it could have a negative jail bed impact.

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment requires the defendant to receive a copy of the order of no contact specifying the applicable prohibited acts before being released from custody on pretrial release.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

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[9] Office of the State Courts Administrator, Agency Bill Analysis for SB 342, which was identical to HB 717 as originally filed (on file with the Criminal Justice Subcommittee).

[10] *Id.*

A bill to be entitled

An act relating to no contact orders; amending s. 903.047, F.S.; providing for the effect and enforceability of orders of no contact as a part of pretrial release; requiring that the defendant receive a copy of the order of no contact before release; specifying acts prohibited by a no contact order; reenacting ss. 741.29(6), 784.046(13) and (15), and 901.15(13), F.S., relating to domestic violence, repeat, sexual, or dating violence, and arrest without a warrant, respectively, to incorporate the amendments made to s. 903.047, F.S., in references thereto; providing an effective date.

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

Section 1. Section 903.047, Florida Statutes, is amended to read:

903.047 Conditions of pretrial release.—

(1) As a condition of pretrial release, whether such release is by surety bail bond or recognizance bond or in some other form, the defendant must ~~shall~~:

(a) Refrain from criminal activity of any kind.

(b) Refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure. An order of no contact is effective

immediately and enforceable for the duration of the pretrial release or until it is modified by the court. The defendant shall receive a copy of the order of no contact which specifies the applicable prohibited acts before the defendant is released from custody on pretrial release. As used in this section, unless otherwise specified by the court, the term "no contact" includes the following prohibited acts:

1. Communicating orally or in any written form, either in person, telephonically, electronically, or in any other manner, either directly or indirectly through a third person, with the victim or any other person named in the order.

2. Having physical or violent contact with the victim or other named person or his or her property.

3. Being within 500 feet of the victim's or other named person's residence, even if the defendant and the victim or other named person share the residence.

4. Being within 500 feet of the victim's or other named person's vehicle, place of employment, or a specified place frequented regularly by such person.

(c) Comply with all conditions of pretrial release.

(2) Upon motion by the defendant when bail is set, or upon later motion properly noticed pursuant to law, the court may modify the condition required by paragraph (1)(b) if good cause is shown and the interests of justice so require. The victim shall be permitted to be heard at any proceeding in which such modification is considered, and the state attorney shall notify

the victim of the provisions of this subsection and of the pendency of any such proceeding.

Section 2. For the purpose of incorporating the amendment made by this act to section 903.047, Florida Statutes, in a reference thereto, subsection (6) of section 741.29, Florida Statutes, is reenacted to read:

741.29 Domestic violence; investigation of incidents; notice to victims of legal rights and remedies; reporting.—

(6) A person who willfully violates a condition of pretrial release provided in s. 903.047, when the original arrest was for an act of domestic violence as defined in s. 741.28, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and shall be held in custody until his or her first appearance.

Section 3. For the purpose of incorporating the amendment made by this act to section 903.047, Florida Statutes, in a reference thereto, subsections (13) and (15) of section 784.046, Florida Statutes, are reenacted to read:

784.046 Action by victim of repeat violence, sexual violence, or dating violence for protective injunction; dating violence investigations, notice to victims, and reporting; pretrial release violations; public records exemption.—

(13) Whenever a law enforcement officer determines upon probable cause that an act of dating violence has been committed within the jurisdiction, or that a person has violated a condition of pretrial release as provided in s. 903.047 and the

original arrest was for an act of dating violence, the officer may arrest the person or persons suspected of its commission and charge such person or persons with the appropriate crime. The decision to arrest and charge shall not require consent of the victim or consideration of the relationship of the parties.

(15) A person who willfully violates a condition of pretrial release provided in s. 903.047, when the original arrest was for an act of dating violence as defined in this section, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, and shall be held in custody until his or her first appearance.

Section 4. For the purpose of incorporating the amendment made by this act to section 903.047, Florida Statutes, in a reference thereto, subsection (13) of section 901.15, Florida Statutes, is reenacted to read:

901.15 When arrest by officer without warrant is lawful.—A law enforcement officer may arrest a person without a warrant when:

(13) There is probable cause to believe that the person has committed an act that violates a condition of pretrial release provided in s. 903.047 when the original arrest was for an act of domestic violence as defined in s. 741.28, or when the original arrest was for an act of dating violence as defined in s. 784.046.

Section 5. This act shall take effect October 1, 2015.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Judiciary Committee

Representative Raschein offered the following:

Amendment

Remove line 37 and insert:

victim or any other person named in the order. If the victim and the defendant have children in common, at the request of the defendant, the court may designate an appropriate third person to contact the victim for the sole purpose of facilitating the defendant's contact with the children. However, this subparagraph does not prohibit an attorney for the defendant, consistent with rules regulating The Florida Bar, from communicating with any person protected by the no contact order for lawful purposes.

PCB JDC 15-01

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JDC 15-01 Mental Health Services in the Criminal Justice System
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1452

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Weber	Havlicak

SUMMARY ANALYSIS

Florida's mental health courts, veterans' courts, drug courts, and juvenile delinquency pretrial intervention programs provide pretrial or postadjudicatory alternatives for qualifying offenders involved in the criminal justice system. These courts allow offenders to access programs and treatment options that address the underlying cause of the offender's actions.

This bill:

- Expands the definition of veteran, for the purpose of participation in veterans' court, to include those discharged or released under a general discharge;
- Allows counties to create and fund treatment-based mental health court programs;
- Allows qualifying offenders to transfer to a problem-solving court in another county;
- Creates a Forensic Hospital Diversion Pilot Program;
- Allows judges to require offenders to participate in postadjudicatory treatment-based mental health court programs if certain eligibility requirements are met;
- Allows judges to require qualifying veterans to participate in treatment programs as part of their probation or community control;
- Permits a defendant with a mental illness and who meets qualifying criteria to participate in pretrial mental health court program; and
- Allows a juvenile offender with a mental illness to be admitted to a delinquency pretrial program for treatment purposes and allows a judge to dismiss charges against the juvenile upon the juvenile's successful completion of the program.

This bill contains provisions that will have both a positive and negative fiscal impact on the Department of Children and Families, the court system, and local governments. See Fiscal Analysis section.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Mental Health and Substance Use of Offenders in the Criminal Justice System

On any given day in Florida there are approximately 17,000 prison inmates, 15,000 local jail detainees, and 40,000 individuals under correctional supervision in the community who experience serious mental illness.[1] Every year there are as many as 125,000 adults with mental illnesses or substance use disorders who require immediate treatment that are arrested and booked into Florida jails.[2] 150,000 children and adolescents are referred to Florida's Department of Juvenile Justice every year, and over 70 percent of those children and adolescents have at least one mental health disorder.[3]

From 2002-2010, the population of inmates with mental illnesses or substance use disorders in Florida increased from 8,000 to 17,000 individuals.[4] By 2020, the number of inmates with these types of disorders is expected to reach more than 35,000, with an average annual increase of 1,700 individuals.[5] Between 2002 and 2010 forensic commitments increased from 863 to 1,549 and are projected to reach nearly 2,800 by 2016.[6]

The majority of individuals with serious mental illnesses or substance use disorders who come in contact with the criminal justice system are charged with minor misdemeanor and low-level felony offenses that are often a direct result of their untreated condition.[7] These individuals are typically poor, uninsured, homeless, minorities, and experiencing co-occurring mental health or substance use disorders.[8]

Florida's Forensic Mental Health Programs

Qualifying offenders[9], can be involuntarily committed to state civil[10] and forensic[11] treatment facilities by the Department of Children and Families (DCF), under the authority of Chapter 916. Individuals

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[1] The Florida Senate, *Interim Report 2011-106*, (Oct. 2010). [hereinafter *Senate Interim Report 2011-106*]
[2] *Id.*
[3] Department of Children and Families, *Staff Analysis and Economic Impact, Senate Bill Number 2018* (Mar. 2, 2009). [hereinafter *Staff Analysis, Senate Bill Number 2018*]
[4] *Senate Interim Report 2011-106.*
[5] *Id.* This increase is enough to fill more than 20 correction institutions which essentially equates to one new prison added every year. *Id.*
[6] *Id.*
[7] *Staff Analysis, Senate Bill Number 2018.*
[8] These individuals often have difficulty accessing resources because of lack of knowledge about available services, lack of funds, criminal record stigma, or a lack of capacity to access the services. *State and County Collaboration: Mental Health and the Criminal Justice System*, National Association of Counties, *available at* http://www.ojp.usdoj.gov/newsroom/testimony/2009/statecountycollabo.pdf [hereinafter *State and County Collaboration*]
[9] Chapter 916, F.S., provides the criteria for defendants who are adjudicated incompetent to proceed. The court must find by clear and convincing evidence that the defendant is mentally ill and because of the mental illness:

- The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and that neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being;
- There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person;
- All available, less restrictive treatment alternatives, including treatment in community residential facilities or community inpatient or outpatient settings have been judge to be inappropriate; and
- There is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and defendant will regain competency to proceed in the reasonably foreseeable future.

committed to the custody of DCF are usually treated at one of the three forensic mental health treatment facilities (Florida State Hospital in Chattahoochee, North Florida Evaluation and Treatment Center in Gainesville, or South Florida Evaluation and Treatment Center in Miami). In 2011, Florida spent more than $210 million each year on 1,700 beds, serving approximately 3,000 individuals in forensic treatment; the amount spent on those beds alone was one third of all adult mental health dollars and two thirds of all state mental health hospital dollars.[12]

The cost to local governments to house these individuals who are arrested and booked into Florida jails is estimated to be over $500 million.[13] Another $600 million is spent each year housing individuals with mental illnesses in state prisons and forensic treatment facilities.[14] It has been projected that the number of state prison beds serving inmates with mental illnesses will more than double from 17,000 to 35,000 by 2020 and will be accompanied with capital and operating costs of more than $3.6 billion for the new beds alone.[15]

Miami-Dade Forensic Alternative Center and Community-Based Mental Health System

DCF implemented a pilot program, the Miami-Dade Forensic Alternative Center (MD-FAC), in the Eleventh Judicial Circuit in the fall of 2009.[16] The program was established to demonstrate the feasibility of diverting those individuals with mental illness who had been deemed incompetent to proceed to trial from state hospital placement to community-based treatment and competency restoration services.[17]

Between August 2009 and August 2010, a total of 111 individuals were accepted and admitted to the program.[18] As of 2010, 38 individuals either stepped down from forensic commitment or completed the program; of those, 27 remained actively linked to the MD-FAC program and 11 did not.[19] Of the 27 individuals who remained actively linked to the MD-FAC program and the services it provides, 19 individuals did not recidivate.[20] Of those individuals, only one individual was charged with committing a new offense (misdemeanor, petit theft), while 8 were rebooked into jail for non-compliance with conditions of release.[21]

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[10] A "civil facility" is a mental health facility established within DCF or by contract with DCF to serve individuals committed pursuant to chapter 394, F.S., and those defendants pursuant to chapter 916, F.S., who do not require the security provided in a forensic facility. Section 916.106(4), F.S.

[11] A "forensic facility" is a separate and secure facility established within DCF or an agency to service forensic clients. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons with retardation or autism and separately housing persons who have been involuntarily committed pursuant to chapter 916, F.S., from nonforensic residents. Section 916.106(10), F.S.

[12] *Senate Interim Report 2011-106.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* In order to be eligible for admission to MD-FAC, an individual must be charged with a less serious offense (ex. second or third degree felony). Miami-Dade Forensic Alternative Ctr., *Pilot Program Status Report*, (Aug. 2010) (on file with the House Judiciary Comm.).

[18] *Pilot Program Status Report* at 3.

[19] *Id.* at 5-6.

[20] *Id.*

[21] *Id.* The individuals who remained linked to MD-FAC services accounted for 11 jail bookings and spent a total of 85 days in jail after stepping down from forensic commitment; in contrast, of the 11 individuals who did not remain linked with the program, 9 were rebooked for a total of 23 books resulting from new offenses and 15 resulting from technical violations. The 9 individuals who recidivated accounted for 1,435 days in jail since stepping down from forensic commitment. *Id.*

As a result of the MD-FAC program:

- The average number of days to restore competency has been reduced, as compared to forensic treatment facilities.[22]
- The burden on local jails has been reduced, as individuals served by MD-FAC are not returned to jail upon restoration of competency.[23]
- Because individuals are not returned to jail, it prevents the individual's symptoms from worsening while incarcerated, possibly requiring readmission to state treatment facilities.[24]
- Individuals access treatment more quickly and efficiently because of the ongoing assistance, support, and monitoring following discharge from inpatient treatment and community re-entry.[25]
- Individuals in the program receive additional services not provided in the state treatment facilities, such as intensive services targeting competency restoration, as well as community-living and re-entry skills.[26]
- It is standard practice at MD-FAC to provide assistance to all individuals in accessing federal entitlement benefits that pay for treatment and housing upon discharge.[27]

Florida's Veterans' Courts

Veterans' courts are specialty courts that serve veterans and active duty servicemembers who are involved in the criminal justice system and have a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.[28]

Section 394.47891, F.S., allows each circuit's chief judge to establish veterans' courts, and as of January 2015, Florida has 21 veterans' courts, including 7 courts that receive state general revenue funding. For Fiscal Year 2014-15, 7 counties in Florida received state general revenue funding to

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Comparison of competency restoration services provided forensic treatment facilities and MD-FAC (average number of days year to date, FY 2009-10):	**Forensic facilities**	**MD-FAC**	**Difference***
Average days to restore competency (admission date to date court notified as competent)	138.9	99.3	39.6 days (-29%)
Average length of stay for individuals restored to competency (this includes the time it takes for counties to pick up individuals)	157.8	139.6	18.2 days (-12%)

Id. "[I]ndividuals enrolled in MD-FAC are not rebooked into the jail following restoration of competency. Instead, they remain at the treatment program where they are re-evaluated by court appointed experts while the treatment team develops a comprehensive transition plan for eventual step-down into a less restrictive community placement. When court hearings are held to determine competency and/or authorize step-down into community placements, individuals are brought directly to court by MD-FAC staff. This not only reduces burdens on the county jail, but eliminates the possibility that individuals will decompensate while incarcerated and require subsequent readmission to state treatment facilities. It also ensures that individuals remain linked to the service provider through the community re-entry and re-integration process." *Id.*
However, those individuals diverted to MD-FAC have to meet certain criteria, which may result in the less mentally ill or individuals with less serious charges to go to MD-FAC. Additionally, the state hospitals accept individuals from across the mental health spectrum. This variance may be a contributing factor in the above comparison.

23 MD-FAC program staff provides ongoing assistance, support and monitoring following an individual's discharge from inpatient treatment and community re-entry. Additionally, individuals are less likely to return to state hospitals, emergency rooms, and other crisis settings. *Id.*

24 Of the 44 individuals referred to MD-FAC between 2009 and 2010, 23% had one or more previous admissions to a state forensic hospital for competency restoration and subsequent readmission to the Miami-Dade County Jail. *Id.*

25 *Senate Interim Report 2011-106* at 9.

26 *Id.*

27 *Id.*

28 *State-Funded Veterans' Courts in Florida*, The Florida Legislature's Office of Program Policy Analysis and Government Accountability (Jan. 30, 2015) (on file with the House Judiciary Committee). [hereinafter *State-Funded Veterans' Courts in Florida*]

create or maintain veterans' courts.[29] Because Florida's veterans' courts are statutorily required to serve only servicemembers and veterans who have been discharged from military service under honorable conditions, court participants are generally eligible to receive services through the U.S. Department of Veterans Affairs (VA) and do not require court funding for the majority of services.[30]

Florida's veterans' and servicemember courts use several factors to determine eligibility. First, a veteran must fit into the statutory definition of a veteran or servicemember.[31] Because of the statutory definition of veteran, the veteran must have a military service discharge under honorable conditions. Second, the veteran must have a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem. Third, he or she must have committed a misdemeanor or felony crime that is accepted in veterans' court.[32] If the veteran meets these eligibility requirements and agrees to participate, the case is sent to the state attorney for approval. Depending on availability, participants may be placed in either pretrial or post-adjudication diversion programs. Pretrial diversion is structured such that the charges may be dismissed or reduced when the participant completes the program. The post-adjudication track corresponds with probation supervision and may allow the participant to join in a treatment program instead of being incarcerated.[33]

Individuals who commit a qualifying offense listed in section 948.06(8)(c), F.S., cannot be admitted into veterans' courts.[34] 52 percent of the participants in Florida's state-funded veterans' courts committed felonies, primarily third degree felonies; the most common of which were grand theft, burglary, felony battery, and drug possession.[35] 48 percent of the participants committed first and second degree misdemeanors; the most common of which were battery and driving under the influence.[36]

As of October 1, 2014, the seven state-funded courts had 265 participants and between July 2013 and October 2014, 45 participants graduated from state-funded courts.[37] It generally takes 12 to 18 months to successfully complete veterans' court. The number of graduates is expected to increase over time because of this.[38]

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[29] Clay, Okaloosa, Pasco, and Pinellas Counties received $150,000 each/$600,000 total in Recurring General Revenue, Duval and Orange Counties received $200,000 each/$400,000 total in Recurring General Revenue, and Alachua County received $150,000 total in Recurring General Revenue.

[30] Section 1.01, F.S., defines a veteran as a person who served in the active military, naval, or air service and who was discharged or released therefrom under honorable conditions only or who later received an upgraded discharge under honorable conditions, notwithstanding any action by the U.S. Department of Veterans Affairs on individuals discharged or released with other than honorable discharges. There are five types of discharge: honorable, general discharge under honorable conditions (general), other than honorable, bad conduct, and dishonorable. *State-Funded Veterans' Courts in Florida.* Typically, veterans who received honorable discharges or general discharges are eligible for VA benefits while veterans who received other than honorable, bad conduct, or dishonorable discharges are not. *Id.*

[31] *See supra* note 30 for the definition of veteran. Section 250.01, F.S., defines a servicemember as any person serving as a member of the United States Armed Forces on active duty or state active duty and all members of the Florida National Guard and United States Reserve Force.

[32] Eligibility requirements can be found in *State-Funded Veterans' Courts in Florida* at 2-3. Florida Statutes prohibit individuals charged with certain types of violent crimes from admission into veterans' court. *See* Section 948.06(8)(c), F.S. Each veterans' court also has the discretion to limit veteran participation based on the type or nature of the alleged crime or crime committed. *State-Funded Veterans' Courts in Florida* at 3.

[33] *State-Funded Veterans' Courts in Florida* at 3.

[34] *Id.* Section 948.06(8)(c) lists over 19 "qualifying offenses" that would preclude an individual's admission into veterans' court.

[35] *State-Funded Veterans' Courts in Florida* at 5. Per s. 775.081, F.S., felonies of the third degree are the lowest degree of felony. Per s. 775.082, F.S., persons convicted of a third degree felony can be sentenced to a term of imprisonment not exceeding 5 years.

[36] *Id.* at 5. Per s. 775.082, F.S., a person who has been convicted of a misdemeanor of the first degree may be sentenced to a term of imprisonment not exceeding one year, and persons convicted of a misdemeanor of the second degree may be sentenced to a term of imprisonment not exceeding 60 days.

[37] *State-Funded Veterans' Courts in Florida* at 3.

[38] *Id.*

Mental Health Courts

As of October 2014, there were 26 mental health courts operating in 16 counties across the state of Florida.[39] Mental health courts hold offenders accountable while connecting them to the treatment services necessary to address their mental illness.[40] Mental health courts typically share the following goals:

- To improve public safety by reducing criminal recidivism;
- To improve the quality of life of people with mental illnesses and to increase their participation in effective treatment; and
- To reduce court- and corrections-related costs through administrative efficiencies and often by providing an alternative to incarceration.[41]

However, there is no statutory framework which codifies these mental health courts and, as a result, eligibility, program requirements, and other processes differ among the courts.

For example, in order to be eligible to participate in Alachua County's Mental Health Court, a defendant must be diagnosed with a mental illness or developmental disability and be arrested for a misdemeanor or criminal traffic offense.[42] However, in order to be eligible to participate in Nassau County's Mental Health Court, the defendant must have an Axis I mental health diagnosis[43] and have been charged with non-violent misdemeanors.[44] Nassau County's Mental Health Court may also consider third degree felony convictions.[45]

Additionally, anyone can refer a person to the Mental Health Court in Nassau County[46]; whereas only judges, private attorneys, public defenders, state attorneys, or pretrial officers can refer a person to Okaloosa County's Mental Health Court.[47]

Effects of the Bill

Section 1

Section 1 amends s. 394.47891, F.S., to include veterans who were discharged or released under a general discharge as eligible veterans for a Military Veterans and Servicemembers Court Program.

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[39] FLORIDA COURTS, *Mental Health Courts*, http://www.flcourts.org/resources-and-services/court-improvement/problem-solving-courts/mental-health-courts.stml (last visited Mar. 16, 2015).

[40] *Id.*

[41] *Id.*

[42] OFFICE OF THE STATE ATTORNEY EIGHTH JUDICIAL CIRCUIT, *Alachua County Mental Health Court*, http://sao8.org/Mental%20Health.htm (last visited Mar. 16, 2015). Those charged with domestic violence, driving under the influence, and sexual offenses are excluded from the program. However, Alachua County does provide certain exemptions for:

- Defendants charged with domestic violence involving parents and children or siblings may be admitted if the court approves;
- Defendants charged with simple battery, if the victim consents; and
- Defendants who violate county court probation with the consent of the county court judge to whom the case is assigned. *Id.*

[43] Axis I is the top-level of the Diagnostic and Statistical Manual of Mental Disorders multiaxial system of diagnosis. *Axis I*, PSY.WEB (May 15, 2014), http://www.psyweb.com/DSM_IV/jsp/Axis_I.jsp. Axis I diagnoses are the most widely recognized (ex., schizophrenic episode, panic attack, major depressive episode, dementia, eating disorders, mood disorders, etc.). *Id.*

[44] NASSAU COUNTY MENTAL HEALTH COURT, *Eligibility And Referral*, http://www.ncmhc.org/default.cfm?page=eligibility (last visited Mar. 16, 2015).

[45] *Id.*

[46] *Id.* Nassau County's Mental Health Court website states that anyone can refer a person to that court. Police, corrections staff, attorneys, friends, family members, community behavior health providers, judges, and court staff may do so by contacting the Program Director and indicating that person's case may be eligible. *Id.*

[47] FIRST JUDICIAL CIRCUIT OF FLORIDA, *Mental Health Court*, http://www.firstjudicialcircuit.org/programs-and-services/mental-health-court (last visited Mar. 16, 2015).

Section 2

Section 2 creates s. 394.47892, F.S., which allows each county to fund a treatment-based mental health court program under which defendants in the justice system assessed with a mental illness will be processed respective to the severity of their identified mental illness; however, if a county chooses to fund a treatment-based mental health court program, the county must secure funding from sources other than the state for costs not otherwise assumed by the state.

The bill will require that entry into any pretrial treatment-based mental health court program shall be voluntary and any entry into any postadjudicatory treatment-based mental health court program must be based upon the sentencing court's assessment of:

- The defendant's criminal history;
- The defendant's mental health screening outcome;
- The defendant's amenability to the services of the program;
- The defendant's total sentence points;
- The recommendation of the state attorney and the victim, if any; and
- The defendant's agreement to enter the program.

Section 2 also creates s. 394.47892(5), F.S., which, contingent on annual appropriation by the Legislature, commands each judicial circuit to establish, at a minimum, one coordinator position for the treatment-based mental health court program and establishes the coordinator's duties and responsibilities.

The bill requires each circuit to report sufficient client-level and programmatic data to the Office of State Courts Administrator annually for the purposes of program evaluation. Client-level data includes:

- Primary offenses that resulted in the mental health court referral or sentence;
- Treatment compliance;
- Completion status and reasons for failure to complete;
- Offenses committed during treatment and sanctions imposed, frequency of court appearances; and
- Units of service.

Program level data includes:

- Referral and screening procedures;
- Eligibility criteria;
- Type and duration of treatment offered; and
- Residential treatment resources.

Finally, the bill authorizes the chief judge of each judicial circuit to appoint an advisory committee for the treatment-based mental health court program and sets out who can serve on such a committee.

Section 3

Section 3 amends s. 910.035, F.S., to include case transfer from one county to another because of the defendant's participation in a problem-solving court.

The bill defines the term problem-solving court as a drug court, military veterans and servicemembers court, mental health court, or a delinquency pretrial intervention court program and allows for a case to be transferred to a county other than that in which the charge arose if the following conditions are met:

- If the person is eligible for participation in a problem-solving court, upon request by the person or a court and if the defendant agrees to the transfer, the case shall be transferred to a county other than that in which the charge arose;
    - The authorized representative of the trial court must consult with the authorized representative of the problem-solving court and both must agree to the transfer;

- If all parties agree, the trial court shall enter a transfer order directing the case transferred to the county that has accepted the defendant into its problem-solving court;
- The appropriate documentation must be provided whether it is pretrial or post-trial admission to a problem-solving court; and
- After the transfer to the problem-solving court takes place, the clerk shall set the matter to hearing, and the court shall ensure the defendant's entry into the problem-solving court.

If the defendant successfully completes the problem-solving court, the case shall be disposed of; if not, the case shall be disposed of within the guidelines of the Criminal Punishment Code.

Section 4

Section 4 amends the definition of "Court" in s. 916.106, F.S., to include the county court as provided in s. 916.17, F.S.

Section 5

Currently, only circuit court judges with defendants before them charged with felony offenses may order the defendant to conditional release with an approved plan of providing appropriate outpatient care and treatment in lieu of involuntary commitment for offenders with mental illnesses. Section 5 amends s. 916.17, F.S., to authorize county court judges to order conditional release for this purpose for defendants charged with misdemeanor offenses.

Section 6

Section 6 creates s. 916.185, F.S., which creates a Forensic Hospital Diversion Pilot Program to serve eligible individuals who have mental illnesses or co-occurring mental illnesses and substance use disorders who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities. The program is designed to provide competency-restoration and community-reintegration services in either a locked residential treatment facility, when appropriate, or a community-based facility based upon consideration of public safety, the needs of the defendant, and available resources. Additionally, the section instructs DCF to implement the Pilot Program in Escambia County, Hillsborough County, and Dade County that mirrors the MD-FAC.

Section 7

Section 7 amends s. 948.01, F.S., which allows a court to place a defendant, who committed an offense on or after July 1, 2015, into a postadjudicatory treatment-based mental health court program as a condition of probation or community control if:

- The offense is a nonviolent felony[48];
- The defendant is amenable to mental health treatment;
- The defendant meets the requirements for mental health courts found in s. 394.47892(4)(a), F.S.[49]; and

[48] The bill defines a "nonviolent felony" as a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Defendants charged with resisting an officer with violence under s. 843.01, F.S., battery on a law enforcement officer under s. 784.07, F.S., or aggravated assault may participate in the mental health court program if the court so orders after the victim has been given his or her right to provide testimony or written statement to the court as provided in s. 921.143, F.S.

[49] Entry into any postadjudicatory treatment-based mental health court program as a condition or probation or community control must be based upon the sentencing court's assessment of:

- The defendant's criminal history;
- The defendant's mental health screening outcome;
- The defendant's amenability to the services of the program;

- The defendant agrees to enter the program.

The bill authorizes the Department of Corrections to establish designated mental health probation officers to support individuals under supervision of the mental health court.

Section 8

Section 8 amends s. 948.06, F.S., which allows a court to order a defendant, whose offense was committed on or after July 1, 2015, to successfully complete a postadjudicatory treatment-based mental health court program or military veterans and servicemembers court program if:

- The offender has violated his or her community control or probation;
- The underlying offense is a nonviolent felony[50];
- The offender is amenable to the services of postadjudicatory treatment-based mental health court program;
- The offender agreed to participate in the program after the court explains its purpose; and
- The offender is otherwise qualified.[51]

If the offender fails to comply with the terms of the program or the offender's sentence is completed, the case is returned to the sentencing court.

Section 9

A person who is charged with a felony, other than a felony listed in s. 948.06(8)(c),[52] and who is identified as a veteran under s. 1.01, F.S., is eligible for voluntary admission into a pretrial veterans' treatment intervention program if the veteran or service member suffers from a:

- Military service-related mental illness;
- Traumatic brain injury;
- Substance abuse disorder; or
- Psychological problem.

Section 9 amends s. 948.08, F.S., to include veterans who were discharged or released under a general discharge within the definition of veteran, as persons eligible for voluntary admission into a pretrial veterans' treatment intervention program.

Section 9 amends s. 948.08, F.S., which states that if a person, who is identified as having a mental illness and who has not previously been convicted of a felony, is charged with:

- A nonviolent felony that includes a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08, F.S.;
- Resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the defendant's participation;
- Battery on a law enforcement officer under s. 784.07, if the law enforcement officer and state attorney consent to the defendant's participation; or
- Aggravated assault where the victim and state attorney consent to the defendant's participation

is eligible for voluntary admission into a pretrial mental health court program, subject to approval by the chief judge of the circuit for a period to be determined by the risk and needs assessment of the defendant.

- The defendant's total sentence points;
- The recommendation of the state attorney and the victim, if any; and
- The defendant's agreement to enter the program.

[50] *See* definition of nonviolent felony, *supra* note 48.

[51] *See* factors to determine qualification, *supra* note 49.

[52] s. 948.06(8)(c) lists over 19 "qualifying offenses" that would preclude a defendant's participation in a pretrial veterans' treatment intervention program.

If, at the end of the program, the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or order that the charges revert to normal channels for prosecution. If, at the end of the program, the court finds that the defendant has successfully completed the pretrial program, the court shall dismiss the charges.

Section 10

A person who is charged with a misdemeanor, and who is identified as a veteran under s. 1.01, F.S., is eligible for voluntary admission into a pretrial veterans' treatment intervention program if the veteran or service member suffers from a:

- Military service-related mental illness;
- Traumatic brain injury;
- Substance abuse disorder; or
- Psychological problem.

Section 10 amends s. 948.16, F.S., to include veterans who were discharged or released under a general discharge within the definition of veteran, as persons eligible for voluntary admission into a pretrial veterans' treatment intervention program.

The bill also to allows a defendant, who is identified as having a mental illness and who is charged with a misdemeanor, to voluntarily enter a misdemeanor pretrial mental health court program, upon the motion of either party or the court, subject to the approval of the chief judge of the circuit.

Section 10 requires any public or private entity providing a pretrial mental health program to contract with the county or appropriate government entity.

Section 11

Section 11 amends s. 948.21, F.S., to allow a court to impose a condition requiring a probationer or community controllee, whose crime was committed on or after July 1, 2015, who is a veteran (including veterans who were discharged or released under a general discharge) or servicemember, and who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem to participate in a treatment program capable of treating the veteran's mental illness, injury, disorder or problem.

Section 12

Section 12 amends s. 985.345, F.S., which allows a child, who is identified as having a mental illness and who has not previously been adjudicated for a felony, to voluntarily be admitted to a delinquency pretrial mental health court program, upon motion of either party or the court, subject to approval by the chief judge of the circuit, if the child is charged with:

- A misdemeanor;
- A nonviolent felony[53];
- Resisting an officer with violence, if the law enforcement officer and state attorney consent to the child's participation;
- Battery on a law enforcement officer, if the law enforcement officer and state attorney consent to the child's participation; or
- Aggravated assault, if the victim and state attorney consent to the child's participation.

If, at the end of the program, the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue if resources and

[53] For the purposes of this subsection, the term "nonviolent felony" means a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as define din s. 776.08.

funding are available or order the charges revert to normal channels for prosecution. However, if the court finds that the child has successfully completed the delinquency pretrial intervention program, the court may dismiss the charges against the child and the child may subsequently have his or her arrest record and plea of nolo contendere expunged as to the charges.

Section 12 also requires any public or private entity providing a pretrial mental health program under this section to contract with the county or appropriate government entity.

Section 13

Section 13 provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 394.47891, F.S., relating to military veterans and servicemembers court programs.

Section 2 creates 394.47892, F.S., relating to treatment-based mental health court programs.

Section 3 amends s. 910.035, F.S., relating to transfer from county for plea and sentence.

Section 4 amends s. 916.106, F.S., relating to definitions.

Section 5 amends s. 916.17, F.S., relating to conditional release.

Section 6 creates s. 916.185, F.S., relating to Forensic Hospital Diversion Pilot Program.

Section 7 amends s. 948.01, F.S., relating to when court may place defendant on probation or into community control.

Section 8 amend 948.06, F.S., relating to violation of probation or community control.

Section 9 amends s. 948.08, F.S., relating to pretrial intervention program.

Section 10 amends s. 948.16, F.S., relating to misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program.

Section 11 amends s. 948.21, F.S., relating to condition of probation or community control; military servicemembers and veterans.

Section 12 amends s. 985.345, F.S., relating to delinquency pretrial intervention program.

Section 13 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   This bill expands the definition of the term veteran to include veterans who were discharged or released under a general discharge for the purposes of eligibility to participate in problem-solving courts. This may increase the number of veterans eligible to participate in these problem-solving

courts and programs, which may have a negative fiscal impact on existing or new problem-solving courts and/or related programs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill expands the definition of the term veteran to include veterans who were discharged or released under general discharge for the purposes of eligibility to participate in problem-solving courts. This may increase the number of veterans eligible to participate in these problem-solving courts and programs, which may have a negative fiscal impact on local governments that choose to fund problem-solving courts and/or related programs.

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:

Section 6 of the bill creates s. 916.185, F.S, authorizing the creation of a Forensic Hospital Diversion Pilot Program. In subsection (6) of this section, DCF is given authority to adopt rules under ss. 120.536(1) and 120.54, F.S., to administer this section.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to mental health services in the criminal justice system; amending s. 394.47891, F.S.; expanding eligibility criteria for military veterans and servicemembers court programs; creating s. 394.47892, F.S.; authorizing the creation of treatment-based mental health court programs; amending s. 910.035, F.S.; defining the term "problem-solving court"; authorizing a person eligible for participation in a problem-solving court to transfer his or her case to another county's problem-solving court under certain circumstances; making technical changes; amending s. 916.106, F.S.; redefining the term "court" to include county courts in certain circumstances; amending s. 916.17, F.S.; authorizing a county court to order the conditional release of a defendant for the provision of outpatient care and treatment; creating s. 916.185, F.S.; creating the Forensic Hospital Diversion Pilot Program; providing legislative intent; providing definitions; requiring the Department of Children and Families to implement a Forensic Hospital Diversion Pilot Program in three specified judicial circuits; providing the scope of eligibility for the pilot program; providing legislative intent concerning training; authorizing the department to adopt rules; amending ss. 948.01 and

948.06, F.S.; authorizing a court to order certain defendants to a postadjudicatory mental health court program; amending s. 948.08, F.S.; expanding eligibility requirements for certain pretrial intervention program; amending s. 948.16, F.S.; expanding veteran eligibility requirements and mental illnesses for misdemeanor pretrial veterans' treatment intervention program; amending s. 948.21, F.S.; expands veterans eligibility requirement for participating in court-ordered probation or community control; amending s. 985.345, authorizing pretrial mental health court program for certain juvenile offenders; providing an effective date.

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

Section 1. Section 394.47891, Florida Statutes, is amended to read:

394.47891 Military veterans and servicemembers court programs.—The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program under which veterans, as defined in s. 1.01, <u>including veterans who were discharged or released under a general discharge,</u> and servicemembers, as defined in s. 250.01, who are <u>charged or</u> convicted of a criminal offense and who suffer from a military-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem can be sentenced in

accordance with chapter 921 in a manner that appropriately addresses the severity of the mental illness, traumatic brain injury, substance abuse disorder, or psychological problem through services tailored to the individual needs of the participant. Entry into any Military Veterans and Servicemembers Court Program must be based upon the sentencing court's assessment of the defendant's criminal history, military service, substance abuse treatment needs, mental health treatment needs, amenability to the services of the program, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

Section 2. Section 394.47892, Florida Statutes, is created to read:

394.47892 Treatment-based mental health court programs.—

(1) Each county may fund a treatment-based mental health court program under which defendants in the justice system assessed with a mental illness will be processed in such a manner as to appropriately address the severity of the identified mental illness through treatment services tailored to the individual needs of the participant. The Legislature intends to encourage the Department of Corrections, the Department of Children and Families, the Department of Juvenile Justice, the Department of Health, the Department of Law Enforcement, the Department of Education, and such agencies, local governments, law enforcement agencies, other interested public or private entities, and individuals to support the creation and

establishment of these problem-solving court programs. Participation in treatment-based mental health court programs does not divest any public or private agency of its responsibility for a child or an adult, but enables these agencies to better meet their needs through shared responsibility and resources.

(2) Treatment-based mental health court programs may include pretrial intervention programs as provided in ss. 948.08, 948.16, and 985.345, postadjudicatory treatment-based mental health court programs as provided in ss. 948.01 and 948.06, and review of the status of compliance or noncompliance of sentenced defendants through a treatment-based mental health court program.

(3) Entry into any pretrial treatment-based mental health court program shall be voluntary.

(4)(a) Entry into any postadjudicatory treatment-based mental health court program as a condition of probation or community control pursuant to s. 948.01, or s. 948.06 must be based upon the sentencing court's assessment of the defendant's criminal history, mental health screening outcome, amenability to the services of the program, total sentence points, the recommendation of the state attorney and the victim, if any, and the defendant's agreement to enter the program.

(b) A defendant who is sentenced to a postadjudicatory mental health court program and who, while a mental health court participant is the subject of a violation of probation or

community control under s. 948.06 shall have the violation of probation or community control heard by the judge presiding over the postadjudicatory mental health court program. The judge shall dispose of any such violation, after a hearing on or admission of the violation, as he or she deems appropriate if the resulting sentence or conditions are lawful.

(5)(a) Contingent upon an annual appropriation by the Legislature, each judicial circuit shall establish, at a minimum, one coordinator position for the treatment-based mental health court program within the state courts system to coordinate the responsibilities of the participating agencies and service providers. Each coordinator shall provide direct support to the treatment-based mental health court program by providing coordination between the multidisciplinary team and the judiciary, providing case management, monitoring compliance of the participants in the treatment-based mental health court program with court requirements, and providing program evaluation and accountability.

(b) Each circuit shall report sufficient client-level and programmatic data to the Office of State Courts Administrator annually for purposes of program evaluation. Client-level data include primary offenses that resulted in the mental health court referral or sentence, treatment compliance, completion status and reasons for failure to complete, offenses committed during treatment and the sanctions imposed, frequency of court appearances, and units of service. Programmatic data include

referral and screening procedures, eligibility criteria, type and duration of treatment offered, and residential treatment resources.

(6) If a county chooses to fund a treatment-based mental health court program, the county must secure funding from sources other than the state for those costs not otherwise assumed by the state pursuant to s. 29.004. However, this does not preclude counties from using treatment and other service dollars provided through state executive branch agencies. Counties may provide, by interlocal agreement, for the collective funding of these programs.

(7) The chief judge of each judicial circuit may appoint an advisory committee for the treatment-based mental health court program. The committee shall be composed of the chief judge, or his or her designee, who shall serve as chair; the judge of the treatment-based mental health court program, if not otherwise designated by the chief judge as his or her designee; the state attorney, or his or her designee; the public defender, or his or her designee; the treatment-based mental health court program coordinators; community representatives; treatment representatives; and any other persons the chair finds are appropriate.

Section 3. Section 910.035, Florida Statutes, is amended to read:

910.035 Transfer from county for plea, ~~and~~ sentence, or participation in a problem-solving court.—

(1) INDICTMENT OR INFORMATION PENDING.—A defendant arrested or held in a county other than that in which an indictment or information is pending against him or her may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the indictment or information is pending, and to consent to disposition of the case in the county in which the defendant was arrested or is held, subject to the approval of the prosecuting attorney of the court in which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction for the county in which the defendant is held, and the prosecution shall continue in that county upon the information or indictment originally filed. In the event a fine is imposed upon the defendant in that county, two-thirds thereof shall be returned to the county in which the indictment or information was originally filed.

(2) INDICTMENT OR INFORMATION NOT PENDING.—A defendant arrested on a warrant issued upon a complaint in a county other than the county of arrest may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and to consent to disposition of the case in the county in which the defendant was arrested, subject to the approval of the prosecuting attorney of

the court in which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, and upon the filing of an information or the return of an indictment, the clerk of the court from which the warrant was issued shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction in the county in which the defendant was arrested, and the prosecution shall continue in that county upon the information or indictment originally filed.

(3) EFFECT OF NOT GUILTY PLEA.—If, after the proceeding has been transferred pursuant to subsection (1) or subsection (2), the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he or she wishes to plead guilty or nolo contendere shall not be used against the defendant.

(4) APPEARANCE IN RESPONSE TO A SUMMONS.—For the purpose of initiating a transfer under this section, a person who appears in response to a summons shall be treated as if he or she had been arrested on a warrant in the county of such appearance.

(5)(a) For purposes of this subsection, the term "problem-solving court" means a drug court pursuant to s. 948.01, s. 948.06, s. 948.08, s. 948.16, or s. 948.20; a military veterans and servicemembers court pursuant to s. 394.47891, s. 948.08, s.

948.16, or s. 948.21; a mental health court pursuant to s. 394.47892, s. 948.01, s. 948.06, s. 948.08, or s. 948.16, or a delinquency pretrial intervention court program pursuant to s. 985.345.

(b) Any person eligible for participation in a problem-solving ~~drug~~ court shall, upon request by the person or a court, ~~treatment program pursuant to s. 948.08(6) may be eligible to~~ have the case transferred to a county other than that in which the charge arose if the defendant agrees to the transfer and ~~the drug court program agrees and if the following conditions are met:~~

~~(a)~~ The authorized representative of the trial ~~drug~~ court ~~program of the county requesting to transfer the case shall~~ consults with the authorized representative of the problem-solving ~~drug~~ court ~~program~~ in the county to which transfer is desired, and both representatives agree to the transfer.

(c) ~~(b)~~ If all parties agree to the transfer as required by paragraph (b), ~~approval for transfer is received from all parties,~~ the trial court shall ~~accept a plea of nolo contendere and~~ enter a transfer order directing the clerk to transfer the case to the county that ~~which~~ has accepted the defendant into its problem-solving ~~drug~~ court ~~program~~.

(d)1. ~~(c)~~ When transferring a pretrial problem-solving court case, The transfer order shall include a copy of the probable cause affidavit; any charging documents in the case; all reports, witness statements, test results, evidence lists, and

other documents in the case; the defendant's mailing address and phone number; and the defendant's written consent to abide by the rules and procedures of the receiving county's problem-solving ~~drug~~ court ~~program~~.

2. When transferring a postadjudicatory problem-solving court case, the transfer order shall include a copy of the charging documents in the case; the final disposition; all reports, test results, and other documents in the case; the defendant's mailing address and phone number; and the defendant's written consent to abide by the rules and procedures of the receiving county's problem-solving court.

(e) ~~(d)~~ After the transfer takes place, the clerk shall set the matter for a hearing before the problem-solving ~~drug~~ court ~~program judge and the court shall~~ to ensure the defendant's entry into the problem-solving ~~drug~~ court ~~program~~.

(f) ~~(e)~~ Upon successful completion of the problem-solving ~~drug~~ court program, the jurisdiction to which the case has been transferred shall dispose of the case ~~pursuant to s. 948.08(6)~~. If the defendant does not complete the problem-solving ~~drug~~ court program successfully, the jurisdiction to which the case has been transferred shall dispose of the case within the guidelines of the Criminal Punishment Code.

Section 4. Subsection (5) of section 916.106, Florida Statutes, is amended to read:

916.106 Definitions.—For the purposes of this chapter, the term:

(5) "Court" means the circuit court and the county court as provided in s. 916.17.

Section 5. Subsection (1) of section 916.17, Florida Statutes, is amended to read:

916.17 Conditional release.—

(1) Except for an inmate currently serving a prison sentence, the committing court may order a conditional release of any defendant in lieu of an involuntary commitment to a facility pursuant to s. 916.13 or s. 916.15 based upon an approved plan for providing appropriate outpatient care and treatment. A county court may order the conditional release of a defendant for purposes of the provision of outpatient care and treatment only. Upon a recommendation that outpatient treatment of the defendant is appropriate, a written plan for outpatient treatment, including recommendations from qualified professionals, must be filed with the court, with copies to all parties. Such a plan may also be submitted by the defendant and filed with the court with copies to all parties. The plan shall include:

(a) Special provisions for residential care or adequate supervision of the defendant.

(b) Provisions for outpatient mental health services.

(c) If appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care.

In its order of conditional release, the court shall specify the conditions of release based upon the release plan and shall direct the appropriate agencies or persons to submit periodic reports to the court regarding the defendant's compliance with the conditions of the release and progress in treatment, with copies to all parties.

Section 6. Section 916.185, Florida Statutes, is created to read:

916.185 Forensic Hospital Diversion Pilot Program .—

(1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds that many jail inmates who have serious mental illnesses and who are committed to state forensic mental health treatment facilities for restoration of competency to proceed could be served more effectively and at less cost in community-based alternative programs. The Legislature further finds that many people who have serious mental illnesses and who have been discharged from state forensic mental health treatment facilities could avoid returning to the criminal justice and forensic mental health systems if they received specialized treatment in the community. Therefore, it is the intent of the Legislature to create the Forensic Hospital Diversion Pilot Program to serve offenders who have mental illnesses or co-occurring mental illnesses and substance use disorders and who are involved in or at risk of entering state forensic mental health treatment facilities, prisons, jails, or state civil mental health treatment facilities.

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

(a) "Best practices" means treatment services that incorporate the most effective and acceptable interventions available in the care and treatment of offenders who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(b) "Community forensic system" means the community mental health and substance use forensic treatment system, including the comprehensive set of services and supports provided to offenders involved in or at risk of becoming involved in the criminal justice system.

(c) "Evidence-based practices" means interventions and strategies that, based on the best available empirical research, demonstrate effective and efficient outcomes in the care and treatment of offenders who are diagnosed as having mental illnesses or co-occurring mental illnesses and substance use disorders.

(3) CREATION.—There is created a Forensic Hospital Diversion Pilot Program that will provide competency-restoration and community-reintegration services in either a locked residential treatment facility when appropriate, or a community-based facility based on considerations of public safety, the needs of the individual, and available resources.

(a) The department shall implement a Forensic Hospital Diversion Pilot Program modeled after the Miami-Dade Forensic Alternative Center, taking into account local needs and

resources, in Escambia County, in conjunction with the First Judicial Circuit in Escambia County; in Hillsborough County, in conjunction with the Thirteenth Judicial Circuit in Hillsborough County; and in Dade County, in conjunction with the Eleventh Judicial Circuit in Dade County.

(b) In creating and implementing the program, the department shall include a comprehensive continuum of care and services that use evidence-based practices and best practices to treat offenders who have mental health and co-occurring substance use disorders.

(c) The department and the corresponding judicial circuits shall implement this section within available resources. The department may reallocate resources from forensic mental health programs or other adult mental health programs serving offenders involved in the criminal justice system.

(4) ELIGIBILITY.—Participation in the Forensic Hospital Diversion Pilot Program is limited to offenders who:

(a) Are 18 years of age or older;

(b) Are charged with a felony of the second degree or a felony of the third degree;

(c) Do not have a significant history of violent criminal offenses;

(d) Are adjudicated incompetent to proceed to trial or not guilty by reason of insanity pursuant to this part;

(e) Meet public safety and treatment criteria established by the department for placement in a community setting; and

(f) Otherwise would be admitted to a state mental health treatment facility.

(5) TRAINING.—The Legislature encourages the Florida Supreme Court, in consultation and cooperation with the Florida Supreme Court Task Force on Substance Abuse and Mental Health Issues in the Courts, to develop educational training for judges in the pilot program areas which focuses on the community forensic system.

(6) RULEMAKING.—The department may adopt rules under ss. 120.536(1) and 120.54 to administer this section.

Section 7. Subsection (8) is added to section 948.01, Florida Statutes, to read:

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

(8)(a) Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2015, the sentencing court may place the defendant into a postadjudicatory treatment-based mental health court program if the offense is a nonviolent felony, the defendant is amenable to mental health treatment, including prescribed medications, and the defendant is otherwise qualified under s. 394.47892(4). The satisfactory completion of the program must be a condition of the defendant's probation or community control. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Defendants charged with

resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim has been given his or her right to provide testimony or written statement to the court as provided in s. 921.143.

(b) The defendant must be fully advised of the purpose of the program, and the defendant must agree to enter the program. The original sentencing court shall relinquish jurisdiction of the defendant's case to the postadjudicatory treatment-based mental health court program until the defendant is no longer active in the program, the case is returned to the sentencing court due to the defendant's termination from the program for failure to comply with the terms thereof, or the defendant's sentence is completed.

(c) The Department of Corrections is authorized to establish designated mental health probation officers to support individuals under supervision of the mental health court.

Section 8. Paragraph (j) is added to subsection (2) of section 948.06, Florida Statutes, to read:

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

(2)

(j) 1. Notwithstanding s. 921.0024 and effective for offenses committed on or after July 1, 2015, the court may order

the offender to successfully complete a postadjudicatory treatment-based mental health court program under s. 394.47892 or a military veterans and servicemembers court program under s. 394.47891 if:

a. The court finds or the offender admits that the offender has violated his or her community control or probation;

b. The underlying offense is a nonviolent felony. As used in this subsection, the term "nonviolent felony" means a third degree felony violation under chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08. Offenders charged with resisting an officer with violence under s. 843.01, battery on a law enforcement officer under s. 784.07, or aggravated assault may participate in the mental health court program if the court so orders after the victim has been given his or her right to provide testimony or written statement to the court as provided in s. 921.143;

c. The court determines that the offender is amenable to the services of a postadjudicatory treatment-based mental health court program or a military veterans and servicemembers court program;

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

e. The offender is otherwise qualified to participate in a postadjudicatory treatment-based mental health court program under s. 394.47892(3) or a military veterans and servicemembers court program under s. 394.47891.

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

Section 9. Subsection (8) is added and paragraph (a) of subsection (7) of section 948.08, Florida Statutes, is amended to read:

948.08 Pretrial intervention program.—

(7)(a) Notwithstanding any provision of this section, a person who is charged with a felony, other than a felony listed in s. 948.06(8)(c), and identified as a veteran, as defined in s. 1.01, including veterans who were discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, is eligible for voluntary admission into a pretrial veterans' treatment intervention program approved by the chief judge of the circuit, upon motion of either party or the court's own motion, except:

1. If a defendant was previously offered admission to a pretrial veterans' treatment intervention program at any time before trial and the defendant rejected that offer on the

record, the court may deny the defendant's admission to such a program.

2. If a defendant previously entered a court-ordered veterans' treatment program, the court may deny the defendant's admission into the pretrial veterans' treatment program.

(8)(a) Notwithstanding any provision of this section, a defendant identified as having a mental illness, and who has not been convicted of a felony and is charged with:

1. A nonviolent felony that includes a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;

2. Resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the defendant's participation;

3. Battery on a law enforcement officer under s. 784.07, if the law enforcement officer and state attorney consent to the defendant's participation; or

4. Aggravated assault where the victim and state attorney consent to the defendant's participation

is eligible for voluntary admission into a pretrial mental health court program, established pursuant to s. 394.47892, and approved by the chief judge of the circuit, for a period to be determined by the risk and needs assessment of the defendant, upon motion of either party or the court's own motion.

(b) At the end of the pretrial intervention period, the

court shall consider the recommendation of the treatment provider and the recommendation of the state attorney as to disposition of the pending charges. The court shall determine, by written finding, whether the defendant has successfully completed the pretrial intervention program. If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment, which may include mental health programs offered by licensed service providers as defined in s. 394.455 or order that the charges revert to normal channels for prosecution. The court shall dismiss the charges upon a finding that the defendant has successfully completed the pretrial intervention program.

Section 10. Section 948.16, Florida Statutes, is amended to read:

948.16 Misdemeanor pretrial substance abuse education and treatment intervention program; misdemeanor pretrial veterans' treatment intervention program; misdemeanor pretrial mental health court program.—

(1)(a) A person who is charged with a nonviolent, nontraffic-related misdemeanor and identified as having a substance abuse problem or who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under chapter 893, prostitution under s. 796.07, possession of alcohol while under 21 years of age under s. 562.111, or possession of a controlled substance without a valid prescription under s.

499.03, and who has not previously been convicted of a felony, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program established pursuant to s. 397.334, approved by the chief judge of the circuit, for a period based on the program requirements and the treatment plan for the offender, upon motion of either party or the court's own motion, except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

(b) While enrolled in a pretrial intervention program authorized by this section, the participant is subject to a coordinated strategy developed by a drug court team under s. 397.334(4). The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider as defined in s. 397.311 or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court. The coordinated strategy must

be provided in writing to the participant before the participant agrees to enter into a pretrial treatment-based drug court program or other pretrial intervention program. Any person whose charges are dismissed after successful completion of the treatment-based drug court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585.

(2)(a) A veteran, as defined in s. 1.01, or servicemember, <u>including veterans who were discharged or released under a general discharge,</u> as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, and who is charged with a misdemeanor is eligible for voluntary admission into a misdemeanor pretrial veterans' treatment intervention program approved by the chief judge of the circuit, for a period based on the program's requirements and the treatment plan for the offender, upon motion of either party or the court's own motion. However, the court may deny the defendant admission into a misdemeanor pretrial veterans' treatment intervention program if the defendant has previously entered a court-ordered veterans' treatment program.

(b) While enrolled in a pretrial intervention program authorized by this section, the participant shall be subject to a coordinated strategy developed by a veterans' treatment intervention team. The coordinated strategy should be modeled after the therapeutic jurisprudence principles and key

components in s. 397.334(4), with treatment specific to the needs of veterans and servicemembers. The coordinated strategy may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but need not be limited to, placement in a treatment program offered by a licensed service provider or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court. The coordinated strategy must be provided in writing to the participant before the participant agrees to enter into a misdemeanor pretrial veterans' treatment intervention program or other pretrial intervention program. Any person whose charges are dismissed after successful completion of the misdemeanor pretrial veterans' treatment intervention program, if otherwise eligible, may have his or her arrest record of the dismissed charges expunged under s. 943.0585.

(3) A defendant who is charged with a misdemeanor and identified as having a mental illness is eligible for voluntary admission into a misdemeanor pretrial mental health court program established pursuant to s. 394.47892, approved by the chief judge of the circuit, for a period to be determined by the risk and needs assessment of the defendant, upon motion of either party or the court's own motion.

(4) ~~(3)~~ At the end of the pretrial intervention period, the court shall consider the recommendation of the treatment program and the recommendation of the state attorney as to disposition

of the pending charges. The court shall determine, by written finding, whether the defendant successfully completed the pretrial intervention program. Notwithstanding the coordinated strategy developed by a drug court team pursuant to s. 397.334(4) or by the veterans' treatment intervention team, if the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or return the charges to the criminal docket for prosecution. The court shall dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.

(5) ~~(4)~~ Any public or private entity providing a pretrial substance abuse education and treatment program or mental health program under this section shall contract with the county or appropriate governmental entity. The terms of the contract shall include, but not be limited to, the requirements established for private entities under s. 948.15(3). This requirement does not apply to services provided by the Department of Veterans' Affairs or the United States Department of Veterans Affairs.

Section 11. Section 948.21, Florida Statutes, is amended to read:

948.21 Condition of probation or community control; military servicemembers and veterans.—

(1) Effective for a probationer or community controllee whose crime was committed on or after July 1, 2012, and who is a veteran, as defined in s. 1.01, or servicemember, as defined in

s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

(2) Effective for a probationer or community controllee whose crime was committed on or after July 1, 2015, and who is a veteran, as defined in s. 1.01, including veterans who were discharged or released under a general discharge, or servicemember, as defined in s. 250.01, who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, the court may, in addition to any other conditions imposed, impose a condition requiring the probationer or community controllee to participate in a treatment program capable of treating the probationer or community controllee's mental illness, traumatic brain injury, substance abuse disorder, or psychological problem.

(3) The court shall give preference to treatment programs for which the probationer or community controllee is eligible through the United States Department of Veterans Affairs or the Florida Department of Veterans' Affairs. The Department of Corrections is not required to spend state funds to implement

this section.

Section 12. Subsection (4) of section 985.345, Florida Statutes, is renumbered as subsection (7) and amended, and new subsections (4) through (6) are added to that section to read:

985.345 Delinquency pretrial intervention program.—

(4) Notwithstanding any provision of law to the contrary, a child is eligible for voluntary admission into a delinquency pretrial mental health court program, established pursuant to s. 394.47892, approved by the chief judge of the circuit, for a period based on the program requirements and the treatment services that are suitable for the child, upon motion of either party or the court's own motion if the child is charged with:

a. a misdemeanor;

b. a nonviolent felony; for purposes of this subsection, the term "nonviolent felony" means a third degree felony violation of chapter 810 or any other felony offense that is not a forcible felony as defined in s. 776.08;

c. resisting an officer with violence under s. 843.01, if the law enforcement officer and state attorney consent to the child's participation;

d. battery on a law enforcement officer under 784.07, if the law enforcement officer and state attorney consent to the child's participation; or

e. aggravated assault, if the victim and state attorney consent to the child's participation

and the child is identified as having a mental illness, and has not been previously adjudicated for a felony.

(5) At the end of the delinquency pretrial intervention period, the court shall consider the recommendation of the state attorney and the program administrator as to disposition of the pending charges. The court shall determine, by written finding, whether the child has successfully completed the delinquency pretrial intervention program. If the court finds that the child has not successfully completed the delinquency pretrial intervention program, the court may order the child to continue in an education, treatment, or monitoring program if resources and funding are available or order that the charges revert to normal channels for prosecution. The court may dismiss the charges upon a finding that the child has successfully completed the delinquency pretrial intervention program.

(6) Any child whose charges are dismissed after successful completion of the mental health court program, if otherwise eligible, may have his or her arrest record and plea of nolo contendere to the dismissed charges expunged under s. 943.0585.

(7) ~~(4)~~ Any entity, whether public or private, providing pretrial substance abuse education, treatment intervention, ~~and~~ a urine monitoring program, or a mental health program under this section must contract with the county or appropriate governmental entity, and the terms of the contract must include, but need not be limited to, the requirements established for private entities under s. 948.15(3). It is the intent of the

Legislature that public or private entities providing substance abuse education and treatment intervention programs involve the active participation of parents, schools, churches, businesses, law enforcement agencies, and the department or its contract providers.

Section 13. This act shall take effect July 1, 2015.