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# Judiciary Committee

**Thursday, March 26, 2015  
1:00 PM – 3:00 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 26, 2015 01:00 pm  
**End Date and Time:** Thursday, March 26, 2015 03:00 pm  
**Location:** Sumner Hall (404 HOB)  
**Duration:** 2.00 hrs

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

CS/CS/HB 5 Guardianship Proceedings by Justice Appropriations Subcommittee, Civil Justice Subcommittee, Passidomo, Rodríguez, J.  
CS/HB 7 Pub. Rec./Claim Settlement on Behalf of Minor or Ward by Government Operations Subcommittee, Passidomo, Rodríguez, J.  
CS/HB 133 Sexual Offenses by Civil Justice Subcommittee, Plasencia  
CS/HB 305 Unlawful Detention by a Transient Occupant by Civil Justice Subcommittee, Harrison  
CS/CS/HB 439 Department of Legal Affairs by Justice Appropriations Subcommittee, Criminal Justice Subcommittee, Eisnaugle  
CS/HB 465 Human Trafficking by Criminal Justice Subcommittee, Spano, Kerner  
HB 467 Pub. Rec./Human Trafficking Victims by Spano  
HB 469 Pub. Rec./Residential Facilities Serving Victims of Sexual Exploitation by Spano  
CS/CS/HB 531 Limited Liability Companies by Economic Development & Tourism Subcommittee, Civil Justice Subcommittee, McGhee, Spano  
HB 619 Service of Process by Rouson  
HB 625 Florida Civil Rights Act by Cortes, B., Berman  
CS/HB 921 Motor Vehicle Manufacturers, Factory Branches, Distributors, Importers, & Dealers by Business & Professions Subcommittee, Trujillo  
CS/HB 961 Electronic Noticing of Trust Accounts by Civil Justice Subcommittee, Broxson

**NOTICE FINALIZED on 03/24/2015 16:10 by Ingram.Michele**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 5 Guardianship Proceedings

**SPONSOR(S):** Justice Appropriations Subcommittee; Civil Justice Subcommittee; Passidomo; Rodriguez, J. and others

**TIED BILLS:** CS/HB 7      **IDEN./SIM. BILLS:** SB 366

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Robinson	Bond
2) Justice Appropriations Subcommittee	12 Y, 1 N, As CS	Schrader	Lloyd
3) Judiciary Committee		Robinson <i>TR</i>	Havlicak <i>RN</i>

### SUMMARY ANALYSIS

Guardianship is a concept whereby a "guardian" acts for another, called the "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary. Guardianships may be established for both adults and minors. The bill:

- Allows a court to refer contested guardianship matters to mediation or alternative dispute resolution;
- Allows the court to appoint the Office of Criminal Conflict and Civil Regional Counsel to act as a court monitor if the ward is indigent;
- Allows a court to authorize payments to experts and professionals acting on behalf of the guardianship without the need for expert testimony;
- Allows a court to waive appointment of a guardian ad litem in a guardianship case regarding the settlement of a claim by a minor;
- Requires notice to an alleged incapacitated person and his or her counsel of the appointment of an emergency temporary guardian unless such notice would cause the alleged incapacitated person harm;
- Allows a business entity that has met the registration requirements to act as guardian of a ward;
- Requires letters of guardianship to specify, where applicable, the authority of a health care surrogate;
- Prohibits preference to the emergency temporary guardian when selecting the permanent guardian;
- Requires appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian;
- Prohibits a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian;
- Requires the state to pay the fees of an examining committee in the event that the court finds that an adult is not incapacitated. In such case, if the court finds the petitioner acted in bad faith, the court may require the petitioner to reimburse these fees;
- Prohibits abuse, exploitation, or neglect of a ward by a guardian;
- Creates additional duties of a guardian;
- Requires that annual guardianship plans be filed prior to the time that they take effect; and
- Provides the legal standard for restoration to capacity and requires a court to give priority to hearings thereon.

The bill appears to have a minimal negative fiscal impact on state government expenditures. The bill does not appear to have a fiscal impact on local governments.

The bill takes effect upon becoming law and applies to all pending proceedings.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0005c.JDC.DOCX

DATE: 3/24/2015

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Guardianship is a concept whereby a “guardian,” acts for another, called the “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property (or a combination of both), which may be limited or plenary. Guardianships may be established for both adults and minors. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is mentally competent this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of an examination committee.

#### **Fiduciary Duties of a Guardian**

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship<sup>1</sup>. A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.<sup>2</sup> The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>3</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner. Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward and ensuring that the ward is personally visited by the guardian periodically to assess the ward’s overall physical and social health. A guardian is also under a duty to file an initial guardianship report,<sup>4</sup> an annual guardianship report<sup>5</sup>, and an annual accounting of the ward’s property.<sup>6</sup> Such reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.<sup>7</sup>

At the heart of a court’s interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S., explicitly states that the “fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.” Section 744.446(4), F.S., also provides that in the event of “a breach by the guardian of the guardian’s fiduciary duty, the court shall take those necessary actions to protect the ward and the ward’s assets.”

One of the tools available to a court when the breach of a guardian’s fiduciary duty is alleged or suspected is the appointment of a court monitor under s. 744.107, F.S., or an emergency court monitor under s. 744.1075, F.S., if the court finds there is imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward’s property is in danger of being wasted, misappropriated, or lost. A monitor may investigate allegations of wrongdoing, seek information,

<sup>1</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

<sup>2</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>3</sup> *Capital Bank v. MVP, Inc*, 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

<sup>4</sup> s. 744.362, F.S.

<sup>5</sup> s. 744.367, F.S.

<sup>6</sup> s. 744.3678, F.S.

<sup>7</sup> s. 744.368, F.S.

examine documents, and interview the ward. A monitor must report his or her findings to the court for judicial action.<sup>8</sup> The court may appoint any person as monitor except a family member of the ward or any person with a personal interest in the proceedings.<sup>9</sup>

In addition to action by the court in response to a report from a court monitor finding fraud, including removal as guardian,<sup>10</sup> guardians may be subject to criminal penalties under s. 825.103(1)(c), F.S., for breaching certain fiduciary duties to the ward, including committing fraud in obtaining their appointments, abusing their powers, or wasting, embezzling, or intentionally mismanaging the assets of the ward.

The public is also required to report abuse, neglect, or exploitation of vulnerable adults to the Department of Children and Families by s. 415.1034, F.S.

### **Effect of Proposed Changes - Fiduciary Duties of a Guardian**

The bill amends s. 744.107, F.S. and s. 744.1075, F.S. to authorize a court to appoint the Office of Criminal Conflict and Civil Regional Counsel as a court monitor for an indigent ward.<sup>11</sup> The bill would serve to codify current practice in that the Office of Criminal Conflict and Civil Regional Counsel are currently providing this service.

The bill creates s. 744.359, F.S., to provide that a guardian may not abuse, neglect, or exploit a ward under the guardian's care. Exploitation is described as any action whereby a guardian commits fraud in obtaining appointment as a guardian, abuses his or her power as guardian, or wastes, embezzles, or intentionally mismanages the ward's assets. Any person believing that a guardian is abusing, neglecting, or exploiting a ward must report the incident to the central abuse hotline of the Department of Children and Families. The court is directed to interpret s.744.359, F.S. in conformance with s. 825.103, F.S., which creates criminal penalties related to the exploitation of an elderly person or disabled adult.

The bill amends s. 744.361(1), F.S., to confirm and codify pre-existing Florida law that a guardian is a fiduciary with respect to a ward under the guardian's care. The bill further amends s. 744.361, F.S., to impose additional statutory duties upon a guardian as a fiduciary:

- To act only within the scope of the authority granted to the guardian;
- To act in good faith;
- To act in the ward's best interests; and
- To keep clear, distinct, and accurate records.<sup>12</sup>

Specific to guardians of the person, the bill creates the duty of a guardian to:

- Consider the expressed desires of the ward;
- Allow the ward to maintain contact with family and friends except where contact may harm the ward (the court may review such decisions upon petition by an interested person);
- Not restrict the physical liberty of the ward more than necessary;
- Assist the ward in developing or regaining capacity if medically possible;

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<sup>8</sup> s. 744.107(2), F.S.

<sup>9</sup> s. 744.107(1), F.S.

<sup>10</sup> s. 744.474, F.S.

<sup>11</sup> The Offices of Criminal Conflict and Civil Regional Counsel are created at s. 27.511, F.S. They provide representation to persons entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law in criminal cases where Office of the Public Defender has a conflict of interest as well as in certain civil proceedings, including the appointment of counsel for an indigent alleged incapacitated person under ch. 744, F.S.

<sup>12</sup> The language here is modeled after that creating a similar duty in the Florida Trust Code at s. 736.0810, F.S.

- Notify the court if the guardian believes that the ward may have capacity to exercise one or more of the ward's removed rights;
- Make provisions for medical services and, to the extent possible, acquire a clear understanding of the risks and benefits of a recommended course of treatment;
- Evaluate the ward's medical and health care options, financial resources, and desires in making decisions regarding the ward's residence; and
- Advocate for the ward in institutional and residential settings.

### **Guardianship Plan**

In order that the court may monitor and supervise a guardian's compliance as a fiduciary, a guardian must file reports and plans. A guardian of the person must file an annual plan. If the court requires calendar year planning, the plan must be filed by April 1 of the plan year. Otherwise, the plan must be filed within 90 days after the anniversary month that the letters of guardianship were filed.<sup>13</sup> An approved plan is a court order giving the guardian power to act within its terms and limits the powers of the guardian to such terms.<sup>14</sup>

Because proposed plans are filed within the term in which they are effective, it is unclear which plan controls. Also unclear is the effect of failure to file or what is the effect of the court failing to timely review and approve a plan.

### **Effect of Proposed Changes - Guardianship Plan**

The bill amends s. 744.367, F.S. to revise when a guardian of the person must file an annual guardianship plan. Where a calendar year filing is required, the plan must be filed between September 1 and December 1 of the previous year. Otherwise, the plan must be filed between 60 and 90 days before the last day of the anniversary month.

The bill amends s. 744.369, F.S. to provide that a guardian may continue to act under a previous year's annual guardianship plan until the next year's annual guardianship plan has been approved by the court unless otherwise ordered by the court.

### **Emergency Temporary Guardianship**

A guardianship is initiated when a competent adult, who can attest as to why he or she believes a person may be incapacitated, files with a court a petition to determine another person's incapacity.<sup>15</sup> Upon the filing of the petition, the court must appoint an examining committee of relevant medical professionals to conduct a comprehensive examination of the alleged incapacitated person, review the reports of the examining committee, and hold an adjudicatory hearing prior to finding that a person is incapacitated. Accordingly, establishing a guardianship can take several weeks.<sup>16</sup> However, where there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken, the court may appoint an emergency temporary guardian any time after the filing of the petition to determine incapacity.<sup>17</sup> This may occur on the court's own motion or in response to a petition for an emergency temporary guardian. A court may also appoint an emergency temporary guardian if a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine capacity.<sup>18</sup>

<sup>13</sup> s. 744.367(1), F.S.

<sup>14</sup> s. 744.369(8), F.S.

<sup>15</sup> s. 744.3201, F.S.

<sup>16</sup> Section 744.331, F.S. provides for up to 34 days, or longer upon a showing of good cause, for a court to hold an adjudicatory hearing on a petition to determine incapacity.

<sup>17</sup> s. 744.3031, F.S.

<sup>18</sup> s. 744.344(4), F.S.

Although the alleged incapacitated person and his or her attorney are entitled to notice and copies of the petition to determine incapacity and any subsequent petition for the appointment of a permanent guardian<sup>19</sup>, s. 744.3031, F.S., which governs the appointment of an emergency temporary guardian, is silent regarding notice to the alleged incapacitated person and his or her counsel of the petition to appoint an emergency temporary guardian and any hearing thereon. Practitioners and members of the public have reported that emergency temporary guardians are often appointed without notice to the alleged incapacitated person.

### **Effect of Proposed Changes - Emergency Temporary Guardianship**

The bill amends s. 744.344(4), F.S., to allow for the appointment of an emergency temporary guardian if a petition for appointment of a guardian has not been ruled upon at the time of the hearing on the petition to determine incapacity.

The bill amends s. 744.3031, F.S., to require that notice of the filing of a petition for appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated person, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing unless the petitioner can demonstrate that substantial harm to the alleged incapacitated person would occur if notice was given.

### **Costs and Fees of Examining Committee**

When a petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician.<sup>20</sup> The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training or education may, in the court's discretion, "advise the court in the form of an expert opinion."<sup>21</sup>

Each member of the examining committee is charged with examining the alleged incapacitated person, making a comprehensive assessment, and rendering to the court a professional opinion as to a diagnosis, a prognosis and a recommended course of treatment. This evaluation includes an assessment of the capacity of the individual to exercise enumerated rights in s. 744.3215, F.S.

Compensation of examining committee members is governed by s. 744.331(7), F.S., which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent, "by the state."<sup>22</sup> If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.<sup>23</sup>

The statute is silent, however, with respect to how the examining committee members are to be compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

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<sup>19</sup> s. 744.331(1), F.S.

<sup>20</sup> s. 744.331(3)(a), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> s. 744.331(7)(b), F.S.

<sup>23</sup> *Id.*



This “gap” in s. 744.331(7), F.S., as to who is responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the Legislature.<sup>24</sup>

### **Effect of Proposed Changes - Costs and Fees of Examining Committee**

This bill amends s. 744.331(7)(c), F.S., to provide that if the petition is dismissed or denied, the fees of the examining committee are paid upon court order as “expert witness” fees under s. 29.004(6), F.S. This change implements the provisions of s. 29.004(6), F.S., which awards fees to court appointed experts generally, and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by s. 744.331, F.S., without incentive to find incompetency. The bill also provides that, where the petitioner was found to have filed a petition in bad faith and the state has paid the members of the examining committee, the petitioner must reimburse the state for fees paid.

### **Appointing a Guardian**

An order appointing a guardian indicates the nature of the guardianship as either plenary or limited and the specific powers and duties of the guardian.<sup>25</sup> A plenary guardian exercises all delegable rights<sup>26</sup> and powers of the ward, while a limited guardian may exercise only the rights and powers of the ward specifically designated by the court order.<sup>27</sup>

A court may appoint any person qualified under s. 744.309, F.S., to serve as guardian of the ward. However, in appointing a guardian, the court is required to give preference to certain qualified persons.<sup>28</sup>

The court issues letters of guardianship upon the entry of the order appointing a guardian. Letters evidence the guardian’s authority to act on behalf of the ward to the public, similar to letters of administration in probate proceedings. Letters of guardianship also state the nature of the guardianship as plenary or limited, but only specify the powers and duties of the guardian if the guardianship is limited.<sup>29</sup> Additionally, a court must address the authority of a guardian to act with regard to a previously executed advance directive in the letters of guardianship for a limited guardianship.<sup>30</sup>

### **Effect of Proposed Changes**

The bill amends s. 744.309 F.S., allowing a business entity that has met the registration requirements in s. 744.1083 F.S. to act as a guardian of a ward.

The bill amends s. 744.312, F.S., to provide that a court may not give the emergency temporary guardian preference in appointment of a permanent guardian. Additionally, the bill requires a court to appointment professional guardians on a rotating basis; unless the court finds that the special requirements of the guardianship require appointment of a specific professional guardian. Also, a court may not appointment an emergency temporary guardian who is a professional guardian to be the permanent guardian, unless such professional guardian had been designated as a standby guardian or

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<sup>24</sup> See *Faulkner v. Faulkner*, 65 So. 3d 1167 (Fla. 1st DCA 2011); *Levine v. Levine*, 4 So. 3d 730 (Fla. 5th DCA 2009); and *Ehrlich v. Severinson*, 985 So. 2d 639 (Fla. 4th DCA 2008).

<sup>25</sup> s. 744.344(1), F.S.

<sup>26</sup> The delegable rights of a ward include the right to contract, to sue and defend lawsuits, to apply for government benefits, to manage property or to make any gift or disposition of property, to determine his or her residence, to consent to medical and mental health treatment, and to make decisions about his or her social environment or other social aspects of his or her life. s. 744.3215(3), F.S.

<sup>27</sup> s. 744.102(9), F.S.

<sup>28</sup> s. 744.312, F.S.

<sup>29</sup> s. 744.345, F.S.

<sup>30</sup> *Id.*

preneed guardian<sup>31</sup> or the court makes specific written findings that such professional guardian meets special requirements of the guardianship.

The bill amends ss. 744.3115 and 744.345, F.S., to provide that the court must specify in any order appointing a guardian of the person and in all letters of guardianship what authority the guardian may exercise with regard to the ward's health care decisions versus what authority, if any, a health care surrogate previously designated by the ward may continue to exercise.

The bill amends s. 744.331(6), F.S., to require that a court consider the incapacitated person's unique needs and abilities when determining what rights should be removed in a guardianship proceeding. It further requires that the court only remove such rights which the alleged incapacitated person does not have the legal capacity to exercise.

### **Costs and Fees Associated with Guardianship Administration**

Section 744.108, F.S., governs awards of compensation to a guardian or attorney in connection with a guardianship. It provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward."<sup>32</sup> Similarly, s. 744.311(7), F.S.,<sup>33</sup> provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

Section 744.108(8), F.S., provides that fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>34</sup> It is unclear whether the scope of this subsection covers all requests for attorney's fees or is limited to only fees for the guardian's attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such as court-appointed counsel for the ward, is entitled to recover attorney fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, F.S., is silent on the subject. Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney's fee unless a statute dispenses with that requirement.<sup>35</sup> If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney's fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian's fees or attorney's fees adds a layer of costs that deplete the ward's estate. Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those cases where expert testimony would be necessary, the interested party may present such testimony.

### **Effect of Proposed Changes - Costs and Fees Associated with Guardianship Administration**

The bill adds subsection (9) to s. 744.108, F.S., dispensing with any requirement for expert testimony to support an award of fees unless requested. Expert testimony may be offered at the option of either

<sup>31</sup> A standby guardian is a guardian selected by the natural guardians (primarily parents) of a minor child in anticipation of the future need for a guardian of the minor. See s. 744.304, F.S. A preneed guardian is a guardian nominated by a competent adult while the adult is still competent, in anticipation of a future guardianship. See s. 744.3045, F.S.

<sup>32</sup> s. 744.108(1), F.S.

<sup>33</sup> This section provides that an attorney will be provided for the alleged incompetent.

<sup>34</sup> s. 744.108(8), F.S.

<sup>35</sup> See *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So. 2d 1044 (Fla. 4th DCA 1989); *Estate of Cordiner v. Evans*, 497 So. 2d 920 (Fla. 2d DCA 1986); *Clark v. Squire, Sanders & Dempsey*, 495 So. 2d 264 (Fla. 3d DCA 1986).

party after giving notice to interested persons. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.<sup>36</sup>

The bill amends s. 744.108(8), F.S., to provide that the court may award attorneys' fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel.

### **Alternative Dispute Resolution**

Disputes may arise in guardianship proceedings regarding the extent of the guardianship (limited or plenary), guardianship care plans, the ward's right to choose a guardian, real estate and property sale and division issues, methods of accounting for finances, use of funds, medical care, the ward's right to travel and manage affairs, whether to use independent care professionals, less restrictive alternatives for the ward, visitation, and issues involving respect among family members and care providers. Such disputes are litigated within the guardianship proceeding which burden judicial calendars, delay resolution of critical guardianship issues, and increase the cost of the guardianship to wards and family members.

Alternative dispute resolution ("ADR") is a term that refers broadly to many different methods of settling disputes outside of litigation. ADR typically includes negotiation, conciliation, mediation, and arbitration. Mediation is an alternative to judicial action whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.<sup>37</sup> Courts are required to refer certain cases to mediation under s. 44.102, F.S. Although the statute does not specifically provide for guardianship mediation, courts have the general discretion to refer to mediation all or any part of a filed civil action for which mediation is not required under s. 44.102, F.S.

Florida Probate Rules also allow the referral of adversarial matters to mediation.<sup>38</sup> However, because only proceedings to remove a guardian or surcharge a guardian are adversarial, it is unclear whether the types of disputes described above may be referred to mediation.

### **Effect of Proposed Changes - Alternative Dispute Resolution**

The bill creates s. 744.1065, F.S. to authorize a court, upon its own motion or the motion of an interested person, to refer a guardianship matter under ch. 744, F.S., to alternative dispute resolution, including mediation. Alternative dispute resolution may only be ordered if it is in the best interest of the alleged incapacitated person, ward or minor.

### **Restoration to Capacity**

A ward has the right to be restored to capacity at the earliest possible time.<sup>39</sup> Section 744.464, F.S., describes the legal procedure for restoration to capacity in Florida. The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed, but the statute is silent regarding the evidentiary standard used to determine restoration to capacity. In the adjudicatory hearing on a petition alleging incapacity, the petitioner must establish the partial or total incapacity of the person by clear and convincing evidence.<sup>40</sup>

<sup>36</sup> This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.

<sup>37</sup> s. 44.1011, F.S.

<sup>38</sup> Florida Rules of Civil Procedure govern an adversary proceeding under the Florida Probate Rules. Fla. Prob. R. 5.025.; See also Fla. R. Civ. P. 1.700(a): "The presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration."

<sup>39</sup> s. 744.3215(1)(c), F.S.

<sup>40</sup> Section 744.331(5)(c), F.S. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the

However, a circuit court case<sup>41</sup>, suggests that the standard for restoration to capacity is a preponderance of evidence.<sup>42</sup> Without clear statutory guidance, uncertainty remains in the law regarding the proper evidentiary standard in restoration to capacity proceedings.

### **Effect of Proposed Changes - Restoration to Capacity**

The bill amends s. 744.464, F.S., to establish a “preponderance of the evidence” burden of proof for the restoration of an incapacitated person’s rights. The bill also requires that a court make specific findings of fact regarding competency and that a court to give priority to any suggestion of capacity and advance such cause on the judicial calendar.

### **Claims of Minors**

Section 744.3025(1)(a), F.S., provides that a court may appoint a guardian ad litem before approving a settlement of a minor’s claim in any case in which the gross settlement of the claim exceeds \$15,000.<sup>43</sup> The statute is silent as to the specific criteria to be utilized by the court in its determination of the need for the appointment of a guardian ad litem.

### **Effect of Proposed Changes - Claims of Minors**

The bill amends s. 744.3025(1)(a), F.S., to provide that the court may appoint a guardian ad litem only “if the court believes that a guardian ad litem is necessary to protect the minor’s interest.”

## **B. SECTION DIRECTORY:**

Section 1 creates s. 744.1065, F.S., regarding mediation and alternative dispute resolution.

Section 2 amends s. 744.107, F.S., regarding court monitors.

Section 3 amends s. 744.1075, F.S., regarding emergency court monitors.

Section 4 amends s. 744.108, F.S., regarding guardian and attorney fees and expenses.

Section 5 amends s. 744.3025, F.S., regarding claims of minors.

Section 6 amends s. 744.3031, F.S., regarding emergency temporary guardianship.

Section 7 amends s. 744.309, F.S., regarding business entity acting as a guardian.

Section 8 amends s. 744.3115, F.S., regarding advance directives for health care.

Section 9 amends s. 744.312, F.S., regarding considerations in the appointment of a guardian.

Section 10 amends s. 744.331, F.S., regarding procedures to determine incapacity.

Section 11 amends s. 744.344, F.S., regarding the order of appointment of a guardian.

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witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Inquiry Concerning a Judge*, 645 So. 2d 398, 404 (Fla.1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

<sup>41</sup> *In re Guardianship of Branch*, 10 FLW Supp. 23, 25 (2nd Cir. 2002).

<sup>42</sup> A preponderance of the evidence is the greater weight of the evidence or evidence that more likely than not tends to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n. 1 (Fla. 2000).

<sup>43</sup> Under current law, parents as natural guardians may settle a claim of less than \$15,000 without appointment of a guardian ad litem. ss. 744.301 and 744.3025, F.S. These settlements are typically related to a personal injury case.

Section 12 amends s. 744.345, F.S., regarding letters of guardianship.

Section 13 creates s. 744.359, F.S., regarding abuse, neglect, or exploitation by a guardian.

Section 14 amends s. 744.361, F.S., regarding the powers and duties of a guardian.

Section 15 amends s. 744.367, F.S., regarding the duty to file the annual guardianship report.

Section 16 amends s. 744.369, F.S., regarding judicial review of guardianship reports.

Section 17 amends s. 744.3715, F.S., regarding petition of guardian's failure to comply with duties.

Section 18 amends s. 744.464, F.S., regarding restoration to capacity.

Section 19 provides that the bill applies to all guardianship proceedings pending on the effective date.

Section 20 provides an effective date of upon becoming a law.

## 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. However, if the court finds a petition to determine incapacity has been filed in bad faith the petitioner will be assessed such fees reimbursable to the State Courts System.

#### 2. Expenditures:

In part, this bill provides that if a petition to determine incapacity is dismissed, the guardianship examining committee must be paid from state funds as court-appointed expert witnesses. This requirement is likely to create an insignificant fiscal impact on state expenditures. The Real Property, Probate, and Trust Law Section of the Florida Bar reports that compensation awarded to an examining committee is modest, generally \$600 or less per appointment. A finding that an alleged incapacitated person is competent is uncommon and the state currently pays the examining committee fees for indigent cases dismissed before hearing, so the provision would affect only payment of examining committee fees in the cases of non-indigent persons. The data on filings addressed in the bill fall under the general title of Guardianship;<sup>44</sup> the total number of statewide Guardianship filings dismissed before hearing in Fiscal Year 2013-14 was 629. The bill addresses a small subset of the Guardianship filings, specifically the dismissal of petitions to determine incapacity. An informal survey conducted of a sample of judicial circuits did not indicate that a significant number of petitions to determine incapacity (competency cases) are dismissed before hearing. Of the competency cases dismissed before hearing a percentage were indigent filings, and an indeterminate amount were filed in bad faith in which costs and attorney fees will be assessed against the petitioner and the petitioner will be required to reimburse the State Courts System for amounts paid to the examining committee. Additionally, some circuits are already paying examining committee fees in situations where the alleged incapacitated person is not indigent and a good faith petition is dismissed.

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<sup>44</sup> Collected "Guardianship" data includes all matters relating to determination of status; contracts and conveyances of incompetents; maintenance custody of wards and their property interests; control and restoration of rights; appointment and removal of guardians pursuant to ch. 744, F.S.; appointment of guardian advocates for individuals with developmental disabilities pursuant to s. 393.12, F.S., and actions to remove the disabilities of non-age minors pursuant to ss. 743.08 and 743.09, F.S.

**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:**

None.

**D. FISCAL COMMENTS:**

The provisions of the bill that lessen the need for expert testimony regarding fees may lower the cost to individuals for maintenance of a guardianship case. In the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

The provision in this bill regarding mediation and alternative dispute resolution may lessen the costs to individuals of resolving disputed issues in guardianship proceedings.

**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:**

Section 2 and 3 of the bill provides that the Office of Criminal Conflict and Civil Regional Counsel ("office") may be appointed as a court monitor if the ward is indigent. Current law provides that the same office may be appointed as an attorney for an alleged incapacitated person<sup>45</sup>. Where the office had been previously appointed to represent the ward when the ward was an alleged incapacitated person, it is possible that the second appointment as monitor, while similar in nature (both appointments are for the protection of the ward), may create a potential conflict of interest that would require the office to decline.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 22, 2015, the Civil Justice Subcommittee adopted six amendments to a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute passed by the subcommittee differs from the bill as filed by:

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<sup>45</sup> s. 744.331(2)(a), F.S.  
STORAGE NAME: h0005c.JDC.DOCX  
DATE: 3/24/2015

- Authorizing a court to refer disputed guardianship matters under ch. 744, F.S. to mediation and alternative dispute resolution.
- Authorizing a court to appoint the office of criminal conflict and civil regional counsel as a court monitor if a ward is indigent.
- Specifying the time of service for notice of the filing of a petition to appoint an emergency temporary guardian and the hearing thereon, but authorizing a court to omit such notice if the notice would cause substantial harm to the incapacitated person.
- Requiring appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian.
- Prohibiting a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian.
- Requiring that proposed s. 744.359, F.S., which prohibits the abuse, neglect, or exploitation of a ward by a guardian, be interpreted in conformance with s. 825.103, F.S. Section 825.103, F.S. is a criminal law that prohibits the exploitation of an elderly person or disabled adult.
- Authorizing a court to review decisions of a guardian regarding visitation of the ward by family and friends.
- Requiring a court to give priority to a suggestion of capacity.
- Providing that the bill applies to all pending proceedings.

On February 17, 2015, the Justice Appropriations Subcommittee adopted five amendments to the committee substitute and reported the bill favorably as amended. The committee substitute passed by the subcommittee differs from the bill as filed by:

- Amending s. 744.108 F.S., providing that expert witness fees are recoverable by the prevailing interested person.
- Authorizing a business entity that has met the registration requirements in s. 744.1083 F.S., to be qualified to act as guardian of a ward.
- Clarifying limitation where an interested party objects to appointment of the emergency temporary guardian as a permanent guardian, excluding standby guardian and preneed guardian.
- Requiring the court to make specific findings of fact that justify an appointment of a professional guardian with a special talent or specific prior experience without reference to the rotation.
- Clarifying reimbursement of fees if case is dismissed or denied.
- Authorizing an interested person, including the ward to petition the court when a guardian has denied visitation between the ward and his or her relatives in violation of s. 744.361(13) F.S.

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

1                                   A bill to be entitled  
2           An act relating to guardianship proceedings; creating  
3           s. 744.1065, F.S.; authorizing a court to refer  
4           guardianship matters to mediation or alternative  
5           dispute resolution under certain circumstances;  
6           amending ss. 744.107 and 744.1075, F.S.; authorizing a  
7           court to appoint the office of criminal conflict and  
8           civil regional counsel as a court monitor in  
9           guardianship proceedings; amending s. 744.108, F.S.;  
10          providing that fees and costs incurred by an attorney  
11          who has rendered services to a ward in compensation  
12          proceedings are payable from guardianship assets;  
13          providing that expert testimony is not required in  
14          proceedings to determine compensation for an attorney  
15          or guardian; requiring a person offering expert  
16          testimony to provide notice to interested persons;  
17          providing that expert witness fees are recoverable by  
18          the prevailing interested person; amending s.  
19          744.3025, F.S.; providing that a court may appoint a  
20          guardian ad litem to represent a minor if necessary to  
21          protect the minor's interest in a settlement;  
22          providing that a settlement of a minor's claim is  
23          subject to certain confidentiality provisions;  
24          amending s. 744.3031, F.S.; requiring notification of  
25          an alleged incapacitated person and such person's  
26          attorney of a petition for appointment of an emergency



27 temporary guardian before a hearing on the petition  
 28 commences; amending s. 744.309, F.S.; providing that a  
 29 business entity may act as guardian of a person;  
 30 amending s. 744.3115, F.S.; directing the court to  
 31 specify authority for health care decisions with  
 32 respect to a ward's advance directive; amending s.  
 33 744.312, F.S.; prohibiting a court from giving  
 34 preference to the appointment of certain persons as  
 35 guardians; providing requirements for the appointment  
 36 of professional guardians; amending s. 744.331, F.S.;  
 37 directing the court to consider certain factors when  
 38 determining incapacity; requiring that the examining  
 39 committee be paid from state funds as court-appointed  
 40 expert witnesses if a petition for incapacity is  
 41 dismissed; requiring that a petitioner reimburse the  
 42 state for such expert witness fees if the court finds  
 43 the petition to have been filed in bad faith; amending  
 44 s. 744.344, F.S.; providing conditions under which the  
 45 court is authorized to appoint an emergency temporary  
 46 guardian; amending s. 744.345, F.S.; revising  
 47 provisions relating to letters of guardianship;  
 48 creating s. 744.359, F.S.; prohibiting abuse, neglect,  
 49 or exploitation of a ward by a guardian; requiring  
 50 reporting thereof to the Department of Children and  
 51 Families central abuse hotline; providing for  
 52 interpretation; amending s. 744.361, F.S.; providing

53 additional powers and duties of a guardian; amending  
 54 s. 744.367, F.S.; revising the period during which a  
 55 guardian must file an annual guardianship plan with  
 56 the court; amending s. 744.369, F.S.; providing for  
 57 the continuance of a guardian's authority to act under  
 58 an expired annual report under certain circumstances;  
 59 amending s. 744.3715, F.S.; providing that an  
 60 interested party may petition the court regarding a  
 61 guardian's failure to comply with the duties of a  
 62 guardian; amending s. 744.464, F.S.; establishing the  
 63 burden of proof for determining restoration of  
 64 capacity of a ward in pending guardianship cases;  
 65 requiring a court to advance such cases on the  
 66 calendar; providing applicability; providing an  
 67 effective date.

68

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

70

71 Section 1. Section 744.1065, Florida Statutes, is created  
 72 to read:

73 744.1065 Mediation; alternative dispute resolution.—At any  
 74 time, the court may, upon its own motion or the motion of an  
 75 interested person, refer a matter under the jurisdiction of this  
 76 chapter to mediation or alternative dispute resolution if the  
 77 court finds that mediation or alternative dispute resolution is  
 78 in the best interests of the alleged incapacitated person, ward,

79 | or minor.

80 | Section 2. Subsection (5) is added to section 744.107,  
81 | Florida Statutes, to read:

82 | 744.107 Court monitors.—

83 | (5) The court may appoint the office of criminal conflict  
84 | and civil regional counsel as monitor if the ward is indigent.

85 | Section 3. Subsection (6) is added to section 744.1075,  
86 | Florida Statutes, to read:

87 | 744.1075 Emergency court monitor.—

88 | (6) The court may appoint the office of criminal conflict  
89 | and civil regional counsel as monitor if the ward is indigent.

90 | Section 4. Subsections (5) and (8) of section 744.108,  
91 | Florida Statutes, are amended, and subsection (9) is added to  
92 | that section, to read:

93 | 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees  
94 | and expenses.—

95 | (5) All petitions for guardian ~~guardian's~~ and attorney  
96 | ~~attorney's~~ fees and expenses must be accompanied by an itemized  
97 | description of the services performed for the fees and expenses  
98 | sought to be recovered.

99 | (8) When court proceedings are instituted to review or  
100 | determine a guardian's or an attorney's fees under subsection  
101 | (2), such proceedings are part of the guardianship  
102 | administration process and the costs, including costs and  
103 | attorney fees for the guardian's attorney, an attorney appointed  
104 | under s. 744.331(2), or an attorney who has rendered services to

105 | the ward, shall be determined by the court and paid from the  
 106 | assets of the guardianship estate unless the court finds the  
 107 | requested compensation under subsection (2) to be substantially  
 108 | unreasonable.

109 | (9) The court may determine that a request for  
 110 | compensation by the guardian, the guardian's attorney, a person  
 111 | employed by the guardian, an attorney appointed under s.  
 112 | 744.331(2), or an attorney who has rendered services to the  
 113 | ward, is reasonable without receiving expert testimony. A person  
 114 | or party may offer expert testimony for or against a request for  
 115 | compensation after giving notice to interested persons.  
 116 | Reasonable expert witness fees shall be awarded by the court and  
 117 | paid from the assets of the guardianship estate to the  
 118 | prevailing interested person.

119 | Section 5. Section 744.3025, Florida Statutes, is amended  
 120 | to read:

121 | 744.3025 Claims of minors.—

122 | (1)(a) The court may appoint a guardian ad litem to  
 123 | represent the minor's interest before approving a settlement of  
 124 | the minor's portion of the claim in a ~~any~~ case in which a minor  
 125 | has a claim for personal injury, property damage, wrongful  
 126 | death, or other cause of action in which the gross settlement of  
 127 | the claim exceeds \$15,000 if the court believes a guardian ad  
 128 | litem is necessary to protect the minor's interest.

129 | (b) Except as provided in paragraph (e), the court shall  
 130 | appoint a guardian ad litem to represent the minor's interest

131 before approving a settlement of the minor's claim in a ~~any~~ case  
 132 in which the gross settlement involving a minor equals or  
 133 exceeds \$50,000.

134 (c) The appointment of the guardian ad litem must be  
 135 without the necessity of bond or notice.

136 (d) The duty of the guardian ad litem is to protect the  
 137 minor's interests as described in the Florida Probate Rules.

138 (e) A court need not appoint a guardian ad litem for the  
 139 minor if a guardian of the minor has previously been appointed  
 140 and that guardian has no potential adverse interest to the  
 141 minor. ~~A court may appoint a guardian ad litem if the court  
 142 believes a guardian ad litem is necessary to protect the  
 143 interests of the minor.~~

144 (2) Unless waived, the court shall award reasonable fees  
 145 and costs to the guardian ad litem to be paid out of the gross  
 146 proceeds of the settlement.

147 (3) A settlement of a claim pursuant to this section is  
 148 subject to the confidentiality provisions of this chapter.

149 Section 6. Subsections (2) through (8) of section  
 150 744.3031, Florida Statutes, are renumbered as subsections (3)  
 151 through (9), respectively, and a new subsection (2) is added to  
 152 that section, to read:

153 744.3031 Emergency temporary guardianship.—

154 (2) Notice of filing of the petition for appointment of an  
 155 emergency temporary guardian and a hearing on the petition must  
 156 be served on the alleged incapacitated person and on the alleged

157 incapacitated person's attorney at least 24 hours before the  
 158 hearing on the petition is commenced, unless the petitioner  
 159 demonstrates that substantial harm to the alleged incapacitated  
 160 person would occur if the 24-hour notice is given.

161 Section 7. Paragraph (a) of subsection (1) of section  
 162 744.309, Florida Statutes, is amended to read:

163 744.309 Who may be appointed guardian of a resident ward.—

164 (1) RESIDENT.—

165 (a) Any resident of this state who is sui juris and is 18  
 166 years of age or older, or a business entity that has met the  
 167 registration requirements of s. 744.1083, is qualified to act as  
 168 guardian of a ward.

169 Section 8. Section 744.3115, Florida Statutes, is amended  
 170 to read:

171 744.3115 Advance directives for health care.—In each  
 172 proceeding in which a guardian is appointed under this chapter,  
 173 the court shall determine whether the ward, prior to incapacity,  
 174 has executed any valid advance directive under chapter 765. If  
 175 any advance directive exists, the court shall specify in its  
 176 order and letters of guardianship what authority, if any, the  
 177 guardian shall exercise over the ward with regard to health care  
 178 decisions and what authority, if any, the surrogate shall  
 179 continue to exercise over the ward with regard to health care  
 180 decisions ~~surrogate~~. Pursuant to the grounds listed in s.  
 181 765.105, the court, upon its own motion, may, with notice to the  
 182 surrogate and any other appropriate parties, modify or revoke

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183 the authority of the surrogate to make health care decisions for  
 184 the ward. For purposes of this section, the term "health care  
 185 decision" has the same meaning as in s. 765.101.

186 Section 9. Section 744.312, Florida Statutes, is reordered  
 187 and amended to read:

188 744.312 Considerations in appointment of guardian.-

189 (1)~~(4)~~ If the person designated is qualified to serve  
 190 pursuant to s. 744.309, the court shall appoint any standby  
 191 guardian or preneed guardian, unless the court determines that  
 192 appointing such person is contrary to the best interests of the  
 193 ward.

194 (2)~~(1)~~ If a guardian cannot be appointed under subsection  
 195 (1) ~~Subject to the provisions of subsection (4)~~, the court may  
 196 appoint any person who is fit and proper and qualified to act as  
 197 guardian, whether related to the ward or not.

198 ~~(2)~~ The court shall give preference to the appointment of  
 199 a person who:

- 200 (a) Is related by blood or marriage to the ward;
- 201 (b) Has educational, professional, or business experience
- 202 relevant to the nature of the services sought to be provided;
- 203 (c) Has the capacity to manage the financial resources
- 204 involved; or
- 205 (d) Has the ability to meet the requirements of the law
- 206 and the unique needs of the individual case.

207 (3) The court shall also:

- 208 (a) Consider the wishes expressed by an incapacitated

209 | person as to who shall be appointed guardian.~~†~~

210 |       (b) Consider the preference of a minor who is age 14 or  
211 | over as to who should be appointed guardian.~~†~~

212 |       (c) Consider any person designated as guardian in any will  
213 | in which the ward is a beneficiary.

214 |       (4) The court may not give preference to the appointment  
215 | of a person under subsection (2) solely based on the fact that  
216 | such person was appointed by the court to serve as an emergency  
217 | temporary guardian. This limitation applies only when an  
218 | interested person objects to appointment of the emergency  
219 | temporary guardian as a permanent guardian. This limitation does  
220 | not apply to a standby guardian or to a preneed guardian.

221 |       (5) Appointment of professional guardians by the court  
222 | shall be on a rotating basis of professional guardians deemed  
223 | qualified by the chief judge of the circuit. However, the court  
224 | may appoint a professional guardian without reference to the  
225 | rotation when the special requirements of the guardianship  
226 | demand that the court appoint a guardian with special talent or  
227 | specific prior experience. The court must make specific findings  
228 | of fact that justify a finding that there are special  
229 | requirements requiring an appointment without reference to the  
230 | rotation.

231 |       (6) An emergency temporary guardian who is a professional  
232 | guardian may not be appointed as the permanent guardian of a  
233 | ward. This limitation applies only when an interested person  
234 | objects to appointment of the emergency temporary guardian as a



235 permanent guardian. This limitation does not apply to a standby  
 236 guardian or to a preneed guardian. The court may waive this  
 237 limitation only when the special requirements of the  
 238 guardianship demand that the court appoint that professional  
 239 guardian because he or she has special talent or specific prior  
 240 experience. The court must make specific findings of fact that  
 241 justify a finding that there are special requirements requiring  
 242 an appointment without reference to this limitation.

243 Section 10. Subsection (6) and paragraph (c) of subsection  
 244 (7) of section 744.331, Florida Statutes, are amended to read:

245 744.331 Procedures to determine incapacity.—

246 (6) ORDER DETERMINING INCAPACITY.—If, after making  
 247 findings of fact on the basis of clear and convincing evidence,  
 248 the court finds that a person is incapacitated with respect to  
 249 the exercise of a particular right, or all rights, the court  
 250 shall enter a written order determining such incapacity. In  
 251 determining incapacity, the court shall consider the person's  
 252 unique needs and abilities and may only remove those rights that  
 253 the court finds the person is incapable of exercising. A person  
 254 is determined to be incapacitated only with respect to those  
 255 rights specified in the order.

256 (a) The court shall make the following findings:

- 257 1. The exact nature and scope of the person's
- 258 incapacities;
- 259 2. The exact areas in which the person lacks capacity to
- 260 make informed decisions about care and treatment services or to

261 | meet the essential requirements for her or his physical or  
 262 | mental health or safety;

263 |         3. The specific legal disabilities to which the person is  
 264 | subject; and

265 |         4. The specific rights that the person is incapable of  
 266 | exercising.

267 |         (b) When an order determines that a person is incapable of  
 268 | exercising delegable rights, the court must consider and find  
 269 | whether there is an alternative to guardianship that will  
 270 | sufficiently address the problems of the incapacitated person. A  
 271 | ~~guardian must be appointed to exercise the incapacitated~~  
 272 | ~~person's delegable rights unless the court finds there is an~~  
 273 | ~~alternative.~~ A guardian may not be appointed if the court finds  
 274 | there is an alternative to guardianship which will sufficiently  
 275 | address the problems of the incapacitated person. If the court  
 276 | finds there is not an alternative to guardianship that  
 277 | sufficiently addresses the problems of the incapacitated person,  
 278 | a guardian must be appointed to exercise the incapacitated  
 279 | person's delegable rights.

280 |         (c) In determining that a person is totally incapacitated,  
 281 | the order must contain findings of fact demonstrating that the  
 282 | individual is totally without capacity to care for herself or  
 283 | himself or her or his property.

284 |         (d) An order adjudicating a person to be incapacitated  
 285 | constitutes proof of such incapacity until further order of the  
 286 | court.

287 (e) After the order determining that the person is  
 288 incapacitated has been filed with the clerk, it must be served  
 289 on the incapacitated person. The person is deemed incapacitated  
 290 only to the extent of the findings of the court. The filing of  
 291 the order is notice of the incapacity. An incapacitated person  
 292 retains all rights not specifically removed by the court.

293 (f) Upon the filing of a verified statement by an  
 294 interested person stating:

295 1. That he or she has a good faith belief that the alleged  
 296 incapacitated person's trust, trust amendment, or durable power  
 297 of attorney is invalid; and

298 2. A reasonable factual basis for that belief,

299  
 300 the trust, trust amendment, or durable power of attorney shall  
 301 not be deemed to be an alternative to the appointment of a  
 302 guardian. The appointment of a guardian does not limit the  
 303 court's power to determine that certain authority granted by a  
 304 durable power of attorney is to remain exercisable by the agent  
 305 ~~attorney in fact~~.

306 (7) FEES.—

307 (c) If the petition is dismissed or denied:~~r~~

308 1. The fees of the examining committee shall be paid upon  
 309 court order as expert witness fees under s. 29.004(6).

310 2. Costs and attorney ~~attorney's~~ fees of the proceeding  
 311 may be assessed against the petitioner if the court finds the  
 312 petition to have been filed in bad faith. The petitioner shall

313 also reimburse the state courts system for any amounts paid  
 314 under subparagraph 1. upon such a finding.

315 Section 11. Subsection (4) of section 744.344, Florida  
 316 Statutes, is amended to read:

317 744.344 Order of appointment.—

318 (4) If a petition for the appointment of a guardian has  
 319 not been filed or ruled upon at the time of the hearing on the  
 320 petition to determine capacity, the court may appoint an  
 321 emergency temporary guardian in the manner and for the purposes  
 322 specified in s. 744.3031.

323 Section 12. Section 744.345, Florida Statutes, is amended  
 324 to read:

325 744.345 Letters of guardianship.—Letters of guardianship  
 326 shall be issued to the guardian and shall specify whether the  
 327 guardianship pertains to the person, or the property, or both,  
 328 of the ward. The letters must state whether the guardianship is  
 329 plenary or limited, and, if limited, the letters must state the  
 330 powers and duties of the guardian. ~~If the guardianship is~~  
 331 ~~limited,~~ The letters shall state whether or not and to what  
 332 extent the guardian is authorized to act on behalf of the ward  
 333 with regard to any advance directive previously executed by the  
 334 ward.

335 Section 13. Section 744.359, Florida Statutes, is created  
 336 to read:

337 744.359 Abuse, neglect, or exploitation by a guardian.—

338 (1) A guardian may not abuse, neglect, or exploit a ward.

339 (2) A guardian has committed exploitation when the  
 340 guardian:

341 (a) Commits fraud in obtaining appointment as a guardian.

342 (b) Abuses his or her powers.

343 (c) Wastes, embezzles, or intentionally mismanages the  
 344 assets of the ward.

345 (3) A person who believes that a guardian is abusing,  
 346 neglecting, or exploiting a ward shall report the incident to  
 347 the central abuse hotline of the Department of Children and  
 348 Families.

349 (4) This section shall be interpreted in conformity with  
 350 s. 825.103.

351 Section 14. Section 744.361, Florida Statutes, is amended  
 352 to read:

353 744.361 Powers and duties of guardian.—

354 (1) The guardian of an incapacitated person is a fiduciary  
 355 and may exercise only those rights that have been removed from  
 356 the ward and delegated to the guardian. The guardian of a minor  
 357 shall exercise the powers of a plenary guardian.

358 (2) The guardian shall act within the scope of the  
 359 authority granted by the court and as provided by law.

360 (3) The guardian shall act in good faith.

361 (4) A guardian may not act in a manner that is contrary to  
 362 the ward's best interests under the circumstances.

363 (5) A guardian who has special skills or expertise, or is  
 364 appointed in reliance upon the guardian's representation that

365 the guardian has special skills or expertise, shall use those  
 366 special skills or expertise when acting on behalf of the ward.

367 (6)~~(2)~~ The guardian shall file an initial guardianship  
 368 report in accordance with s. 744.362.

369 (7)~~(3)~~ The guardian shall file a guardianship report  
 370 annually in accordance with s. 744.367.

371 (8)~~(4)~~ The guardian of the person shall implement the  
 372 guardianship plan.

373 (9)~~(5)~~ When two or more guardians have been appointed, the  
 374 guardians shall consult with each other.

375 (10)~~(6)~~ A guardian who is given authority over any  
 376 property of the ward shall:

377 (a) Protect and preserve the property and invest it  
 378 prudently as provided in chapter 518, apply it as provided in s.  
 379 744.397, and keep clear, distinct, and accurate records of the  
 380 administration of the ward's property ~~account for it faithfully.~~

381 (b) Perform all other duties required of him or her by  
 382 law.

383 (c) At the termination of the guardianship, deliver the  
 384 property of the ward to the person lawfully entitled to it.

385 (11)~~(7)~~ The guardian shall observe the standards in  
 386 dealing with the guardianship property that would be observed by  
 387 a prudent person dealing with the property of another, ~~and, if~~  
 388 ~~the guardian has special skills or is named guardian on the~~  
 389 ~~basis of representations of special skills or expertise, he or~~  
 390 ~~she is under a duty to use those skills.~~

391 (12)~~(8)~~ The guardian, if authorized by the court, shall  
 392 take possession of all of the ward's property and of the rents,  
 393 income, issues, and profits from it, whether accruing before or  
 394 after the guardian's appointment, and of the proceeds arising  
 395 from the sale, lease, or mortgage of the property or of any  
 396 part. All of the property and the rents, income, issues, and  
 397 profits from it are assets in the hands of the guardian for the  
 398 payment of debts, taxes, claims, charges, and expenses of the  
 399 guardianship and for the care, support, maintenance, and  
 400 education of the ward or the ward's dependents, as provided for  
 401 under the terms of the guardianship plan or by law.

402 (13) Recognizing that every individual has unique needs  
 403 and abilities, a guardian who is given authority over a ward's  
 404 person shall, as appropriate under the circumstances:

405 (a) Consider the expressed desires of the ward as known by  
 406 the guardian when making decisions that affect the ward.

407 (b) Allow the ward to maintain contact with family and  
 408 friends unless the guardian believes that such contact may cause  
 409 harm to the ward.

410 (c) Not restrict the physical liberty of the ward more  
 411 than reasonably necessary to protect the ward or another person  
 412 from serious physical injury, illness, or disease.

413 (d) Assist the ward in developing or regaining his or her  
 414 own capacity, if medically possible.

415 (e) Notify the court if the guardian believes that the  
 416 ward has regained capacity and that one or more of the rights

417 | that have been removed should be restored to the ward.

418 |       (f) To the extent applicable, make provision for the  
 419 | medical, mental, rehabilitative, or personal care services for  
 420 | the welfare of the ward.

421 |       (g) To the extent applicable, acquire a clear  
 422 | understanding of the risks and benefits of a recommended course  
 423 | of health care treatment before making a health care decision.

424 |       (h) Evaluate the ward's medical and health care options,  
 425 | financial resources, and desires when making residential  
 426 | decisions that are best suited for the current needs of the  
 427 | ward.

428 |       (i) Advocate on behalf of the ward in institutional and  
 429 | other residential settings.

430 |       (14)~~(9)~~ A professional guardian must ensure that each of  
 431 | the guardian's wards is personally visited by the guardian or  
 432 | one of the guardian's professional staff at least once each  
 433 | calendar quarter. During the personal visit, the guardian or the  
 434 | guardian's professional staff person shall assess:

435 |           (a) The ward's physical appearance and condition.

436 |           (b) The appropriateness of the ward's current living  
 437 | situation.

438 |           (c) The need for any additional services and the necessity  
 439 | for continuation of existing services, taking into consideration  
 440 | all aspects of social, psychological, educational, direct  
 441 | service, health, and personal care needs.

442 |       (d) The nature and extent of visitation and communication



443 with the ward's family and friends.

444

445 This subsection does not apply to a professional guardian who  
446 has been appointed only as guardian of the property.

447 Section 15. Subsection (1) of section 744.367, Florida  
448 Statutes, is amended to read:

449 744.367 Duty to file annual guardianship report.—

450 (1) Unless the court requires filing on a calendar-year  
451 basis, each guardian of the person shall file with the court an  
452 annual guardianship plan at least 60 days, but no more than  
453 ~~within~~ 90 days, before ~~after~~ the last day of the anniversary  
454 month that the letters of guardianship were signed, and the plan  
455 must cover the coming fiscal year, ending on the last day in  
456 such anniversary month. If the court requires calendar-year  
457 filing, the guardianship plan for the forthcoming calendar year  
458 must be filed on or after September 1 but no later than December  
459 1 of the current year ~~before April 1 of each year.~~

460 Section 16. Subsection (8) of section 744.369, Florida  
461 Statutes, is amended to read:

462 744.369 Judicial review of guardianship reports.—

463 (8) The approved report constitutes the authority for the  
464 guardian to act in the forthcoming year. The powers of the  
465 guardian are limited by the terms of the report. The annual  
466 report may not grant additional authority to the guardian  
467 without a hearing, as provided for in s. 744.331, to determine  
468 that the ward is incapacitated to act in that matter. Unless the

469 court orders otherwise, the guardian may continue to act under  
 470 authority of the last-approved report until the forthcoming  
 471 year's report is approved.

472 Section 17. Subsection (1) of section 744.3715, Florida  
 473 Statutes, is amended to read:

474 744.3715 Petition for interim judicial review.—

475 (1) At any time, any interested person, including the  
 476 ward, may petition the court for review alleging that the  
 477 guardian is not complying with the guardianship plan, ~~or~~ is  
 478 exceeding his or her authority under the guardianship plan, is  
 479 acting in a manner contrary to s. 744.361, is denying visitation  
 480 between the ward and his or her relatives in violation of s.  
 481 744.361(13), or and the guardian is not acting in the best  
 482 interest of the ward. The petition for review must state the  
 483 nature of the objection to the guardian's action or proposed  
 484 action. Upon the filing of any such petition, the court shall  
 485 review the petition and act upon it expeditiously.

486 Section 18. Paragraphs (a) and (b) of subsection (3) of  
 487 section 744.464, Florida Statutes, are amended, and subsection  
 488 (4) is added to that section, to read:

489 744.464 Restoration to capacity.—

490 (3) ORDER OF RESTORATION.—

491 (a) If no objections are filed, and the court is satisfied  
 492 that with the medical examination establishes by a preponderance  
 493 of the evidence that restoration of all or some of the ward's  
 494 rights is appropriate, the court shall enter an order of

495 restoration of capacity, restoring all or some of the rights  
 496 which were removed from the ward in accordance with those  
 497 findings. ~~The order must be issued within 30 days after the~~  
 498 ~~medical report is filed.~~

499 (b) At the conclusion of a hearing, conducted pursuant to  
 500 s. 744.1095, the court shall make specific findings of fact and,  
 501 based on a preponderance of the evidence, enter an order either  
 502 denying the suggestion of capacity or restoring all or some of  
 503 the rights which were removed from the ward. The ward has the  
 504 burden of proving by a preponderance of the evidence that the  
 505 restoration of capacity is warranted.

506 (4) TIMELINESS OF HEARING.—The court shall give priority  
 507 to any suggestion of capacity and shall advance the cause on the  
 508 calendar.

509 Section 19. The amendments made by this act apply to all  
 510 proceedings pending on the effective date of this act.

511 Section 20. This act shall take effect upon becoming a  
 512 law.



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COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Passidomo offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Effective July 1, 2015, subsection (3) of section 709.2109, Florida Statutes, is amended to read:

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

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



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18 under the power of attorney is not suspended unless a verified  
19 motion in accordance with s. 744.3203 is also filed.

20 (a) If an emergency arises after initiation of proceedings  
21 to determine incapacity and before adjudication regarding the  
22 principal's capacity, the agent may petition the court in which  
23 the proceeding is pending for authorization to exercise a power  
24 granted under the power of attorney. The petition must set forth  
25 the nature of the emergency, the property or matter involved,  
26 and the power to be exercised by the agent.

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

37 Section 2. Subsection (5) is added to section 744.107,  
38 Florida Statutes, to read:

39 744.107 Court monitors.—

40 (5) The court may appoint the office of criminal conflict  
41 and civil regional counsel as monitor if the ward is indigent.

42 Section 3. Subsection (6) is added to section 744.1075,  
43 Florida Statutes, to read:



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44 744.1075 Emergency court monitor.—

45 (6) The court may appoint the office of criminal conflict  
46 and civil regional counsel as monitor if the ward is indigent.

47 Section 4. Subsections (5) and (8) of section 744.108,  
48 Florida Statutes, are amended, and subsection (9) is added to  
49 that section, to read:

50 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees  
51 and expenses.—

52 (5) All petitions for guardian ~~guardian's~~ and attorney  
53 ~~attorney's~~ fees and expenses must be accompanied by an itemized  
54 description of the services performed for the fees and expenses  
55 sought to be recovered.

56 (8) When court proceedings are instituted to review or  
57 determine a guardian's or an attorney's fees under subsection  
58 (2), such proceedings are part of the guardianship  
59 administration process and the costs, including costs and  
60 attorney fees for the guardian's attorney, an attorney appointed  
61 under s. 744.331(2), or an attorney who has rendered services to  
62 the ward, shall be determined by the court and paid from the  
63 assets of the guardianship estate unless the court finds the  
64 requested compensation under subsection (2) to be substantially  
65 unreasonable.

66 (9) The court may determine that a request for  
67 compensation by the guardian, the guardian's attorney, a person  
68 employed by the guardian, an attorney appointed under s.  
69 744.331(2), or an attorney who has rendered services to the



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70 ward, is reasonable without receiving expert testimony. A person  
71 or party may offer expert testimony for or against a request for  
72 compensation after giving notice to interested persons.  
73 Reasonable expert witness fees shall be awarded by the court and  
74 paid from the assets of the guardianship estate utilizing the  
75 standards in subsection (8).

76 Section 5. Section 744.3025, Florida Statutes, is amended  
77 to read:

78 744.3025 Claims of minors.-

79 (1) (a) The court may appoint a guardian ad litem to  
80 represent the minor's interest before approving a settlement of  
81 the minor's portion of the claim in a any case in which a minor  
82 has a claim for personal injury, property damage, wrongful  
83 death, or other cause of action in which the gross settlement of  
84 the claim exceeds \$15,000 if the court believes a guardian ad  
85 litem is necessary to protect the minor's interest.

86 (b) Except as provided in paragraph (e), the court shall  
87 appoint a guardian ad litem to represent the minor's interest  
88 before approving a settlement of the minor's claim in a any case  
89 in which the gross settlement involving a minor equals or  
90 exceeds \$50,000.

91 (c) The appointment of the guardian ad litem must be  
92 without the necessity of bond or notice.

93 (d) The duty of the guardian ad litem is to protect the  
94 minor's interests as described in the Florida Probate Rules.

95 (e) A court need not appoint a guardian ad litem for the



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96 | minor if a guardian of the minor has previously been appointed  
97 | and that guardian has no potential adverse interest to the  
98 | minor. ~~A court may appoint a guardian ad litem if the court~~  
99 | ~~believes a guardian ad litem is necessary to protect the~~  
100 | ~~interests of the minor.~~

101 | (2) Unless waived, the court shall award reasonable fees  
102 | and costs to the guardian ad litem to be paid out of the gross  
103 | proceeds of the settlement.

104 | (3) A settlement of a claim pursuant to this section is  
105 | subject to the confidentiality provisions of this chapter.

106 | Section 6. Subsections (2) through (8) of section  
107 | 744.3031, Florida Statutes, are renumbered as subsections (3)  
108 | through (9), respectively, and a new subsection (2) is added to  
109 | that section, to read:

110 | 744.3031 Emergency temporary guardianship.—

111 | (2) Notice of filing of the petition for appointment of an  
112 | emergency temporary guardian and a hearing on the petition must  
113 | be served on the alleged incapacitated person and on the alleged  
114 | incapacitated person's attorney at least 24 hours before the  
115 | hearing on the petition is commenced, unless the petitioner  
116 | demonstrates that substantial harm to the alleged incapacitated  
117 | person would occur if the 24-hour notice is given.

118 | Section 7. Subsection (7) is added to section 744.309,  
119 | Florida Statutes, to read:

120 | 744.309 Who may be appointed guardian of a resident ward.—

121 | (7) FOR-PROFIT CORPORATE GUARDIAN.—A for-profit corporate





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122 guardian existing under the laws of this state is qualified to  
123 act as guardian of a ward if the entity is qualified to do  
124 business in the state; is wholly owned by the person who is the  
125 circuit's public guardian in the circuit where the corporate  
126 guardian is appointed; and has met the registration requirements  
127 of s. 744.1083, provided that the for-profit corporate guardian:

128 (a) Posts and maintains a blanket fiduciary bond of at  
129 least \$250,000 with the clerk of the circuit court in the county  
130 in which the corporate guardian has its principal place of  
131 business. The corporate guardian shall provide proof of the  
132 fiduciary bond to the clerks of each additional circuit court in  
133 which he or she is serving as a guardian. The bond must cover  
134 all wards for whom the corporation has been appointed as a  
135 guardian at any given time. The liability of the provider of the  
136 bond is limited to the face value of the bond, regardless of the  
137 number of wards for whom the corporation is acting as a  
138 guardian. The terms of the bond must cover the acts or omissions  
139 of each agent or employee of the corporation who has direct  
140 contact with the ward or access to the assets of the  
141 guardianship. The bond must be payable to the Governor and his  
142 or her successors in office and be conditioned on the faithful  
143 performance of all duties of a guardian under this chapter. The  
144 bond is in lieu of and not in addition to the bond required  
145 under s. 744.1085 but is in addition any bonds required under s.  
146 744.351. The expenses incurred to satisfy the bonding  
147 requirements in this section may not be paid with the assets of

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148 any ward; or

149 (b) Maintains a liability insurance policy that covers any  
150 losses sustained by the guardianship caused by errors,  
151 omissions, or any intentional misconduct committed by the  
152 corporation's officers or agents. The policy must cover all  
153 wards for whom the corporation is acting as a guardian agent for  
154 losses up to \$250,000. The terms of the policy must cover acts  
155 or omissions of each agent or employee of the corporation who  
156 has direct contact with the principal or access to the assets of  
157 the guardianship. The corporate guardian shall provide proof of  
158 the fiduciary bond to the clerks of each additional circuit  
159 court in which he or she is serving as a guardian.

160 A for-profit corporation who has been appointed as guardian  
161 prior to the effective date of this legislation is also  
162 qualified to serve as guardian in the particular guardianships  
163 in which the corporation has already been appointed as guardian.

164 Section 8. Section 744.3115, Florida Statutes, is amended  
165 to read:

166 744.3115 Advance directives for health care.—In each  
167 proceeding in which a guardian is appointed under this chapter,  
168 the court shall determine whether the ward, prior to incapacity,  
169 has executed any valid advance directive under chapter 765. If  
170 any advance directive exists, the court shall specify in its  
171 order and letters of guardianship what authority, if any, the  
172 guardian shall exercise over the ward with regard to health care  
173 decisions and what authority, if any, the surrogate shall



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174 continue to exercise over the ward with regard to health care  
175 decisions surrogate. Pursuant to the grounds listed in s.  
176 765.105, the court, upon its own motion, may, with notice to the  
177 surrogate and any other appropriate parties, modify or revoke  
178 the authority of the surrogate to make health care decisions for  
179 the ward. For purposes of this section, the term "health care  
180 decision" has the same meaning as in s. 765.101.

181 Section 9. Section 744.312, Florida Statutes, is reordered  
182 and amended to read:

183 744.312 Considerations in appointment of guardian.—

184 (1)-(4) If the person designated is qualified to serve  
185 pursuant to s. 744.309, the court shall appoint any standby  
186 guardian or preneed guardian, unless the court determines that  
187 appointing such person is contrary to the best interests of the  
188 ward.

189 (2)-(1) If a guardian cannot be appointed under subsection  
190 (1) Subject to the provisions of subsection (4), the court may  
191 appoint any person who is fit and proper and qualified to act as  
192 guardian, whether related to the ward or not.

193 ~~(2)~~ The court shall give preference to the appointment of  
194 a person who:

- 195 (a) Is related by blood or marriage to the ward;  
196 (b) Has educational, professional, or business experience  
197 relevant to the nature of the services sought to be provided;  
198 (c) Has the capacity to manage the financial resources  
199 involved; or



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200 (d) Has the ability to meet the requirements of the law  
201 and the unique needs of the individual case.

202 (3) The court shall also:

203 (a) Consider the wishes expressed by an incapacitated  
204 person as to who shall be appointed guardian.†

205 (b) Consider the preference of a minor who is age 14 or  
206 over as to who should be appointed guardian.†

207 (c) Consider any person designated as guardian in any will  
208 in which the ward is a beneficiary.

209 (d) Consider the wishes of next of kin of the ward, where  
210 the ward cannot express a preference.

211 (4) Except where a standby guardian or a preneed guardian  
212 is appointed by the court:

213 (a) If a professional guardian is appointed, a court that  
214 does not utilize a rotation system for appointment of the  
215 professional guardian in that particular matter involved must in  
216 each guardianship case make specific findings of fact listing  
217 why the particular person was selected by the court as guardian.  
218 The order must reference each of the factors in subsections (2)  
219 and (3).

220 (b) An emergency temporary guardian who is a professional  
221 guardian may not be appointed as the permanent guardian of a  
222 ward unless one of the next of kin of the alleged incapacitated  
223 person or the ward requests that the professional guardian be  
224 appointed as permanent guardian. The court may waive the  
225 limitations of this paragraph if the special requirements of the



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226 guardianship demand that the court appoint a guardian because he  
227 or she has special talent or specific prior experience. The  
228 court must make specific findings of fact that justify a finding  
229 that there are special requirements requiring an appointment  
230 without reference to this limitation.

231 (5) The court may not give preference to the appointment  
232 of a person under subsection (2) solely based on the fact that  
233 such person was appointed by the court to serve as an emergency  
234 temporary guardian.

235 Section 10. Effective July 1, 2015, section 744.3203,  
236 Florida Statutes, is created to read:

237 744.3203 Suspension of power of attorney before incapacity  
238 determination.-

239 (1) At any time during proceedings to determine incapacity  
240 but before the entry of an order determining incapacity, the  
241 authority granted under an alleged incapacitated person's power  
242 of attorney to a parent, spouse, child or grandchild is  
243 suspended when the petitioner files a motion stating that a  
244 specific power of attorney should be suspended for any of the  
245 following grounds:

246 (a) The agent's decisions are not in accord with the  
247 alleged incapacitated person's known desires.

248 (b) The power of attorney is invalid.

249 (c) The agent has failed to discharge duties, or  
250 incapacity or illness renders the agent incapable of discharging  
251 duties.



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252 (d) The agent has abused powers.

253 (e) There is a danger the property of the alleged  
254 incapacitated person may be wasted, misappropriated, or lost  
255 unless the authority under the power of attorney is suspended.

256  
257 Grounds for suspending a power of attorney do not include the  
258 existence of a dispute between the agent and the petitioner  
259 which is more appropriate for resolution in some other forum or  
260 a legal proceeding other than a guardianship proceeding.

261 (2) The motion must:

262 (a) Identify one or more of the grounds in subsection (1);

263 (b) Include specific statements of fact showing that  
264 grounds exist to justify the relief sought; and

265 (c) Include the following statement: "Under penalties of  
266 perjury, I declare that I have read the foregoing motion and  
267 that the facts stated in it are true to the best of my knowledge  
268 and belief," followed by the signature of the petitioner.

269 (3) Upon the filing of a response to the motion by the  
270 agent under the power of attorney, the court shall schedule the  
271 motion for an expedited hearing. Unless an emergency has arisen  
272 and the agent's response sets forth the nature of the emergency,  
273 the property or matter involved, and the power to be exercised  
274 by the agent, notice must be given to all interested persons,  
275 the alleged incapacitated person, and the alleged incapacitated  
276 person's attorney. The court order following the hearing must  
277 set forth what powers the agent is permitted to exercise, if



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278 any, pending the outcome of the petition to determine  
279 incapacity.

280 (4) In addition to any other remedy authorized by law, a  
281 court may award reasonable attorney fees and costs to an agent  
282 who successfully challenges the suspension of the power of  
283 attorney if the petitioner's motion was made in bad faith.

284 (5) The suspension of authority granted to persons other  
285 than a parent, spouse, child or grandchild shall be as provided  
286 in s. 709.2109.

287 Section 11. Subsection (6) and paragraph (c) of subsection  
288 (7) of section 744.331, Florida Statutes, are amended to read:

289 744.331 Procedures to determine incapacity.—

290 (6) ORDER DETERMINING INCAPACITY.—If, after making  
291 findings of fact on the basis of clear and convincing evidence,  
292 the court finds that a person is incapacitated with respect to  
293 the exercise of a particular right, or all rights, the court  
294 shall enter a written order determining such incapacity. In  
295 determining incapacity, the court shall consider the person's  
296 unique needs and abilities and may only remove those rights that  
297 the court finds the person does not have the capacity to  
298 exercise. A person is determined to be incapacitated only with  
299 respect to those rights specified in the order.

300 (a) The court shall make the following findings:

301 1. The exact nature and scope of the person's  
302 incapacities;

303 2. The exact areas in which the person lacks capacity to



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304 make informed decisions about care and treatment services or to  
305 meet the essential requirements for her or his physical or  
306 mental health or safety;

307 3. The specific legal disabilities to which the person is  
308 subject; and

309 4. The specific rights that the person is incapable of  
310 exercising.

311 (b) When an order determines that a person is incapable of  
312 exercising delegable rights, the court must consider and find  
313 whether there is an alternative to guardianship that will  
314 sufficiently address the problems of the incapacitated person. A  
315 ~~guardian must be appointed to exercise the incapacitated~~  
316 ~~person's delegable rights unless the court finds there is an~~  
317 ~~alternative.~~ A guardian may not be appointed if the court finds  
318 there is an alternative to guardianship which will sufficiently  
319 address the problems of the incapacitated person. If the court  
320 finds there is not an alternative to guardianship that  
321 sufficiently addresses the problems of the incapacitated person,  
322 a guardian must be appointed to exercise the incapacitated  
323 person's delegable rights.

324 (c) In determining that a person is totally incapacitated,  
325 the order must contain findings of fact demonstrating that the  
326 individual is totally without capacity to care for herself or  
327 himself or her or his property.

328 (d) An order adjudicating a person to be incapacitated  
329 constitutes proof of such incapacity until further order of the





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330 court.

331 (e) After the order determining that the person is  
332 incapacitated has been filed with the clerk, it must be served  
333 on the incapacitated person. The person is deemed incapacitated  
334 only to the extent of the findings of the court. The filing of  
335 the order is notice of the incapacity. An incapacitated person  
336 retains all rights not specifically removed by the court.

337 (f) Upon the filing of a verified statement by an  
338 interested person stating:

339 1. That he or she has a good faith belief that the alleged  
340 incapacitated person's trust, trust amendment, or durable power  
341 of attorney is invalid; and

342 2. A reasonable factual basis for that belief,

343

344 the trust, trust amendment, or durable power of attorney shall  
345 not be deemed to be an alternative to the appointment of a  
346 guardian. The appointment of a guardian does not limit the  
347 court's power to determine that certain authority granted by a  
348 durable power of attorney is to remain exercisable by the agent  
349 ~~attorney in fact.~~

350 (7) FEES.—

351 (c) If the petition is dismissed or denied:~~7~~

352 1. The fees of the examining committee shall be paid upon  
353 court order as expert witness fees under s. 29.004(6).

354 2. Costs and attorney ~~attorney's~~ fees of the proceeding  
355 may be assessed against the petitioner if the court finds the



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356 petition to have been filed in bad faith. The petitioner shall  
357 also reimburse the state courts system for any amounts paid  
358 under subparagraph 1. upon such a finding.

359 Section 12. Subsection (4) of section 744.344, Florida  
360 Statutes, is amended to read:

361 744.344 Order of appointment.--

362 (4) If a petition for the appointment of a guardian has  
363 not been filed or ruled upon at the time of the hearing on the  
364 petition to determine capacity, the court may appoint an  
365 emergency temporary guardian in the manner and for the purposes  
366 specified in s. 744.3031.

367 Section 13. Section 744.345, Florida Statutes, is amended  
368 to read:

369 744.345 Letters of guardianship.--Letters of guardianship  
370 shall be issued to the guardian and shall specify whether the  
371 guardianship pertains to the person, or the property, or both,  
372 of the ward. The letters must state whether the guardianship is  
373 plenary or limited, and, if limited, the letters must state the  
374 powers and duties of the guardian. ~~If the guardianship is~~  
375 ~~limited,~~ The letters shall state whether or not and to what  
376 extent the guardian is authorized to act on behalf of the ward  
377 with regard to any advance directive previously executed by the  
378 ward.

379 Section 14. Section 744.359, Florida Statutes, is created  
380 to read:

381 744.359 Abuse, neglect, or exploitation by a guardian.--



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382 (1) A guardian may not abuse, neglect, or exploit a ward.

383 (2) A guardian has committed exploitation when the  
384 guardian:

385 (a) Commits fraud in obtaining appointment as a guardian.

386 (b) Abuses his or her powers.

387 (c) Wastes, embezzles, or intentionally mismanages the  
388 assets of the ward.

389 (3) A person who believes that a guardian is abusing,  
390 neglecting, or exploiting a ward shall report the incident to  
391 the central abuse hotline of the Department of Children and  
392 Families.

393 (4) This section shall be interpreted in conformity with  
394 s. 825.103.

395 Section 15. Section 744.361, Florida Statutes, is amended  
396 to read:

397 744.361 Powers and duties of guardian.—

398 (1) The guardian of an incapacitated person is a fiduciary  
399 and may exercise only those rights that have been removed from  
400 the ward and delegated to the guardian. The guardian of a minor  
401 shall exercise the powers of a plenary guardian.

402 (2) The guardian shall act within the scope of the  
403 authority granted by the court and as provided by law.

404 (3) The guardian shall act in good faith.

405 (4) A guardian may not act in a manner that is contrary to  
406 the ward's best interests under the circumstances.

407 (5) A guardian who has special skills or expertise, or is



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408 appointed in reliance upon the guardian's representation that  
409 the guardian has special skills or expertise, shall use those  
410 special skills or expertise when acting on behalf of the ward.

411 ~~(6)(2)~~ The guardian shall file an initial guardianship  
412 report in accordance with s. 744.362.

413 ~~(7)(3)~~ The guardian shall file a guardianship report  
414 annually in accordance with s. 744.367.

415 ~~(8)(4)~~ The guardian of the person shall implement the  
416 guardianship plan.

417 ~~(9)(5)~~ When two or more guardians have been appointed, the  
418 guardians shall consult with each other.

419 ~~(10)(6)~~ A guardian who is given authority over any  
420 property of the ward shall:

421 (a) Protect and preserve the property and invest it  
422 prudently as provided in chapter 518, apply it as provided in s.  
423 744.397, and keep clear, distinct, and accurate records of the  
424 administration of the ward's property ~~account for it faithfully.~~

425 (b) Perform all other duties required of him or her by  
426 law.

427 (c) At the termination of the guardianship, deliver the  
428 property of the ward to the person lawfully entitled to it.

429 ~~(11)(7)~~ The guardian shall observe the standards in  
430 dealing with the guardianship property that would be observed by  
431 a prudent person dealing with the property of another, ~~and, if~~  
432 ~~the guardian has special skills or is named guardian on the~~  
433 ~~basis of representations of special skills or expertise, he or~~



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434 ~~she is under a duty to use those skills.~~

435 (12)~~(8)~~ The guardian, if authorized by the court, shall  
436 take possession of all of the ward's property and of the rents,  
437 income, issues, and profits from it, whether accruing before or  
438 after the guardian's appointment, and of the proceeds arising  
439 from the sale, lease, or mortgage of the property or of any  
440 part. All of the property and the rents, income, issues, and  
441 profits from it are assets in the hands of the guardian for the  
442 payment of debts, taxes, claims, charges, and expenses of the  
443 guardianship and for the care, support, maintenance, and  
444 education of the ward or the ward's dependents, as provided for  
445 under the terms of the guardianship plan or by law.

446 (13) Recognizing that every individual has unique needs  
447 and abilities, a guardian who is given authority over a ward's  
448 person shall, as appropriate under the circumstances:

449 (a) Consider the expressed desires of the ward as known by  
450 the guardian when making decisions that affect the ward.

451 (b) Allow the ward to maintain contact with family and  
452 friends unless the guardian believes that such contact may cause  
453 harm to the ward.

454 (c) Not restrict the physical liberty of the ward more  
455 than reasonably necessary to protect the ward or another person  
456 from serious physical injury, illness, or disease.

457 (d) Assist the ward in developing or regaining his or her  
458 own capacity, if medically possible.

459 (e) Notify the court if the guardian believes that the



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460 ward has regained capacity and that one or more of the rights  
461 that have been removed should be restored to the ward.

462 (f) To the extent applicable, make provision for the  
463 medical, mental, rehabilitative, or personal care services for  
464 the welfare of the ward.

465 (g) To the extent applicable, acquire a clear  
466 understanding of the risks and benefits of a recommended course  
467 of health care treatment before making a health care decision.

468 (h) Evaluate the ward's medical and health care options,  
469 financial resources, and desires when making residential  
470 decisions that are best suited for the current needs of the  
471 ward.

472 (i) Advocate on behalf of the ward in institutional and  
473 other residential settings.

474 (14)(9) A professional guardian must ensure that each of  
475 the guardian's wards is personally visited by the guardian or  
476 one of the guardian's professional staff at least once each  
477 calendar quarter. During the personal visit, the guardian or the  
478 guardian's professional staff person shall assess:

479 (a) The ward's physical appearance and condition.

480 (b) The appropriateness of the ward's current living  
481 situation.

482 (c) The need for any additional services and the necessity  
483 for continuation of existing services, taking into consideration  
484 all aspects of social, psychological, educational, direct  
485 service, health, and personal care needs.

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486        (d) The nature and extent of visitation and communication  
487 with the ward's family and friends.

488

489 This subsection does not apply to a professional guardian who  
490 has been appointed only as guardian of the property.

491        Section 16. Subsection (1) of section 744.367, Florida  
492 Statutes, is amended to read:

493            744.367 Duty to file annual guardianship report.—

494        (1) Unless the court requires filing on a calendar-year  
495 basis, each guardian of the person shall file with the court an  
496 annual guardianship plan at least 60 days, but no more than  
497 within 90 days, before ~~after~~ the last day of the anniversary  
498 month that the letters of guardianship were signed, and the plan  
499 must cover the coming fiscal year, ending on the last day in  
500 such anniversary month. If the court requires calendar-year  
501 filing, the guardianship plan for the forthcoming calendar year  
502 must be filed on or after September 1 but no later than December  
503 1 of the current year ~~before April 1 of each year.~~

504        Section 17. Subsection (8) of section 744.369, Florida  
505 Statutes, is amended to read:

506            744.369 Judicial review of guardianship reports.—

507        (8) The approved report constitutes the authority for the  
508 guardian to act in the forthcoming year. The powers of the  
509 guardian are limited by the terms of the report. The annual  
510 report may not grant additional authority to the guardian  
511 without a hearing, as provided for in s. 744.331, to determine



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512 that the ward is incapacitated to act in that matter. Unless the  
513 court orders otherwise, the guardian may continue to act under  
514 authority of the last-approved report until the forthcoming  
515 year's report is approved.

516 Section 18. Subsection (1) of section 744.3715, Florida  
517 Statutes, is amended to read:

518 744.3715 Petition for interim judicial review.—

519 (1) At any time, any interested person, including the  
520 ward, may petition the court for review alleging that the  
521 guardian is not complying with the guardianship plan, or is  
522 exceeding his or her authority under the guardianship plan, is  
523 acting in a manner contrary to s. 744.361, is denying visitation  
524 between the ward and his or her relatives in violation of s.  
525 744.361(13), or ~~and the guardian~~ is not acting in the best  
526 interest of the ward. The petition for review must state the  
527 nature of the objection to the guardian's action or proposed  
528 action. Upon the filing of any such petition, the court shall  
529 review the petition and act upon it expeditiously.

530 Section 19. Paragraphs (a) and (b) of subsection (3) of  
531 section 744.464, Florida Statutes, are amended, and subsection  
532 (4) is added to that section, to read:

533 744.464 Restoration to capacity.—

534 (3) ORDER OF RESTORATION.—

535 (a) If no objections are filed, and the court is satisfied  
536 that with the medical examination establishes by a preponderance  
537 of the evidence that restoration of all or some of the ward's





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538 | rights is appropriate, the court shall enter an order of  
539 | restoration of capacity, restoring all or some of the rights  
540 | which were removed from the ward in accordance with those  
541 | findings. ~~The order must be issued within 30 days after the~~  
542 | ~~medical report is filed.~~

543 | (b) At the conclusion of a hearing, conducted pursuant to  
544 | s. 744.1095, the court shall make specific findings of fact and,  
545 | based on a preponderance of the evidence, enter an order either  
546 | denying the suggestion of capacity or restoring all or some of  
547 | the rights which were removed from the ward. The ward has the  
548 | burden of proving by a preponderance of the evidence that the  
549 | restoration of capacity is warranted.

550 | (4) TIMELINESS OF HEARING.—The court shall give priority  
551 | to any suggestion of capacity and shall advance the cause on the  
552 | calendar.

553 | Section 20. Sections 1 and 10 of this act apply to all  
554 | proceedings filed on or after July 1, 2015. The remaining  
555 | sections of this act shall take effect on July 1, 2015, and  
556 | shall apply to all proceedings pending on that date.

557 | Section 21. Except as otherwise provided, this act shall  
558 | take effect upon becoming a law.

559 |

560 |

561 | -----

562 | **T I T L E A M E N D M E N T**

563 | Remove everything before the enacting clause and insert:



## Amendment No. 1

564 An act relating to guardianship proceedings; creating s.  
565 744.1065, F.S.; authorizing a court to refer guardianship  
566 matters to mediation or alternative dispute resolution under  
567 certain circumstances; amending ss. 744.107 and 744.1075, F.S.;  
568 authorizing a court to appoint the office of criminal conflict  
569 and civil regional counsel as a court monitor in guardianship  
570 proceedings; amending s. 744.108, F.S.; providing that fees and  
571 costs incurred by an attorney who has rendered services to a  
572 ward in compensation proceedings are payable from guardianship  
573 assets; providing that expert testimony is not required in  
574 proceedings to determine compensation for an attorney or  
575 guardian; requiring a person offering expert testimony to  
576 provide notice to interested persons; providing that expert  
577 witness fees are recoverable by the prevailing interested  
578 person; amending s. 744.3025, F.S.; providing that a court may  
579 appoint a guardian ad litem to represent a minor if necessary to  
580 protect the minor's interest in a settlement; providing that a  
581 settlement of a minor's claim is subject to certain  
582 confidentiality provisions; amending s. 744.3031, F.S.;  
583 requiring notification of an alleged incapacitated person and  
584 such person's attorney of a petition for appointment of an  
585 emergency temporary guardian before a hearing on the petition  
586 commences; amending s. 744.309, F.S.; providing that certain  
587 for-profit corporations may act as guardian of a person;  
588 providing conditions; amending s. 744.3115, F.S.; directing the  
589 court to specify authority for health care decisions with

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590 respect to a ward's advance directive; amending s. 744.312,  
591 F.S.; prohibiting a court from giving preference to the  
592 appointment of certain persons as guardians; providing  
593 requirements for the appointment of professional guardians;  
594 amending s. 744.331, F.S.; directing the court to consider  
595 certain factors when determining incapacity; requiring that the  
596 examining committee be paid from state funds as court-appointed  
597 expert witnesses if a petition for incapacity is dismissed;  
598 requiring that a petitioner reimburse the state for such expert  
599 witness fees if the court finds the petition to have been filed  
600 in bad faith; amending s. 744.344, F.S.; providing conditions  
601 under which the court is authorized to appoint an emergency  
602 temporary guardian; amending s. 744.345, F.S.; revising  
603 provisions relating to letters of guardianship; creating s.  
604 744.359, F.S.; prohibiting abuse, neglect, or exploitation of a  
605 ward by a guardian; requiring reporting thereof to the  
606 Department of Children and Families central abuse hotline;  
607 providing for interpretation; amending s. 744.361, F.S.;  
608 providing additional powers and duties of a guardian; amending  
609 s. 744.367, F.S.; revising the period during which a guardian  
610 must file an annual guardianship plan with the court; amending  
611 s. 744.369, F.S.; providing for the continuance of a guardian's  
612 authority to act under an expired annual report under certain  
613 circumstances; amending s. 744.3715, F.S.; providing that an  
614 interested party may petition the court regarding a guardian's  
615 failure to comply with the duties of a guardian; amending s.

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/CS/HB 5 (2015)

Amendment No. 1

616 744.464, F.S.; establishing the burden of proof for determining  
617 restoration of capacity of a ward in pending guardianship cases;  
618 requiring a court to advance such cases on the calendar;  
619 providing applicability; providing an effective date.

620



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 7 Pub. Rec./Claim Settlement on Behalf of Minor or Ward  
**SPONSOR(S):** Government Operations Subcommittee; Passidomo and Rodriguez J.  
**TIED BILLS:** CS/CS/HB 5 **IDEN./SIM. BILLS:** CS/SB 360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Robinson	Bond
2) Government Operations Subcommittee	10 Y, 0 N, As CS	Williamson	Williamson
3) Judiciary Committee		Robinson <i>R</i>	Havlicak <i>RH</i>

### SUMMARY ANALYSIS

Litigation settlement agreements in guardianship cases routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval. The court approval process requires a petition setting forth the terms of the settlement. An order is eventually entered that may also contain the terms of settlement, or may refer to the petition. The petition and the order are part of a court file, and therefore are a matter of public record and open for inspection under current law.

The bill amends the guardianship law to provide that the petition requesting permission for settlement of a claim, the order on the petition, and any document associated with the settlement are confidential and exempt from public records requirements. The court may order partial or full disclosure of the confidential and exempt record upon a showing of good cause.

The bill provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemption will take effect on the same date as House Bill 5 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands the current public record exemption for certain information related to guardianship; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Public Records Law - In General

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.<sup>1</sup>

###### Court Records

Florida courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S.<sup>2</sup> However, the Florida Supreme Court found that "both civil and criminal proceedings in Florida are public events" and that the court will "adhere to the well-established common law right of access to court proceedings and records."<sup>3</sup> There is a Florida constitutional guarantee of access to judicial records.<sup>4</sup> The constitutional provision provides for public access to judicial records, except for those records expressly exempted by the State Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the State Constitution.<sup>5</sup>

###### Exempt versus Confidential and Exempt

There is a difference between records the Legislature has determined to be exempt and those which have been determined to be confidential and exempt.<sup>6</sup> If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.<sup>7</sup> Also, if the information is deemed to be confidential it may only be released to those person and entities designated in statute.<sup>8</sup> However, the agency is not prohibited from disclosing the records in all circumstances where the records are deemed only exempt.<sup>9</sup>

###### Settlements in Guardianship Cases

Litigation settlement agreements routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval.<sup>10</sup> The court approval process requires a petition setting forth the terms of the settlement.<sup>11</sup> An order is eventually entered that also may contain the terms of settlement, or may refer to the petition.<sup>12</sup> The petition and the order are part of a court file, and therefore, are a matter of public record and open for inspection under current law.

---

<sup>1</sup> Art I., s. 24(c), FLA. CONST.

<sup>2</sup> See e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995).

<sup>3</sup> *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).

<sup>4</sup> Art I., s. 24(a), FLA. CONST.

<sup>5</sup> Art I., ss. 24(c) and (d), FLA. CONST.

<sup>6</sup> *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

<sup>7</sup> *Id.*

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

<sup>9</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> See s. 744.301(2), F.S.

<sup>11</sup> s. 744.387, F.S.

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

## **Effect of the Bill**

The bill amends s. 744.3701, F.S., to provide that any court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized.

Because the record is made confidential and exempt, it may not be disclosed except as provided in law. Current law allows the court, the clerk of court, the guardian and the guardian's attorney to review the guardianship court file. The bill amends s. 744.3701, F.S., to provide that record of a settlement may also be disclosed to the guardian ad litem (if any) related to the settlement, to the ward (the minor) if he or she is 14 years of age or older and has not been declared incompetent, and to the attorney for the ward. The record may also be disclosed as ordered by the court.

The bill includes a public necessity statement.

### **B. SECTION DIRECTORY:**

Section 1 amends s. 744.3701, F.S., regarding confidentiality.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of House Bill 5, if adopted in the same legislative session.

## **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:**

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the court system and clerks of court. Staff responsible for



complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the court system and clerks.

### 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:

###### Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it requires a two-thirds vote for final passage.

###### Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it includes a public necessity statement.

###### Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption related to guardianships to include a court record relating to the settlement of a ward's or minor's claim.

#### B. RULE-MAKING AUTHORITY:

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

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 10, 2015, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with committee substitute. The amendment conformed the public necessity statement to the public record exemption.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.

1                                   A bill to be entitled  
 2           An act relating to public records; amending s.  
 3           744.3701, F.S.; providing an exemption from public  
 4           records requirements for records relating to the  
 5           settlement of a claim on behalf of a minor or ward;  
 6           authorizing a guardian ad litem, a ward, a minor, and  
 7           a minor's attorney to inspect guardianship reports and  
 8           court records relating to the settlement of a claim on  
 9           behalf of a minor or ward, upon a showing of good  
 10          cause; authorizing the court to direct disclosure and  
 11          recording of an amendment to a report or court records  
 12          relating to the settlement of a claim on behalf of a  
 13          minor or ward, in connection with real property or for  
 14          other purposes; providing a statement of public  
 15          necessity; providing a contingent effective date.

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

18  
 19           Section 1. Section 744.3701, Florida Statutes, is amended  
 20   to read:

21           744.3701 Confidentiality ~~Inspection of report.~~-

22           (1) Unless otherwise ordered by the court, upon a showing  
 23   of good cause, an ~~any~~ initial, annual, or final guardianship  
 24   report or amendment thereto, or a court record relating to the  
 25   settlement of a claim, is subject to inspection only by the  
 26   court, the clerk or the clerk's representative, the guardian and

27 | the guardian's attorney, the guardian ad litem with regard to  
 28 | the settlement of the claim, and the ward if he or she is at  
 29 | least 14 years of age and has not, unless he or she is a minor  
 30 | ~~or has~~ been determined to be totally incapacitated, ~~and~~ the  
 31 | ward's attorney, the minor if he or she is at least 14 years of  
 32 | age, or the attorney representing the minor with regard to the  
 33 | minor's claim, or as otherwise provided by this chapter.

34 | (2) The court may direct disclosure and recording of parts  
 35 | of an initial, annual, or final report or amendment thereto, or  
 36 | a court record relating to the settlement of a claim, including  
 37 | a petition for approval of a settlement on behalf of a ward or  
 38 | minor, a report of a guardian ad litem relating to a pending  
 39 | settlement, or an order approving a settlement on behalf of a  
 40 | ward or minor, in connection with a ~~any~~ real property  
 41 | transaction or for such other purpose as the court allows, in  
 42 | its discretion.

43 | (3) A court record relating to the settlement of a ward's  
 44 | or minor's claim, including a petition for approval of a  
 45 | settlement on behalf of a ward or minor, a report of a guardian  
 46 | ad litem relating to a pending settlement, or an order approving  
 47 | a settlement on behalf of a ward or minor, is confidential and  
 48 | exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I  
 49 | of the State Constitution and may not be disclosed except as  
 50 | specifically authorized.

51 | Section 2. The Legislature finds that it is a public  
 52 | necessity that a court record relating to the settlement of a

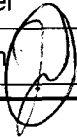
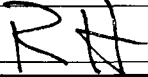
53 ward's or minor's claim, including a petition for approval of a  
 54 settlement on behalf of a ward or minor, a report of a guardian  
 55 ad litem relating to a pending settlement, or an order approving  
 56 a settlement on behalf of a ward or minor, be made confidential  
 57 and exempt from s. 119.07(1), Florida Statutes, and s. 24(a),  
 58 Art. I of the State Constitution. The information contained in  
 59 these records is of a sensitive, personal nature, and its  
 60 disclosure could jeopardize the physical safety and financial  
 61 security of the minor or ward. In order to protect minors,  
 62 wards, and others who could be at risk upon disclosure of a  
 63 settlement, it is necessary to ensure that only those interested  
 64 persons who are involved in settlement proceedings or the  
 65 administration of the guardianship have access to reports and  
 66 records. The Legislature finds that the court retaining  
 67 discretion to direct disclosure of these records is a fair  
 68 alternative to public access.

69       Section 3. This act shall take effect on the same date  
 70 that HB 5 or similar legislation takes effect, if such  
 71 legislation is adopted in the same legislative session or an  
 72 extension thereof and becomes law.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 133 Sexual Offenses  
**SPONSOR(S):** Civil Justice Subcommittee; Plasencia  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1270

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Justice Appropriations Subcommittee	12 Y, 0 N	Schrader	Lloyd
3) Judiciary Committee		Malcolm 	Havlicak 

### SUMMARY ANALYSIS

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. Some statutes of limitations related to felony sexual battery offenses are currently 4 years. The bill extends those statutes of limitations for sexual battery from 4 years to 10 years.

The Criminal Justice Impact Conference (CJIC) met February 27, 2015, and determined this bill will have a positive moderate impact on state prison beds. This means CJIC estimates that this bill may increase the department's prison population by greater than 10, less than 25 inmates annually. The bill does not appear to have a fiscal impact on local governments.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. The date is commonly based on the time that has elapsed since the action giving rise to the case occurred. Laws creating statutes of limitation specify when the time period begins, how long the limitations period runs, and circumstances by which the running of the statutes may be tolled (suspended).

The prohibition on ex post facto laws in the state and federal constitutions<sup>1</sup> applies to laws that extend a statute of limitations. A law that extends a statute of limitations may only delay the conclusion of the limitations period, it cannot revive a previously time-barred action. Accordingly, if the limitations period on a case has already expired, any extension created by this bill will not serve to revive the action.<sup>2</sup>

The title of the bill, the "43 Days Initiative Act," comes from a Florida resident who was the victim of a sexual battery. Unaware of the four-year criminal statute of limitations, the victim did not report the crime to law enforcement until four years and 43 days after the crime, which meant that no charges could be brought against the offender.<sup>3</sup>

#### **Criminal Statutes of Limitation Applicable to Sexual Battery**

Section 794.011, F.S., identifies numerous sexual battery<sup>4</sup> crimes, commonly referred to as rape.<sup>5</sup> Section 775.15, F.S., sets forth the statutes of limitation applicable to criminal prosecutions for sexual battery and provides that the time for prosecution of a criminal case starts to run on the day after the offense is committed. An offense is deemed to have been committed either when every element of the offense has occurred, or, if the legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's duplicity in the course of conduct is terminated.<sup>6</sup>

Under current law, there is no statute of limitations for first-degree felony sexual battery crimes where the victim is a minor.<sup>7</sup> Nor is there a statute of limitations for any sexual battery crime where the victim is under 16 years old.<sup>8</sup> Only two sexual battery offenses where the victim is a minor aged 16 or 17 years have an applicable three-year statute of limitations under current law: sexual battery without the use physical force and violence likely to cause serious personal injury - a second-degree felony;<sup>9</sup> and solicitation of sexual battery by a person in a position of familial or custodial authority to a person less than 18 years of age - a third-degree felony.<sup>10</sup> As to these two offenses, the applicable statute of limitations does not commence until the earlier of the date that the minor reaches 18 years of age or the crime is reported to law enforcement.<sup>11</sup> Moreover, if the sexual battery is a first- or second-degree felony and is reported to law enforcement within 72 hours after the commission of the crime, there is no statute of limitations.<sup>12</sup>

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<sup>1</sup> Article I, s. 9, U.S.Const.; Article I, s. 10, Fla.Const.

<sup>2</sup> *Stogner v. California*, 539 U.S. 607, 632-33 (2003)

<sup>3</sup> 43 Days Initiative, My Story, <http://www.43daysinitiative.org/#!/mystory/c1Inf> (last accessed Feb. 4, 2015).

<sup>4</sup> Section 794.011(1)(h), F.S., defines sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose."

<sup>5</sup> See Note 7 for definition of sexual battery.

<sup>6</sup> s. 775.15(3), F.S.

<sup>7</sup> *Id.* at (13)(b).

<sup>8</sup> *Id.* at (13)(c).

<sup>9</sup> s. 794.011(5)(c), F.S.

<sup>10</sup> s. 794.011(8)(a), F.S.

<sup>11</sup> s. 775.15(13)(a), F.S.

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

In cases of sexual battery crimes against victims 18 years of age or older, current law provides that if the offense is reported to law enforcement within 72 hours of the offense, there is no statute of limitations.<sup>13</sup> If the offense is not reported within 72 hours, the statute of limitations is either four years for first-degree felony sexual battery or three years for second-degree felony sexual battery.<sup>14</sup>

In addition to the time periods for minors and adults stated above, an offender may be prosecuted within one year after the date on which the identity of the offender is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused.<sup>15</sup>

#### *Effect of Bill*

This bill amends the statute of limitations applicable to sexual battery criminal cases, s. 775.15, F.S., to provide that the statute of limitations for first- or second-degree sexual battery committed against a victim 16 years of age or older is extended to 10 years from the date of the crime, except as otherwise provided in current law. The provision providing for no statute of limitations when the crime is reported within 72 hours of its commission is retained in law.

This change applies to any such offense except one already time-barred on or before July 1, 2015. This provision makes the change retroactive to previously committed offenses, provided that the statute of limitations did not run out of time prior to July 1, 2015.

#### B. SECTION DIRECTORY:

Section 1 provides a name for the act.

Section 2 amends s. 775.15, F.S., regarding the statute of limitations for criminal actions.

Section 3 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 Criminal Justice Impact Conference (CJIC) met February 27, 2015, and determined this bill will have a positive moderate impact on state prison beds. This means CJIC estimates that this bill may increase the department's prison population by greater than 10, less than 25 inmates annually. For fiscal year 2013-14, 83 people were sentenced to prison within a year of their offense, 89 within two years, 55 within three years, 26 within four years, and 11 within five years of the offense. The fewer offenders with each additional year imply a declining number over time, but data is not available on the number of unreported offenses that could be captured in an expanded statute of limitation.

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<sup>13</sup> *Id.* at (14).

<sup>14</sup> First-degree felony sexual battery is defined in s. 794.011(4)(b), F.S., as non-consensual sexual battery under a list of enumerated circumstances, including, when the victim is physically helpless to resist, the victim is threatened, the victim is physically or mentally incapacitated, and the offender is a law enforcement officer. Second-degree felony sexual battery is defined in s. 794.011(5)(b), F.S., as non-consensual sexual battery without the use of physical force or violence likely to cause serious personal injury.

<sup>15</sup> Section 775.15(8), F.S.



Furthermore, the CJIC was unable to separate those under 16 years old from the available data, causing the data to be skewed upwards.

**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:

The statute of limitations in effect at the time the crime is committed controls.<sup>16</sup> However, the legislature can amend statutes of limitation to apply retroactively without running afoul of the constitutional ex post facto prohibition if it does so before prosecution is barred by the old statute and clearly indicates that the new statute is to apply retroactively to cases pending when it becomes effective.<sup>17</sup>

The bill appears to express an intent that it apply retroactively to cases pending on the effective date.

A prosecution pursuant to this bill may raise due process concerns if there is a long delay between the commission of the crime and the prosecution of the case. In *United States v. Lovasco*,<sup>18</sup> the United States Supreme Court explained that criminal statutes of limitations provide the "primary guarantee" against bringing "stale" criminal charges and said that the Due Process Clause has a "limited role" in protecting against oppressive delay. The court said that it could "not determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions."<sup>19</sup> In considering whether a delay violates due process, other states have considered factors such as the length of the delay, the prejudice to the accused, and the reason for the delay.<sup>20</sup>

<sup>16</sup> *State v. Wadsworth*, 293 So.2d 345, 347 (Fla. 1974).

<sup>17</sup> *E.g., Scharfschwerdt v. Kanarek*, 553 So.2d 218, 220 (Fla. 4th DCA 1989) (recognizing extended statute of limitations regarding lewd and lascivious assault upon a child and sexual battery); *State v. Calderon*, 951 So. 2d 1031, 1035 (Fla. 3d DCA 2007); *Reino v. State*, 352 So.2d 853 (Fla. 1977) receded from on other grounds, *Perez v. State*, 545 So.2d 1357 (Fla. 1989).

<sup>18</sup> 431 U.S. 783, 789 (1977).

<sup>19</sup> *Id.* at 796.

<sup>20</sup> *See State v. Gray*, 917 S.W. 668 (Tenn. 1996) (holding a 42 year delay between commission of a sex crime and prosecution violated the due process clause).

**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 10, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removes the section of the bill that would have extended from 4 years to 10 years the statutes of limitation applicable to civil action involving sexual battery where the victim is 16 years old or older; and
- Expands the extension of the criminal statute of limitations for sexual battery to include cases where the victim is 16 years of age or older.

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

1 A bill to be entitled  
 2 An act relating to sexual offenses; providing a short  
 3 title; amending s. 775.15, F.S.; revising time  
 4 limitations for the criminal prosecution of specified  
 5 sexual battery offenses if the victim is 16 years of  
 6 age or older; providing applicability; providing an  
 7 effective date.

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

10  
 11 Section 1. This act may be cited as the "43 Days  
 12 Initiative Act."

13 Section 2. Subsection (14) of section 775.15, Florida  
 14 Statutes, is amended to read:

15 775.15 Time limitations; general time limitations;  
 16 exceptions.—

17 (13)

18 (b) If the offense is a first degree felony violation of  
 19 s. 794.011 and the victim was under 18 years of age at the time  
 20 the offense was committed, a prosecution of the offense may be  
 21 commenced at any time. This paragraph applies to any such  
 22 offense except an offense the prosecution of which would have  
 23 been barred by subsection (2) on or before October 1, 2003.

24 (14) (a) A prosecution for a first or second degree felony  
 25 violation of s. 794.011, if the victim is 16 ~~18~~ years of age or  
 26 older at the time of the offense and the offense is reported to

27 a law enforcement agency within 72 hours after commission of the  
 28 offense, may be commenced at any time. ~~If the offense is not~~  
 29 ~~reported within 72 hours after the commission of the offense,~~  
 30 ~~the prosecution must be commenced within the time periods~~  
 31 ~~prescribed in subsection (2).~~

32 (b) Except as provided in paragraph (a) or paragraph  
 33 (13)(b), a prosecution for a first or second degree felony  
 34 violation of s. 794.011, if the victim is 16 years of age or  
 35 older at the time of the offense, must be commenced within 10  
 36 years after the violation is committed. This paragraph applies  
 37 to any such offense except an offense the prosecution of which  
 38 would have been barred by subsection (2) on or before July 1,  
 39 2015.

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



## 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 <i>R</i>	Havlicak <i>RH</i>

### 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.<sup>1</sup>

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.<sup>2</sup>

##### **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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> 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.

<sup>2</sup> ss. 66.021(3), 82.091, and 83.62(1), F.S.

<sup>3</sup> 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.")

<sup>4</sup> s. 83.57, F.S.

<sup>5</sup> s. 83.59, F.S.

<sup>6</sup> *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.<sup>7</sup> 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.<sup>8</sup>

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<sup>9</sup> 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.<sup>10</sup> 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<sup>11</sup> 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)<sup>12</sup> or \$395 (civil court).<sup>13</sup>
- Service charge for issuance of each summons - \$10.<sup>14</sup>
- Service of each summons by the Sheriff - \$40.<sup>15</sup>
- Service and execution of the writ of possession by Sheriff - \$90.<sup>16</sup>
- Fees charged by the Sheriff to stand by and to keep the peace in an action for possession - Varies.<sup>17</sup>
- Attorney Fees - Varies.

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<sup>7</sup> s. 82.04, F.S.

<sup>8</sup> s. 66.021, F.S.

<sup>9</sup> s. 34.011(2), F.S.

<sup>10</sup> 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.

<sup>11</sup> s. 26.012(2)(f), F.S.

<sup>12</sup> s. 34.041(1)(a)7., F.S.

<sup>13</sup> s. 28.241(1)(a)1.a., F.S.

<sup>14</sup> ss. 28.241(1)(d) and 34.041(1)(d), F.S.

<sup>15</sup> s. 30.231(1)(a), F.S.

<sup>16</sup> s. 30.231, F.S.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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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<sup>18</sup> See e.g. s. 196.015, F.S.

<sup>19</sup> 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.<sup>20</sup>
- 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."<sup>21</sup>
- 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.<sup>22</sup>
- 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."<sup>23</sup>
- 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.<sup>24</sup>

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.

<sup>20</sup> 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](http://www.sptimes.com/2004/02/17/Tampabay/Law_slanted_in_favor_.shtml).

<sup>21</sup> *Id.*

<sup>22</sup> Eileen Schulte, *Charity backfires on landlord*, The Columbus Dispatch, January 23, 2009, <http://www.dispatch.com/content/stories/insight/2009/01/23/squatters.html>.

<sup>23</sup> 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>.

<sup>24</sup> 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.

1                                   A bill to be entitled  
 2           An act relating to unlawful detention by a transient  
 3           occupant; creating s. 82.045, F.S.; defining the term  
 4           "transient occupant"; providing factors that establish  
 5           a transient occupancy; providing for removal of a  
 6           transient occupant by a law enforcement officer;  
 7           providing a cause of action for wrongful removal;  
 8           limiting actions for wrongful removal; providing a  
 9           civil action for removal of a transient occupant;  
 10          providing an effective date.

11  
 12   Be It Enacted by the Legislature of the State of Florida:

13  
 14          Section 1.   Section 82.045, Florida Statutes, is created to  
 15          read:

16          82.045   Remedy for unlawful detention by a transient  
 17          occupant of residential property.-

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

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

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

27 the property.

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

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

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

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

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

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

41 8. The person has an apparent permanent residence  
 42 elsewhere.

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

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

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

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

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

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2015

79 is instead a tenant of residential property entitled to the  
80 protections of part II of chapter 83, the court may not dismiss  
81 the action without first allowing the plaintiff to give notice  
82 required by that part and to thereafter amend the complaint to  
83 pursue eviction under that part. County courts have jurisdiction  
84 over actions authorized under this subsection. The filing fee  
85 for an action under this subsection is the fee established in s.  
86 34.041(1)(a)7. for removal of a tenant.

87       Section 2. 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	<input checked="" type="checkbox"/>	(Y/N)
FAILED TO ADOPT	—	(Y/N)
WITHDRAWN	—	(Y/N)
OTHER	—	

*Accepted w/out objection  
3-19-15*

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Harrison offered the following:

**Amendment**

5 Remove line 21 and insert:

6 pursuant to a lease, and whose occupancy was intended as

3  
4  
7  
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10  
11  
12

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Harrison offered the following:

**Amendment**

5 Remove lines 50-86 and insert:

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

14 (a) A person who fails to comply with the direction of the  
 15 law enforcement officer to surrender possession or occupancy  
 16 violates s. 810.08. In any prosecution of a violation of s.  
 17 810.08 related to this section, whether the defendant was

Amendment No. 2

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

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

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



Amendment No. 2a

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Wood offered the following:

**Amendment to Amendment (772949) by Representative Harrison**

Remove line 10 of the amendment and insert:

6 possession of residential property. The sworn affidavit must  
 7 state that there is no written or oral lease and must set



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

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Harrison offered the following:

3  
 4 **Amendment**



5 Remove line 25 and insert:

6 1. The person does not have ownership, financial, or  
 7 leasehold



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/HB 439 Department of Legal Affairs  
**SPONSOR(S):** Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Eisnaugle  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1362

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Patton	Cunningham
2) Justice Appropriations Subcommittee	9 Y, 0 N, As CS	McAuliffe	Lloyd
3) Judiciary Committee		Patton 	Havlicak 

**SUMMARY ANALYSIS**

The Department of Legal Affairs (Department), led by the Attorney General, provides a wide variety of legal services, including protecting Florida consumers in cases of Medicaid fraud, defending the state in civil litigation cases and representing the people of Florida when criminals appeal their convictions in state and federal courts.

This bill makes several changes to a variety of statutes affecting the Department. For example, the bill:

- Expands the jurisdiction of the Office of Statewide Prosecution to include violations of ch. 787, F.S. (kidnapping, false imprisonment, and human trafficking), that were facilitated by or connected to the use of the Internet;
- Authorizes the Department to spend no more than \$20,000 annually to support costs associated with the agency's Law Enforcement Officer of the Year and Victims Services recognition and awards program.
- Allows funds currently awarded to persons who report Medicaid fraud to also be used to fund the Department's Medicaid Fraud Control Unit;
- Expands the definition of the term "crime" for purposes of victim assistance awards;
- Prohibits victim assistance awards for "catastrophic injury" from being reduced;
- Authorizes the Department to award a lifetime maximum of \$1,000 on all victim assistance claims relating to elderly persons and disabled adults who suffer a property loss that causes a substantial diminution in their quality of life; and
- Creates s. 960.196, F.S., that addresses relocation assistance for victims of human trafficking.

The bill contains provisions that will have both a positive and negative fiscal impact on the Department. See Fiscal Analysis section.

The bill is effective July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

The Department of Legal Affairs (Department), led by the Attorney General, provides a wide variety of legal services, including protecting Florida consumers in cases of Medicaid fraud, defending the state in civil litigation cases and representing the people of Florida when criminals appeal their convictions in state and federal courts.<sup>1</sup>

This bill makes several changes to a variety of statutes affecting the Department. A detailed description of these changes follows.

#### **Office of Statewide Prosecution Jurisdiction**

The Office of Statewide Prosecution (OSP), housed within the Department, works regularly with state and federal counterparts to investigate and prosecute complex, often large scale, organized criminal activity.<sup>2</sup> In order for the Statewide Prosecutor to have jurisdiction over a case, the crime must have occurred in more than one judicial circuit or be part of a conspiracy affecting more than one judicial circuit, and it must be one of the offenses<sup>3</sup> enumerated in s. 16.56(1)(a), F.S.<sup>4</sup>

In 2007, the Legislature recognized the multi-jurisdictional nature of the Internet and gave the OSP jurisdiction to investigate and prosecute any crime enumerated in s. 16.56 (1)(a), F.S., that was facilitated by or connected to the use of the Internet.<sup>5</sup> Since this legislation was enacted, violations of ch. 787, F.S. (relating to kidnapping, false imprisonment, and human trafficking) were added to the list of offenses that the OSP had jurisdiction over.<sup>6</sup> However, in what was likely an oversight, the OSP was not given jurisdiction over violations of ch. 787, F.S., that were facilitated by or connected to the use of the Internet.

#### Effect of the Bill

The bill expands the jurisdiction of the OSP to include violations of ch. 787, F.S., that were facilitated by or connected to the use of the Internet.

#### **Spending Authority**

Currently, the Department does not have specific statutory authority to spend funds on promotional materials or other similar items. Section 943.685, F.S., authorizes the Florida Department of Law Enforcement to expend no more than \$5,000 annually to purchase and distribute promotional materials or items that serve to advance with dignity and integrity the good will of this state and to provide basic refreshments at official functions, seminars, or meetings of the department in which dignitaries or representatives from the Federal Government, other states or nationalities, or other agencies are in attendance.

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<sup>1</sup> Florida Office of the Attorney General, *The Role and Function of the Attorney General*, <http://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F> (last visited March 6, 2015).

<sup>2</sup> Florida Office of the Attorney General, *Office of Statewide Prosecution*, <http://myfloridalegal.com/pages.nsf/Main/D243EF87774E965185256CC600785693> (last visited March 6, 2015).

<sup>3</sup> These offenses include bribery; burglary; usury; extortion; gambling; kidnapping; theft; murder; prostitution; perjury; robbery; home-invasion robbery; narcotics violations; racketeering; anti-fencing violations; antitrust violations; crimes involving fraud and deceit; certain computer-related crimes; violations of the Florida Drug and Cosmetic Act; violations of the Florida Motor Fuel Tax Relief Act of 2004; Medicaid fraud; crimes involving voter registration, voting, or candidate or issue petition activities; violations of the Florida Money Laundering Act; violations of the Florida Securities and Investor Protection Act; human trafficking; and attempts, solicitations, or conspiracies to commit these offenses.

<sup>4</sup> FLA. CONST. art. IV, s. 4.; s. 16.56, F.S.

<sup>5</sup> Ch. 2007-143, Laws of Fla.; s. 16.56(1)(b), F.S.

<sup>6</sup> Ch. 2012-97, Laws of Fla.



### Effect of the Bill

The bill creates s. 16.62, F.S., to authorize the Department to spend no more than \$20,000 annually to support costs associated with the agency's Law Enforcement Officer of the Year and Victims Services recognition and awards program.

### **Medicaid Fraud Reporting Rewards**

#### *Medicaid Fraud Reporting Rewards*

The Department's Medicaid Fraud Control Unit investigates and prosecutes fraud involving providers that intentionally defraud the state's Medicaid program.<sup>7</sup> This involves investigating a wide range of misconduct originating primarily from fraudulent billing schemes, which usually involve doctors, dentists, clinics and other health care providers billing for services never performed; over billing for services provided; or billing for tests, services and products that are medically unnecessary.<sup>8</sup>

Section 409.9203, F.S., specifies that a person who furnishes original information relating to Medicaid fraud and reports a violation of the state's Medicaid fraud laws is eligible for a reward,<sup>9</sup> subject to the availability of funds, if the information and report:

- Is made to the Department, the Agency for Health Care Administration, the Department of Health, or the Department of Law Enforcement;
- Relates to criminal fraud upon Medicaid funds or a criminal violation of Medicaid laws by another person; and
- Leads to a recovery of a fine, penalty, or forfeiture of property.<sup>10</sup>

The reward is paid from the Operating Trust Fund from moneys collected pursuant to the Florida False Claims Act (FFCA).

#### *Florida False Claims Act*

The FFCA authorizes private individuals to bring "qui tam" suits in the name of the state against persons or entities who have defrauded the state in contracting or other matters.<sup>11</sup> As an incentive to bring these suits, successful plaintiffs, sometimes called whistleblowers, are permitted to share in the damages recovered.<sup>12</sup> The FFCA also allows the state entity injured by the submission of a false or fraudulent claim to be awarded an amount not to exceed its compensatory damages.<sup>13</sup>

If an FFCA action was based on a claim of funds from the state Medicaid program, 10% of the proceeds that remain after the plaintiff and the state entity have been issued their awards must be deposited into the Operating Trust Fund. Currently, 100% of these funds are used to fund rewards for persons who report Medicaid fraud pursuant to s. 409.9203, F.S.<sup>14</sup>

### Effect of the Bill

The bill requires the 10% of funds that are deposited into the Operating Trust Fund pursuant to the FFCA to be allocated as follows:

- 50% to fund rewards for reporting Medicaid fraud; and
- 50% to fund Medicaid Fraud Control Unit investigations of potential violations of the FFCA and any related civil actions.

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<sup>7</sup> Florida Office of the Attorney General, *Medicaid Fraud Control Unit*, <http://myfloridalegal.com/pages.nsf/Main/ebc480598bbf32d885256cc6005b54d1> (last visited March 6, 2015).

<sup>8</sup> *Id.* Also see, ss. 409.920 and 409.9201, F.S.

<sup>9</sup> The reward may not exceed the lesser of 25 percent of the amount recovered or \$500,000 in a single case. s. 409.9203(2), F.S.

<sup>10</sup> s. 409.9203(1), F.S.

<sup>11</sup> The Florida Bar Journal, *Florida Updates Qui Tam Whistleblower Statute*, Ryon M. McCabe and Robert C. Glass, [http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/22dfadebad8fecfc85257c6e00552de7!OpenDocument&Highlight=0,\\*](http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/22dfadebad8fecfc85257c6e00552de7!OpenDocument&Highlight=0,*) (last visited March 6, 2015).

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

<sup>13</sup> s. 68.085(3), F.S.

<sup>14</sup> *Id.*

This increases the funding available to the Department's Medicaid Fraud Control Unit, but decreases funding available to those who report Medicaid fraud.

### **Florida Deceptive and Unfair Trade Practices Act**

Florida's Deceptive and Unfair Trade Practices Act (FDUTPA)<sup>15</sup> gives consumers legal protection against commercial wrongdoing. Patterned after the Federal Trade Commission Act,<sup>16</sup> FDUTPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.<sup>17</sup> It enables consumers to recover actual damages, permits recovery of reasonable attorneys' fees and costs by the prevailing party, and also provides for declaratory judgments and injunctive relief. It also gives equitable remedies to state enforcement authorities,<sup>18</sup> who may bring suit "on behalf of one or more consumers."<sup>19</sup>

In construing FDUTPA's provisions, due consideration and great weight are given to the interpretations of the Federal Trade Commission and the federal courts relating to the analogous provision of the Federal Trade Commission Act, as of July 1, 2013.<sup>20</sup>

### Effect of the Bill

The bill updates ss. 501.203 and 501.204, F.S., to refer to the Federal Trade Commission Act rules and regulations as of July 1, 2015.

### **Victim Assistance**

The Department's Division of Victim Services serves as an advocate for crime victims and administers a compensation program to ensure financial assistance for innocent victims of crime.<sup>21</sup> Currently, injured crime victims may be eligible for financial assistance for medical care, lost income, funeral expenses, and other out-of-pocket expenses directly related to the injury.<sup>22</sup> Payment is made from the Crime Compensation Trust Fund.<sup>23</sup> The Department may adopt rules establishing compensation award limits, however, compensation awards generally may not exceed:

- \$10,000 for treatment;
- \$10,000 for continuing or periodic mental health care of a minor victim whose normal emotional development is adversely affected by being the victim of a crime;
- A total of \$25,000 for all compensable costs; or
- \$50,000 when the Department makes a written finding that the victim has suffered a catastrophic injury as a direct result of the crime.<sup>24</sup>

### *Definitions*

As noted above, a person must first be a victim of a crime to be eligible for victim assistance.<sup>25</sup> Section 960.03(3), F.S., defines the term "crime" for victim assistance purposes, in part, as:

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<sup>15</sup> ss. 501.201-213, F.S.

<sup>16</sup> 15 U.S.C. §§ 41-58 (2013).

<sup>17</sup> s. 501.204, F.S.

<sup>18</sup> The Department is an enforcing authority of FDUTPA. As such, the Department is authorized to investigate and file civil actions against persons who engage in unfair methods of competition, unfair, unconscionable or deceptive trade practices, including, but not limited to, pyramid schemes, misleading franchise or business opportunities, travel scams, fraudulent telemarketing, and false or misleading advertising. Florida Office of the Attorney General, *Consumer Protection Division*, <http://myfloridalegal.com/pages.nsf/Main/7003247af328dc9e85256cc6006fba91> (last visited on March 6, 2015).

<sup>19</sup> The Florida Bar Journal, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, David J. Federbush, <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Autor/F9BE91D3215162C685256ADB005D6262> (last visited on March 6, 2015).

<sup>20</sup> ss. 501.203(3) and 501.204, F.S.

<sup>21</sup> Florida Office of the Attorney General, *Division of Victims Services*, <http://myfloridalegal.com/pages.nsf/main/1c7376f380d0704c85256cc6004b8ed3!OpenDocument> (last visited on March 6, 2015).

<sup>22</sup> *Id.*

<sup>23</sup> s. 960.21, F.S.

<sup>24</sup> s. 960.13, F.S.

<sup>25</sup> ss. 960.065 and 960.03(3) and (14), F.S.

- A felony or misdemeanor offense committed by an adult or a juvenile which results in physical injury or death, or a felony or misdemeanor offense of child abuse committed by an adult or a juvenile which results in a mental injury,<sup>26</sup> as defined in s. 827.03, F.S., to a person younger than 18 years of age who was not physically injured by the criminal act; or<sup>27</sup>
- A violation of s. 316.193, F.S., (DUI); s. 316.027(1), F.S. (leaving the scene of a crash involving death of bodily injury); s. 327.35(1), F.S. (BUI); s. 782.071(1)(b), F.S. (vehicular homicide); or s. 860.13(1)(a), F.S. (operating an aircraft under the influence); which results in physical injury or death; however, an act involving the operation of a motor vehicle, boat, or aircraft which results in injury or death does not constitute a crime for the purpose of this chapter unless the injury or death was intentionally inflicted through the use of the vehicle, boat, or aircraft.

Section 960.03, F.S., also defines the term “disabled adult” as a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability or organic brain damage or mental limitations that restrict the person’s ability to perform the normal activities of daily living.

### Effect of the Bill

The bill expands the definition of the term “crime” to include:

- A forcible felony committed by an adult or juvenile which directly results in psychiatric or psychological injury;<sup>28</sup> and
- Violations of s. 316.1935, F.S. (fleeing or eluding a law enforcement officer), which results in physical injury or death.

The term is also amended to include an act involving the operation of a motor vehicle, boat, or aircraft which results in another person’s injury or death that is intentionally inflicted through the use of the vehicle, boat, or aircraft.

The bill also amends the definition of the term “disabled adult” to include persons over 18 years of age:

- Who suffer from a condition of physical or mental incapacitation due to mental illness; and
- Who have one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.

### **Awards**

Currently, victim assistance awards, *except awards for loss of support*, are reduced by the amount of any payments or services received or to be received by the claimant as a result of the injury or death:

- From or on behalf of the person who committed the crime; provided, however, that a restitution award ordered by a court to be paid to the claimant by the person who committed the crime shall not reduce any award made pursuant to this chapter unless it appears to the department that the claimant will be unjustly enriched thereby;
- From any other public or private source or provider, including, but not limited to, an award of workers’ compensation pursuant to ch. 440, F.S.;
- From agencies mandated by other Florida statutes to provide or pay for services, except as provided in s. 960.28, F.S.; or
- From an emergency award under s. 960.12, F.S.<sup>29</sup>

<sup>26</sup> The mental injury to the minor must be verified by a psychologist licensed under ch. 490, F.S., by a physician licensed in this state under chs. 458 or 459, F.S., who has completed an accredited residency in psychiatry, or by a physician who has obtained certification as an expert witness pursuant to s. 458.3175, F.S.

<sup>27</sup> The term also includes a criminal act that is committed within this state but that falls exclusively within federal jurisdiction.

<sup>28</sup> This change conforms with the current definition of “victim,” which includes “a person against whom a forcible felony was committed and who suffers a psychiatric or psychological injury as a direct result of that crime but who does not otherwise sustain a personal physical injury or death.” s. 960.03(14)(d), F.S.

<sup>29</sup> s. 960.13(6), F.S.

### Effect of the Bill

The bill prohibits awards for loss of support *and awards for catastrophic injury* from being reduced pursuant to the above provisions. "Catastrophic injury" is defined as a permanent impairment constituted by:

- Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk;
- Amputation of an arm, a hand, a foot, or a leg;
- Severe brain or closed-head injury as evidenced by:
  - Severe sensory or motor disturbances;
  - Severe communication disturbances;
  - Severe complex integrated disturbances of cerebral function;
  - Severe episodic neurological disorders; or
  - Other severe brain and closed-head injury conditions at least as severe in nature as any condition described in subparagraphs 1.-4.;
- Second-degree or third-degree burns on 25 percent or more of the total body surface or third-degree burns on 5 percent or more of the face and hands;
- Total or industrial blindness; or
- Any other injury that would otherwise qualify under ch. 960, F.S., and that is of a nature and severity that would qualify an employee to receive disability income benefits under Title II or supplemental security income benefits under Title XVI of the federal Social Security Act as the Social Security Act existed on July 1, 1992, without regard to any time limitations provided under that act.<sup>30</sup>

### *Awards to Elderly Persons or Disabled Adults*

As noted above, s. 960.13, F.S., establishes criteria and limits for victim compensation awards. Section 960.195, F.S., creates separate criteria and limits for awards to elderly persons and disabled adults who suffer a property loss that causes a substantial diminution in their quality of life. Under this section, the Department is authorized to award a maximum of \$500 to such elderly persons or disabled adults when:

- There is proof that a criminal or delinquent act was committed;
- The criminal or delinquent act is reported to law enforcement authorities within 72 hours;
- The victim cooperates with law enforcement authorities in the investigation of the criminal or delinquent act;
- There is proof that the tangible personal property in question belonged to the claimant;
- The claimant did not contribute to the criminal or delinquent act;
- There is no other source of reimbursement or indemnification available to the claimant; and
- The claimant would not be able to replace the tangible personal property in question without incurring a serious financial hardship.<sup>31</sup>

### Effect of the Bill

The bill amends s.960.195, F.S., specifying that the Department is authorized to award a maximum of \$500 *on any one claim, and a lifetime maximum of \$1,000 on all claims* relating to elderly persons and disabled adults who suffer a property loss that causes a substantial diminution in their quality of life.

The bill requires the criminal or delinquent act be reported to law enforcement authorities within 72 hours, *unless the Department, for good cause shown, finds the delay to have been justified.*

The bill also removes the requirement that the victim cooperate with law enforcement authorities in the investigation of the criminal or delinquent act. However, the bill authorizes the Department to deny, reduce, or withdraw an award upon finding that any claimant or award recipient has not duly cooperated with the state attorney, all law enforcement agencies, and the Department.

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<sup>30</sup> s. 960.03(1), F.S.

<sup>31</sup> s. 960.195, F.S.

## Relocation Assistance

Prior to 2014, s. 960.199, F.S., provided relocation assistance to victims of sexual battery. In 2014, legislation was passed that expanded the statute to include victims of human trafficking.<sup>32</sup> Under the relocation assistance program, a victim of sexual battery<sup>33</sup> or human trafficking<sup>34</sup> who needs relocation assistance and meets the statutory criteria may receive a one-time payment not exceeding \$1,500 on any one claim (a lifetime maximum of \$3,000).<sup>35</sup>

In order for a relocation assistance award to be granted to a sexual battery or human trafficking victim:

- There must be proof that a sexual battery offense or human trafficking offense, as described in s. 787.06(3)(b), (d), (f), or (g), was committed.
- The offense must be reported to the proper authorities.
- The victim's need for assistance must be certified by a certified rape crisis center in this state or by the state attorney or statewide prosecutor having jurisdiction over the offense. A victim of human trafficking's need for assistance may also be certified by a certified domestic violence center in this state.
- The center's certification must assert that the victim is cooperating with law enforcement officials, if applicable, and must include documentation that the victim has developed a safety plan. If the victim seeking relocation assistance is a victim of a human trafficking offense, the certified rape crisis or certified domestic violence center's certification must include, if applicable, approval of the state attorney or statewide prosecutor attesting that the victim is cooperating with law enforcement officials.
- The act of sexual battery or human trafficking must be committed in the victim's place of residence or in a location that would lead the victim to reasonably fear for his or her continued safety in the place of residence.<sup>36</sup>

Relocation payments for a sexual battery or human trafficking claim must be denied if the Department has previously approved or paid out a domestic violence relocation claim under s. 960.198, F.S., to the same victim regarding the same incident.<sup>37</sup>

## Effect of the Bill

The bill creates s. 960.196, F.S., to address relocation assistance for victims of human trafficking. The eligibility criteria (described above) largely remain the same, but there are some differences. For example, the new section requires:

- Victims of human trafficking to need urgent assistance to escape from an unsafe environment directly related to the human trafficking offense.
- The offense to be reported to the proper authorities and the claim filed within 1 year (or 2 years with good cause) after the date of the last human trafficking offense. In a case that exceeds the 2-year requirement due to an active and ongoing investigation, a state attorney, statewide prosecutor, or federal prosecutor may certify in writing a human trafficking victim's need to relocate from an unsafe environment due to the threat of future violence which is directly related to the human trafficking offense.

The bill also makes conforming changes to ss. 960.198 and 960.199, F.S., relating to relocation assistance for victims of domestic violence and sexual battery.

## B. SECTION DIRECTORY:

Section 1. Amends s. 16.56, F.S., relating to Office of Statewide Prosecution.

<sup>32</sup> Chapter 2014-160, Laws of Florida.

<sup>33</sup> As defined in s. 794.011, F.S.

<sup>34</sup> As described in s. 787.06(3)(b), (d), (f), or (g), F.S.

<sup>35</sup> s. 960.199(1), F.S.

<sup>36</sup> s. 960.199(2), F.S.

<sup>37</sup> s. 960.199(3), F.S.

Section 2. Creates s. 16.62, F.S., relating to recognition and awards.

Section 3. Amends s. 409.9203, F.S., relating to rewards for reporting Medicaid fraud.

Section 4. Amends s. 501.203, F.S., relating to definitions.

Section 5. Amends s. 501.204, F.S., relating to unlawful acts and practices.

Section 6. Amends s. 960.03, F.S., relating to definitions; ss. 960.01-960.28.

Section 7. Amends s. 960.13, F.S., relating to awards.

Section 8. Amends s. 960.195, F.S., relating to awards to elderly persons or disabled adults for property loss.

Section 9. Creates s. 960.196, F.S., relating to relocation assistance for victims of human trafficking.

Section 10. Amends s. 960.198, F.S., relating to relocation assistance for victims of domestic violence.

Section 11. Amends s. 960.199, F.S., relating to relocation assistance for victim of sexual battery or human trafficking.

Section 12. Provides an effective date of July 1, 2015.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

If an FFCA action was based on a claim of funds from the state Medicaid program, 10% of the proceeds that remain after the plaintiff and the state entity have been issued their awards must be deposited into the Operating Trust Fund. Currently 100% of these funds are used to fund rewards for persons who report Medicaid fraud pursuant to s. 409.9203, F.S. However, the awards granted for this have been minimal. Of the \$2.6 million collected by the state in the last two fiscal years, only \$22,652 in awards has been paid by the state.

The bill requires the 10% of funds that are deposited into the Operating Trust Fund pursuant to the Florida False Claims Act to be allocated as follows:

- 50% to fund rewards for reporting Medicaid Fraud; and
- 50% to fund Medicaid Fraud Control Unit investigations of potential violations of the FFCA and any related civil actions.

This increases the funding available to the Department's Medicaid Fraud Control Unit.

#### **2. Expenditures:**

The bill expands the definitions of "crime" and "elderly person or disabled adult" for purposes of victim assistance awards. The bill also prohibits the Department from reducing awards for catastrophic injury. This may have a negative fiscal impact on the Department.

The bill also requires victims of human trafficking to meet additional requirements before being eligible for relocation assistance, and limits victim assistance awards for elderly persons and disabled adults who suffer a property loss that causes a substantial diminution in their quality of life

to a lifetime maximum of \$1,000. These provisions may have a positive fiscal impact on the Department.

**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:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

This bill 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 4, 2015, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorable as a committee substitute. The committee substitute:

- Creates s. 16.62, F.S., authorizing the Department to spend no more than \$20,000 annually to purchase and distribute promotional materials and to provide basic refreshments at official functions;
- Removes provisions increasing the penalties for failing to report known or suspected abuse, neglect, or exploitation of a vulnerable adult;
- Removes provisions relating to the Fair Housing Act;
- Removes provisions relating to assault and battery on disabled adults;
- Removes provisions relating to convenience businesses; and
- Updates Florida's FDUTPA statutes to refer to the Federal Trade Commission Act rules and regulations as of July 1, 2015.

On March 18, 2015, the Justice Appropriations Subcommittee adopted one amendment to the committee substitute and reported the bill favorably as amended. The amendment restricts the Department's authorization to spend no more than \$20,000 annually to only the support costs associated with the agency's Law Enforcement Officer of the Year and Victims Services recognition and awards programs.

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





27 in certain circumstances; revising the conditions  
 28 under which such persons are eligible for awards;  
 29 authorizing the department to deny, reduce, or  
 30 withdraw a specified award upon finding that a  
 31 claimant or award recipient has not duly cooperated  
 32 with certain persons and entities; creating s.  
 33 960.196, F.S.; providing for relocation assistance for  
 34 human trafficking victims; amending s. 960.198, F.S.;  
 35 prohibiting relocation assistance for a domestic  
 36 violence claim if the victim has received previous  
 37 relocation assistance for a human trafficking claim;  
 38 amending s. 960.199, F.S.; deleting provisions  
 39 relating to relocation assistance for human  
 40 trafficking victims; providing an effective date.

41

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

43

44 Section 1. Paragraphs (a) and (b) of subsection (1) of  
 45 section 16.56, Florida Statutes, are amended to read:

46 16.56 Office of Statewide Prosecution.—

47 (1) There is created in the Department of Legal Affairs an  
 48 Office of Statewide Prosecution. The office shall be a separate  
 49 "budget entity" as that term is defined in chapter 216. The  
 50 office may:

51 (a) Investigate and prosecute the offenses of:

52 1. Bribery, burglary, criminal usury, extortion, gambling,

- 53 kidnapping, larceny, murder, prostitution, perjury, robbery,  
 54 carjacking, and home-invasion robbery;
- 55 2. Any crime involving narcotic or other dangerous drugs;
- 56 3. Any violation of ~~the provisions of~~ the Florida RICO  
 57 (Racketeer Influenced and Corrupt Organization) Act, including  
 58 any offense listed in the definition of racketeering activity in  
 59 s. 895.02(1)(a), providing such listed offense is investigated  
 60 in connection with a violation of s. 895.03 and is charged in a  
 61 separate count of an information or indictment containing a  
 62 count charging a violation of s. 895.03, the prosecution of  
 63 which listed offense may continue independently if the  
 64 prosecution of the violation of s. 895.03 is terminated for any  
 65 reason;
- 66 4. Any violation of ~~the provisions of~~ the Florida Anti-  
 67 Fencing Act;
- 68 5. Any violation of ~~the provisions of~~ the Florida  
 69 Antitrust Act of 1980, as amended;
- 70 6. Any crime involving, or resulting in, fraud or deceit  
 71 upon any person;
- 72 7. Any violation of s. 847.0135, relating to computer  
 73 pornography and child exploitation prevention, or any offense  
 74 related to a violation of s. 847.0135 or any violation of  
 75 chapter 827 where the crime is facilitated by or connected to  
 76 the use of the Internet or any device capable of electronic data  
 77 storage or transmission;
- 78 8. Any violation of ~~the provisions of~~ chapter 815;

79           9. Any criminal violation of part I of chapter 499;  
 80           10. Any violation of ~~the provisions of~~ the Florida Motor  
 81 Fuel Tax Relief Act of 2004;  
 82           11. Any criminal violation of s. 409.920 or s. 409.9201;  
 83           12. Any crime involving voter registration, voting, or  
 84 candidate or issue petition activities;  
 85           13. Any criminal violation of the Florida Money Laundering  
 86 Act;  
 87           14. Any criminal violation of the Florida Securities and  
 88 Investor Protection Act; or  
 89           15. Any violation of ~~the provisions of~~ chapter 787, as  
 90 well as any and all offenses related to a violation of ~~the~~  
 91 ~~provisions of~~ chapter 787;  
 92  
 93 or any attempt, solicitation, or conspiracy to commit any of the  
 94 crimes specifically enumerated above. The office shall have such  
 95 power only when any such offense is occurring, or has occurred,  
 96 in two or more judicial circuits as part of a related  
 97 transaction, or when any such offense is connected with an  
 98 organized criminal conspiracy affecting two or more judicial  
 99 circuits. Informations or indictments charging such offenses  
 100 shall contain general allegations stating the judicial circuits  
 101 and counties in which crimes are alleged to have occurred or the  
 102 judicial circuits and counties in which crimes affecting such  
 103 circuits or counties are alleged to have been connected with an  
 104 organized criminal conspiracy.

105 (b) Investigate and prosecute any crime enumerated in  
 106 paragraph (a) subparagraphs (a)1.-14. facilitated by or  
 107 connected to the use of the Internet. Any such crime is a crime  
 108 occurring in every judicial circuit within the state.

109 Section 2. Section 16.62, Florida Statutes, is created to  
 110 read:

111 16.62 Recognition and awards.-In addition to expenditures  
 112 separately authorized by law, the Department of Legal Affairs  
 113 may expend no more than \$20,000 annually to support costs  
 114 associated with the Law Enforcement Officer of the Year  
 115 Recognition and Awards Program and the Victims Services  
 116 Recognition and Awards Program.

117 Section 3. Subsection (5) is added to section 409.9203,  
 118 Florida Statutes, to read:

119 409.9203 Rewards for reporting Medicaid fraud.-

120 (5) Notwithstanding s. 68.085(3), 10 percent of any  
 121 remaining proceeds deposited into the Operating Trust Fund from  
 122 an action based on a claim of funds from the state Medicaid  
 123 program shall be allocated in the following manner:

124 (a) Fifty percent of such moneys shall be used to fund  
 125 rewards for reporting Medicaid fraud pursuant to this section.

126 (b) The remaining 50 percent of such moneys shall be used  
 127 by the Medicaid Fraud Control Unit to fund its investigations of  
 128 potential violations of s. 68.082 and any related civil actions.

129 Section 4. Subsection (3) of section 501.203, Florida  
 130 Statutes, is amended to read:

131 501.203 Definitions.—As used in this chapter, unless the  
 132 context otherwise requires, the term:

133 (3) "Violation of this part" means any violation of this  
 134 act or the rules adopted under this act and may be based upon  
 135 any of the following as of July 1, 2015 ~~2013~~:

136 (a) Any rules promulgated pursuant to the Federal Trade  
 137 Commission Act, 15 U.S.C. ss. 41 et seq.;

138 (b) The standards of unfairness and deception set forth  
 139 and interpreted by the Federal Trade Commission or the federal  
 140 courts; or

141 (c) Any law, statute, rule, regulation, or ordinance which  
 142 proscribes unfair methods of competition, or unfair, deceptive,  
 143 or unconscionable acts or practices.

144 Section 5. Section 501.204, Florida Statutes, is amended  
 145 to read:

146 501.204 Unlawful acts and practices.—

147 (1) Unfair methods of competition, unconscionable acts or  
 148 practices, and unfair or deceptive acts or practices in the  
 149 conduct of any trade or commerce are hereby declared unlawful.

150 (2) It is the intent of the Legislature that, in  
 151 construing subsection (1), due consideration and great weight  
 152 shall be given to the interpretations of the Federal Trade  
 153 Commission and the federal courts relating to s. 5(a)(1) of the  
 154 Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July  
 155 1, 2015 ~~2013~~.

156 Section 6. Subsections (3) and (6) of section 960.03,

157 Florida Statutes, are amended to read:

158 960.03 Definitions; ss. 960.01-960.28.—As used in ss.  
 159 960.01-960.28, unless the context otherwise requires, the term:

160 (3) "Crime" means:

161 (a) A felony or misdemeanor offense committed by an adult  
 162 or a juvenile which results in physical injury or death, a  
 163 forcible felony committed by an adult or juvenile which directly  
 164 results in psychiatric or psychological injury, or a felony or  
 165 misdemeanor offense of child abuse committed by an adult or a  
 166 juvenile which results in a mental injury, as defined in s.  
 167 827.03, to a person younger than 18 years of age who was not  
 168 physically injured by the criminal act. The mental injury to the  
 169 minor must be verified by a psychologist licensed under chapter  
 170 490, by a physician licensed in this state under chapter 458 or  
 171 chapter 459 who has completed an accredited residency in  
 172 psychiatry, or by a physician who has obtained certification as  
 173 an expert witness pursuant to s. 458.3175. The term also  
 174 includes a criminal act that is committed within this state but  
 175 that falls exclusively within federal jurisdiction.

176 (b) A violation of s. 316.027(2), s. 316.193, s. 316.1935  
 177 ~~s. 316.027(1)~~, s. 327.35(1), s. 782.071(1)(b), or s.  
 178 860.13(1)(a) which results in physical injury or death.

179 (c) ~~however,~~ An act involving the operation of a motor  
 180 vehicle, boat, or aircraft which results in another person's  
 181 injury or death that is intentionally inflicted through the use  
 182 of the vehicle, boat, or aircraft; however, no other act

183 involving the operation of a motor vehicle, boat, or aircraft  
 184 constitutes a crime for purposes of this chapter ~~does not~~  
 185 ~~constitute a crime for the purpose of this chapter unless the~~  
 186 ~~injury or death was intentionally inflicted through the use of~~  
 187 ~~the vehicle, boat, or aircraft.~~

188 (d) ~~(e)~~ A criminal act committed outside this state against  
 189 a resident of this state which would have been compensable if it  
 190 had occurred in this state and which occurred in a jurisdiction  
 191 that does not have an eligible crime victim compensation program  
 192 as the term is defined in the federal Victims of Crime Act of  
 193 1984.

194 (e) ~~(d)~~ A violation of s. 827.071, s. 847.0135, s.  
 195 847.0137, or s. 847.0138, related to online sexual exploitation  
 196 and child pornography.

197 (6) "Disabled adult" means a person 18 years of age or  
 198 older who suffers from a condition of physical or mental  
 199 incapacitation due to a developmental disability, ~~or~~ organic  
 200 brain damage, or mental illness, or who has one or more physical  
 201 or mental limitations that restrict the person's ability to  
 202 perform the normal activities of daily living.

203 Section 7. Subsection (6) of section 960.13, Florida  
 204 Statutes, is amended to read:

205 960.13 Awards.—

206 (6) Any award made pursuant to this chapter, except an  
 207 award for loss of support or catastrophic injury, shall be  
 208 reduced by the amount of any payments or services received or to



209 be received by the claimant as a result of the injury or death:

210 (a) From or on behalf of the person who committed the  
 211 crime; provided, however, that a restitution award ordered by a  
 212 court to be paid to the claimant by the person who committed the  
 213 crime shall not reduce any award made pursuant to this chapter  
 214 unless it appears to the department that the claimant will be  
 215 unjustly enriched thereby.

216 (b) From any other public or private source or provider,  
 217 including, but not limited to, an award of workers' compensation  
 218 pursuant to chapter 440.

219 (c) From agencies mandated by other Florida statutes to  
 220 provide or pay for services, except as provided in s. 960.28.

221 (d) From an emergency award under s. 960.12.

222 Section 8. Section 960.195, Florida Statutes, is amended  
 223 to read:

224 960.195 Awards to elderly persons or disabled adults for  
 225 property loss.—

226 (1) Notwithstanding the criteria in s. 960.13, for crime  
 227 victim compensation awards, the department may award a maximum  
 228 of \$500 on any one claim and a lifetime maximum of \$1,000 on all  
 229 claims to elderly persons or disabled adults who suffer a  
 230 property loss that causes a substantial diminution in their  
 231 quality of life when:

232 (a) ~~(1)~~ There is proof that a criminal or delinquent act  
 233 was committed. ~~†~~

234 (b) ~~(2)~~ The criminal or delinquent act is reported to law

235 enforcement authorities within 72 hours, unless the department,  
 236 for good cause shown, finds the delay to have been justified.†

237 ~~(3) The victim cooperates with law enforcement authorities~~  
 238 ~~in the investigation of the criminal or delinquent act;~~

239 (c)(4) There is proof that the tangible personal property  
 240 in question belonged to the claimant.†

241 (d)(5) The claimant did not contribute to the criminal or  
 242 delinquent act.†

243 (e)(6) There is no other source of reimbursement or  
 244 indemnification available to the claimant.† ~~and~~

245 (f)(7) The claimant would not be able to replace the  
 246 tangible personal property in question without incurring a  
 247 serious financial hardship.

248 (2) The department may deny, reduce, or withdraw any award  
 249 under subsection (1) upon finding that any claimant or award  
 250 recipient has not duly cooperated with the state attorney, all  
 251 law enforcement agencies, and the department.

252 Section 9. Section 960.196, Florida Statutes, is created  
 253 to read:

254 960.196 Relocation assistance for victims of human  
 255 trafficking.-

256 (1) Notwithstanding the criteria specified in ss.  
 257 960.07(2) and 960.13 for crime victim compensation awards, the  
 258 department may award a one-time payment of up to \$1,500 for any  
 259 one claim and a lifetime maximum of \$3,000 to a victim of human  
 260 trafficking who needs urgent assistance to escape from an unsafe

261 environment directly related to the human trafficking offense.

262 (2) In order for an award to be granted to a victim for  
 263 relocation assistance:

264 (a) There must be proof that a human trafficking offense,  
 265 as described in s. 787.06(3)(b), (d), (f), or (g), was  
 266 committed.

267 (b) The crime must be reported to the proper authorities  
 268 and the claim must be filed within 1 year, or 2 years with good  
 269 cause, after the date of the last human trafficking offense, as  
 270 described in s. 787.06(3)(b), (d), (f), or (g). In a case that  
 271 exceeds the 2-year requirement due to an active and ongoing  
 272 investigation, a state attorney, statewide prosecutor, or  
 273 federal prosecutor may certify in writing a human trafficking  
 274 victim's need to relocate from an unsafe environment due to the  
 275 threat of future violence that is directly related to the human  
 276 trafficking offense.

277 (c) The victim's need must be certified by a certified  
 278 domestic violence or rape crisis center in this state, unless a  
 279 state attorney, statewide prosecutor, or federal prosecutor has  
 280 certified in writing that the victim needs to relocate from an  
 281 unsafe environment due to the threat of future violence that is  
 282 directly related to the human trafficking offense. The center's  
 283 certification must assert that the victim is cooperating with  
 284 the proper authorities and must include documentation that the  
 285 victim has developed a safety plan.

286 (3) Relocation payments for a human trafficking claim

287 shall be denied if the department has previously approved or  
 288 paid out a domestic violence or sexual battery relocation claim  
 289 under s. 960.198 or s. 960.199 to the same victim regarding the  
 290 same incident.

291 Section 10. Subsection (3) of section 960.198, Florida  
 292 Statutes, is amended to read:

293 960.198 Relocation assistance for victims of domestic  
 294 violence.—

295 (3) Relocation payments for a domestic violence claim  
 296 shall be denied if the department has previously approved or  
 297 paid out a human trafficking or sexual battery relocation claim  
 298 under s. 960.196 or s. 960.199 to the same victim regarding the  
 299 same incident.

300 Section 11. Section 960.199, Florida Statutes, is amended  
 301 to read:

302 960.199 Relocation assistance for victims of sexual  
 303 battery ~~or human trafficking.~~—

304 (1) The department may award a one-time payment of up to  
 305 \$1,500 on any one claim and a lifetime maximum of \$3,000 to a  
 306 victim of sexual battery, as defined in s. 794.011, ~~or a victim~~  
 307 ~~of human trafficking, as described in s. 787.06(3)(b), (d), (f),~~  
 308 ~~or (g),~~ who needs relocation assistance.

309 (2) In order for an award to be granted to a victim for  
 310 relocation assistance:

311 (a) There must be proof that a sexual battery offense ~~or~~  
 312 ~~human trafficking offense, as described in s. 787.06(3)(b), (d),~~

313 ~~(f), or (g),~~ was committed.

314 (b) The sexual battery offense ~~or human trafficking~~  
 315 ~~offense, as defined in s. 787.06(3)(b), (d), (f), or (g),~~ must  
 316 be reported to the proper authorities.

317 (c) The victim's need for assistance must be certified by  
 318 a certified rape crisis center in this state ~~or by the state~~  
 319 ~~attorney or statewide prosecutor having jurisdiction over the~~  
 320 ~~offense. A victim of human trafficking's need for assistance may~~  
 321 ~~also be certified by a certified domestic violence center in~~  
 322 ~~this state.~~

323 (d) The center's certification must assert that the victim  
 324 is cooperating with law enforcement officials, if applicable,  
 325 and must include documentation that the victim has developed a  
 326 safety plan. ~~If the victim seeking relocation assistance is a~~  
 327 ~~victim of a human trafficking offense as described in s.~~  
 328 ~~787.06(3)(b), (d), (f), or (g), the certified rape crisis~~  
 329 ~~center's or certified domestic violence center's certification~~  
 330 ~~must include, if applicable, approval of the state attorney or~~  
 331 ~~statewide prosecutor attesting that the victim is cooperating~~  
 332 ~~with law enforcement officials.~~

333 (e) The act of sexual battery ~~or human trafficking, as~~  
 334 ~~described in s. 787.06(3)(b), (d), (f), or (g),~~ must be  
 335 committed in the victim's place of residence or in a location  
 336 that would lead the victim to reasonably fear for his or her  
 337 continued safety in the place of residence.

338 (3) Relocation payments for a sexual battery ~~or human~~

CS/CS/HB 439

2015

339 ~~trafficking~~ claim under this section shall be denied if the  
340 department has previously approved or paid out a human  
341 trafficking or domestic violence relocation claim under s.  
342 960.196 or s. 960.198 to the same victim regarding the same  
343 incident.

344 Section 12. This act shall take effect July 1, 2015.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 465 Human Trafficking  
**SPONSOR(S):** Criminal Justice Subcommittee; Spano; Kerner and others  
**TIED BILLS:** HB 467, HB 469 **IDEN./SIM. BILLS:** SB 1106

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Aziz	Cunningham
2) Justice Appropriations Subcommittee	11 Y, 0 N	McAuliffe	Lloyd
3) Judiciary Committee		Aziz <i>PA</i>	Havlicak <i>RH</i>

### SUMMARY ANALYSIS

Section 787.06, F.S., Florida's human trafficking statute, defines human trafficking as the transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining of another person for the purpose of exploitation of that person. In recent years, the Legislature has overhauled Florida's human trafficking laws to increase penalties for human trafficking and to make human trafficking prosecutions easier. The greatest driver of human trafficking in Florida is prostitution.

Currently, the penalty for soliciting another for prostitution is a second degree misdemeanor for the first offense, a first degree misdemeanor for the second offense, and a third degree felony for a third or subsequent offense. Anyone who is convicted, pleads guilty or pleads nolo contendere for solicitation for prostitution is subject to a \$5,000 fine.

The bill increases the criminal penalties for soliciting, inducing, enticing, or procuring another to commit prostitution. The penalties are increased as follows:

- First offense is a first degree misdemeanor;
- Second offense is a third degree felony; and
- Third, or subsequent, offense is a second degree felony.

The bill requires a judge to sentence a person convicted of solicitation to 10 days in jail if it is their second or subsequent conviction for solicitation.

The bill also requires the court to order a person convicted of solicitation to perform 100 hours of community service and complete an educational program about the negative effects of prostitution and human trafficking. The bill also authorizes a judge to impound or immobilize the car of a person convicted of solicitation for up to 60 days.

The bill authorizes a circuit court in the circuit in which a victim of human trafficking was arrested to grant a human trafficking expunction. The bill allows an advocate to be present with a victim of human trafficking during any human trafficking expunction court proceeding.

The Criminal Justice Impact Conference (CJIC) met February 27, 2015 and determined this bill will have a positive insignificant impact on state prison beds due to the low volume of offenses. This means CJIC estimates that this bill may increase the department's prison population by less than 10 inmates annually. See Fiscal Impact section.

The bill is effective October 1, 2015.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Human Trafficking**

Human trafficking is a form of modern-day slavery. Victims of human trafficking are young children, teenagers, men, and women, and are often subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor.<sup>1</sup> The International Labor Organization (ILO), the United Nations agency charged with addressing labor standards, employment, and social protection issues, estimates that as many as 27 million adults and children are in forced labor, bonded labor, and commercial sexual servitude at any given time.<sup>2</sup> The federal government has estimated that the number of persons trafficked into the United States each year ranges from 14,500-17,500.<sup>3</sup>

It is estimated that as many as 300,000 American youth are currently at risk of becoming victims of commercial sexual exploitation.<sup>4</sup> The majority of American victims of commercial sexual exploitation tend to be runaway youth living on the streets, and generally come from homes where they have been abused, or from families that have abandoned them. These children often become involved in prostitution as a way to support themselves financially.<sup>5</sup> The average age at which girls first become victims of prostitution is 12-14; for boys and transgender youth it is 11-13.<sup>6</sup>

Third party or pimp-controlled commercial sexual exploitation of children is linked to escort and massage services, private dancing, drinking and photographic clubs, major sporting and recreational events, major cultural events, conventions, and tourist destinations. About one-fifth of these children become involved in nationally organized crime networks and are trafficked nationally. They are transported around the United States by a variety of means - cars, buses, vans, trucks or planes - and are often provided counterfeit identification to use in the event of arrest.

Survivors of human trafficking often face both criminalization and stigmatization. Trafficked persons are not always recognized or treated as victims by law enforcement and prosecutors. Despite being victims, individuals who are trafficked are often arrested and convicted of prostitution and other related offenses, and may plead guilty not understanding the consequences. Multiple arrests, incarceration, police violence, deportation, employment, and housing discrimination may result.<sup>7</sup>

##### **Prostitution**

Human trafficking in Florida proliferates through illegal industries such as prostitution.<sup>8</sup> This illegal industry is thriving because of the demand of men soliciting prostitution.<sup>9</sup> Chapter 796, F.S., defines

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<sup>1</sup> U.S. Department of Health and Human Services, Administration for Children and Families, *About Human Trafficking*, <http://www.acf.hhs.gov/trafficking/about/index.html#> (last visited on February 3, 2015).

<sup>2</sup> See U.S. Department of State, *The 2013 Trafficking in Persons (TIP) Report*, June 2013, <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm> (last visited on February 3, 2015).

<sup>3</sup> Sonide Simon, *Human Trafficking and Florida Law Enforcement*, Florida Criminal Justice Executive Institute, pg. 2, March 2008, <http://www.fdle.state.fl.us/Content/getdoc/e77c75b7-e66b-40cd-ad6e-c7f21953b67a/Human-Trafficking.aspx> (last visited on February 3, 2015).

<sup>4</sup> *OJP Fact Sheet*, Office of Justice Programs, U.S. Department of Justice, December 2011, [http://ojp.gov/newsroom/factsheets/ojpfs\\_humantrafficking.html](http://ojp.gov/newsroom/factsheets/ojpfs_humantrafficking.html) (last visited February 3, 2015).

<sup>5</sup> Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U.L. REV. 1055, 1092, n193 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> Melissa Broudo and Sienna Baskin, *Vacating Criminal Convictions For Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. Urban Justice Center. The Sex Workers Project, April 3, 2012, <http://www.sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf> (last visited on February 3, 2015).

<sup>8</sup> Florida State University Center for the Advancement of Human Rights, "Florida Responds to Human Trafficking" Fall 2003 available at [http://www.cahr.fsu.edu/sub\\_category/floridarespondstohumantrafficking.pdf](http://www.cahr.fsu.edu/sub_category/floridarespondstohumantrafficking.pdf) (last visited January 29, 2015).

<sup>9</sup> Cheryl George, *Jailing the Johns: The Issue of Demand in Human Sex Trafficking*, 13 FLA. COASTAL L. REV. 293, 299 (2012).

prostitution as “the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.”<sup>10</sup> Currently, a person who solicits, induces, entices, or procures another to commit prostitution, lewdness or assignation (solicits) commits a second degree misdemeanor.<sup>11</sup> However, a second offense is a first degree misdemeanor,<sup>12</sup> and a third or subsequent offense is a third degree felony<sup>13 14</sup>.

In addition to the criminal penalties, a civil penalty must be assessed against individuals that solicit prostitution.<sup>15</sup> Prior to 2012, the civil penalty was \$500. In 2012, in an attempt to reduce instances of solicitation, the Legislature increased the civil penalty to \$5,000.<sup>16</sup> In May of 2014, a Manatee County judge declared the \$5,000 civil penalty unconstitutional as an excessive fine in violation of both the state and federal constitution.<sup>17</sup> The judge found the required \$5,000 fine excessive since the first offense for soliciting another to commit prostitution is a second degree misdemeanor, which is generally subject to a \$500 fine. The judge’s order is currently on appeal before Florida’s Third District Court of Appeals.

### *Sexual Violence Education Programs*

Several states require a person convicted of soliciting prostitution to attend an educational program on sexual violence. For example, in Kansas, a judge may order a person convicted of buying sexual relations to complete an educational program on commercial sexual exploitation.<sup>18</sup> In Nebraska, as a term of one’s probation, a john must complete a mental health and substance abuse assessment by a licensed mental health professional.<sup>19</sup> New Jersey has even created a “Prostitution Offender Program” for those convicted patrons of prostitutes, which includes information on the causes of prostitution and its relationship to human trafficking.<sup>20</sup>

In Florida, the Department of Health’s Sexual Violence Prevention Program contracts with rape crisis centers, county health departments, and other community based organizations to provide presentations on consent, coercion, and primary prevention of sexual assault.<sup>21</sup> However, there is no current requirement for anyone convicted of s.796.07, F.S., to attend such presentations.

### Effect of the Bill

The bill increases the criminal penalties for solicitation as follows:

- First offense is increased from a second degree misdemeanor to a first degree misdemeanor;
- Second offense is increased from a first degree misdemeanor to a third degree felony; and
- Third or subsequent offenses are increased from a third degree felony to a second degree felony.<sup>22</sup>

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<sup>10</sup> s. 796.07(1)(a), F.S. “Sexual activity” means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation. . .” s. 796.07(1)(d), F.S.

<sup>11</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

<sup>12</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

<sup>13</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>14</sup> s. 796.07(4), F.S.

<sup>15</sup> s. 796.07(6), F.S. The civil penalty is imposed in any judicial disposition other than acquittal or dismissal.

<sup>16</sup> Ch. 2012-105, Laws of Fla. The civil penalty is distributed with the first \$500 paid to the circuit court administrator for funding drug courts and the remaining amount of the penalty deposited to the Operations and Maintenance trust fund at DCF for the purpose of funding safe houses.

<sup>17</sup> *State v. Cotton*, Case No. 2013-MM-004788 (Fla. Manatee Cty. Ct. May 16, 2014). *See also* U.S. CONST. VIII and FLA. CONST. art. 1, s. 17.

<sup>18</sup> Kan. Stat. Ann. § 21-6421.

<sup>19</sup> Neb. Rev. Stat. § 28-801.01.

<sup>20</sup> N.J. Stat. Ann. § 2C:34-1.2.

<sup>21</sup> Florida Department of Health, *Sexual Abuse or Violence Prevention*, <http://www.floridahealth.gov/programs-and-services/prevention/sexual-abuse-or-violence-prevention/index.html> (last visited February 3, 2015).

<sup>22</sup> A second degree felony is punishable by up to 15 year imprisonment and a \$10,000 fine. ss. 775.082 and 775.083, F.S.

The bill requires the court to sentence a person convicted of solicitation a second or subsequent time to serve a minimum of 10 days in jail.

By increasing the penalty for a first offense of solicitation from a second degree misdemeanor to a first degree misdemeanor, courts may be less-inclined to deem the \$5,000 fine excessive since the amount of the fine is not as “grossly disproportional to the defendant’s offense.”<sup>23</sup>

The bill also requires the court to order a person convicted of solicitation to perform 100 hours of community service, and attend and pay for an educational program about the negative effects of prostitution and human trafficking.

The bill also allows a judge to impound or immobilize the vehicle of a person convicted of solicitation for up to 60 days if the vehicle was used in the course of the violation.<sup>24</sup> Within 7 business days of the judge’s order, the clerk of court must send notice<sup>25</sup> of the order to the registered owner of the vehicle (if other than the defendant) and any one claiming a lien on the vehicle. The owner of the vehicle may request the court to dismiss the order. The court must dismiss the order, and the owner will incur no costs, if the owner alleges and the court finds to be true any of the following:

- The owner’s family has no other private or public means of transportation;
- The vehicle was stolen at the time of the offense;
- The owner purchased the vehicle after the offense was committed, and the sale was not made to circumvent the order and allow the defendant continued access to the vehicle; or
- The vehicle is owned by the defendant but is operated solely by employees of the defendant or employees of a business owned by the defendant.

If not dismissed, the petitioner may request an evidentiary hearing. If, at the evidentiary hearing, the court finds any of the above circumstances to be true, the court must dismiss the order and the owner of the vehicle will incur no costs.

### **Expunging Human Trafficking Criminal History Records**

Section 943.0583, F.S., authorizes a victim of human trafficking to petition the court for the expunction of a criminal history record relating to an offense committed while he or she was a victim of human trafficking. A “victim of human trafficking” is defined as a person subjected to coercion for the purpose of being used in human trafficking, a minor who is a victim of human trafficking, or an individual subject to human trafficking as defined by federal law.<sup>26</sup>

To receive the expunction, a victim of human trafficking must petition the court of original jurisdiction over the crime sought to be expunged.<sup>27</sup> A petition must be initiated with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking.<sup>28</sup>

The petition must include:

- A sworn statement attesting that the victim is eligible for such expunction to the best of his or her knowledge or belief and does not have another petition to expunge or seal before any other court; and
- Official documentation of the victim’s status as a victim of human trafficking, if any exists.<sup>29</sup>

At any hearing regarding the expunction, the petitioner or the petitioner’s attorney may appear telephonically, via video conference, or by other electronic means.<sup>30</sup> The court’s determination of the

<sup>23</sup> *United States v. Bajakajian*, 524 U.S. 321, 336 (1998).

<sup>24</sup> The order of impoundment or immobilization must include the names and telephone numbers of all immobilization agencies meeting all of the conditions of s. 316.193(13), F.S.

<sup>25</sup> The notice must be by certified mail, return receipt requested.

<sup>26</sup> s. 943.0583(1)(c), F.S.

<sup>27</sup> s. 943.0583(2), F.S.

<sup>28</sup> s. 943.0583(4), F.S.

<sup>29</sup> s. 943.0583(6), F.S.

petition must be by a preponderance of the evidence.<sup>31</sup> A determination made without official documentation must be made by a showing of clear and convincing evidence.<sup>32</sup> If a court grants an expunction, criminal justice agencies with custody of the expunged record, except FDLE, must physically destroy the record.<sup>33</sup> Persons who have had their human trafficking criminal history records expunged may lawfully deny or fail to acknowledge the arrests that were expunged unless they are a candidate for employment with a criminal justice agency or a defendant in a criminal prosecution.<sup>34</sup>

### **Effect of the Bill**

The bill clarifies which court may grant an expunction by specifying that a circuit court in the circuit in which the petitioner was arrested may order the expunction. The bill also allows an advocate to be present with the petitioner during any human trafficking court proceedings. The advocate must be an advocate from a:

- State attorney's office;
- Law enforcement agency;
- Safe house<sup>35</sup> or safe foster home<sup>36</sup>; or
- Residential facility offering services to adult victims of human trafficking.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 796.07, F.S., relating to prohibiting prostitution and related acts.

Section 2. Amends s. 943.0583, F.S., relating to human trafficking victim expunction.

Section 3. 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.

#### **2. Expenditures:**

The Criminal Justice Impact Conference (CJIC) met February 27, 2015, and determined this bill will have a positive insignificant impact on state prison beds due to the low volume of offenses. This means CJIC estimates that this bill may increase the department's prison population by less than 10 inmates annually.

In Fiscal Year 2013-14, 336 offenders were convicted of a third degree felony for all offenses in s. 796.07, F.S. Of these offenders, 16 were sentenced to prison and 190 were sentenced to jail. It is not possible to separate those sentenced under, s. 796.07(2)(f) F.S., from the other felony offenses

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<sup>30</sup> s. 943.0583(7)(b), F.S.

<sup>31</sup> s. 943.0583(3), F.S.

<sup>32</sup> s. 943.0583(5), F.S.

<sup>33</sup> s. 943.0583(8)(a), F.S. Records retained by FDLE are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, except that the record must be made available to criminal justice agencies for their respective criminal justice purposes. s. 943.0583(10)(a), F.S.

<sup>34</sup> s. 943.0583(8)(b), F.S.

<sup>35</sup> A "safe house" means a group residential placement certified by the Department of Children and Families to care for sexually exploited children. s. 409.1678(1)(b), F.S.

<sup>36</sup> A "safe foster home" means a foster home certified by the Department of Children and Families to care for sexually exploited children. s. 409.1678(1)(a), F.S.

in s. 796.07, F.S., but misdemeanor data shows that 7.3% of 1<sup>st</sup> degree misdemeanor convictions were for violations of s. 796.07(2)(f) F.S. Applying the same percentage to third degree felony sentences results in approximately one offender going to prison and 14 offenders going to jail.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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

2. Expenditures:

Because the bill increases misdemeanor penalties for solicitation to felonies, it will likely have a negative jail bed impact (i.e., decrease the need for jail beds).

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

The bill authorizes a judge to impound or immobilize the car of a person convicted of solicitation for up to 60 days. The bill may have a positive fiscal impact on immobilization agencies.

**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 February 11, 2015, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Requires a court to order a person convicted of solicitation to perform 100 hours of community service;
- Requires a court to sentence a person to 10 days in jail if it is the person's second or subsequent conviction for solicitation;
- Modifies the procedure for a court to dismiss an impoundment or immobilization order;
- Clarifies that a circuit court in the circuit in which the petitioner was arrested may grant a human trafficking expunction;

- Removes language allowing a judge to clear a court room during a human trafficking expunction hearing; and
- Allows an advocate to be present with the victim of human trafficking during any expunction court proceeding.

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



27 read:

28 796.07 Prohibiting prostitution and related acts.—

29 (1) As used in this section:

30 (a) "Prostitution" means the giving or receiving of the  
 31 body for sexual activity for hire but excludes sexual activity  
 32 between spouses.

33 (b) "Lewdness" means any indecent or obscene act.

34 (c) "Assignment" means the making of any appointment or  
 35 engagement for prostitution or lewdness, or any act in  
 36 furtherance of such appointment or engagement.

37 (d) "Sexual activity" means oral, anal, or vaginal  
 38 penetration by, or union with, the sexual organ of another; anal  
 39 or vaginal penetration of another by any other object; or the  
 40 handling or fondling of the sexual organ of another for the  
 41 purpose of masturbation; however, the term does not include acts  
 42 done for bona fide medical purposes.

43 (2) It is unlawful:

44 (a) To own, establish, maintain, or operate any place,  
 45 structure, building, or conveyance for the purpose of lewdness,  
 46 assignment, or prostitution.

47 (b) To offer, or to offer or agree to secure, another for  
 48 the purpose of prostitution or for any other lewd or indecent  
 49 act.

50 (c) To receive, or to offer or agree to receive, any  
 51 person into any place, structure, building, or conveyance for  
 52 the purpose of prostitution, lewdness, or assignment, or to



53 permit any person to remain there for such purpose.

54 (d) To direct, take, or transport, or to offer or agree to  
 55 direct, take, or transport, any person to any place, structure,  
 56 or building, or to any other person, with knowledge or  
 57 reasonable cause to believe that the purpose of such directing,  
 58 taking, or transporting is prostitution, lewdness, or  
 59 assignation.

60 (e) To offer to commit, or to commit, or to engage in,  
 61 prostitution, lewdness, or assignation.

62 (f) To solicit, induce, entice, or procure another to  
 63 commit prostitution, lewdness, or assignation.

64 (g) To reside in, enter, or remain in, any place,  
 65 structure, or building, or to enter or remain in any conveyance,  
 66 for the purpose of prostitution, lewdness, or assignation.

67 (h) To aid, abet, or participate in any of the acts or  
 68 things enumerated in this subsection.

69 (i) To purchase the services of any person engaged in  
 70 prostitution.

71 (3)(a) In the trial of a person charged with a violation  
 72 of this section, testimony concerning the reputation of any  
 73 place, structure, building, or conveyance involved in the  
 74 charge, testimony concerning the reputation of any person  
 75 residing in, operating, or frequenting such place, structure,  
 76 building, or conveyance, and testimony concerning the reputation  
 77 of the defendant is admissible in evidence in support of the  
 78 charge.

79 (b) Notwithstanding any other provision of law, a police  
 80 officer may testify as an offended party in an action regarding  
 81 charges filed pursuant to this section.

82 (4) (a) A person who violates any provision of this  
 83 section, other than paragraph (2)(f), commits:

84 1.(a) A misdemeanor of the second degree for a first  
 85 violation, punishable as provided in s. 775.082 or s. 775.083.

86 2.(b) A misdemeanor of the first degree for a second  
 87 violation, punishable as provided in s. 775.082 or s. 775.083.

88 3.(c) A felony of the third degree for a third or  
 89 subsequent violation, punishable as provided in s. 775.082, s.  
 90 775.083, or s. 775.084.

91 (b)(5) A person who is charged with a third or subsequent  
 92 violation of this section, other than paragraph (2)(f), shall be  
 93 offered admission to a pretrial intervention program or a  
 94 substance abuse treatment program as provided in s. 948.08.

95 (5)(a) A person who violates paragraph (2)(f) commits:

96 1. A misdemeanor of the first degree for a first  
 97 violation, punishable as provided in s. 775.082 or s. 775.083.

98 2. A felony of the third degree for a second violation,  
 99 punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

100 3. A felony of the second degree for a third or subsequent  
 101 violation, punishable as provided in s. 775.082, s. 775.083, or  
 102 s. 775.084.

103 (b) In addition to any other penalty imposed, the court  
 104 shall order a person convicted of a violation of paragraph

105 (2)(f) to:

106 1. Perform 100 hours of community service; and

107 2. Pay for and attend an educational program about the  
 108 negative effects of prostitution and human trafficking, such as  
 109 a sexual violence prevention education program, if such program  
 110 exists in the judicial circuit in which the offender is  
 111 sentenced.

112 (c) In addition to any other penalty imposed, the court  
 113 shall sentence a person convicted of a second or subsequent  
 114 violation of paragraph (2)(f) to a minimum mandatory period of  
 115 incarceration of 10 days.

116 (d)1. If a person who violates paragraph (2)(f) uses a  
 117 vehicle in the course of the violation, the judge, upon the  
 118 person's conviction, may issue an order for the impoundment or  
 119 immobilization of the vehicle for a period of up to 60 days. The  
 120 order of impoundment or immobilization must include the names  
 121 and telephone numbers of all immobilization agencies meeting all  
 122 of the conditions of s. 316.193(13). Within 7 business days  
 123 after the date that the court issues the order of impoundment or  
 124 immobilization, the clerk of the court must send notice by  
 125 certified mail, return receipt requested, to the registered  
 126 owner of the vehicle, if the registered owner is a person other  
 127 than the defendant, and to each person of record claiming a lien  
 128 against the vehicle.

129 2. The owner of the vehicle may request the court to  
 130 dismiss the order. The court must dismiss the order, and the

131 owner of the vehicle will incur no costs, if the owner of the  
 132 vehicle alleges and the court finds to be true any of the  
 133 following:

134 a. The owner's family has no other private or public means  
 135 of transportation;

136 b. The vehicle was stolen at the time of the offense;

137 c. The owner purchased the vehicle after the offense was  
 138 committed, and the sale was not made to circumvent the order and  
 139 allow the defendant continued access to the vehicle; or

140 d. The vehicle is owned by the defendant but is operated  
 141 solely by employees of the defendant or employees of a business  
 142 owned by the defendant.

143 3. If the court denies the request to dismiss the order,  
 144 the petitioner may request an evidentiary hearing. If, at the  
 145 evidentiary hearing, the court finds to be true any of the  
 146 circumstances described in sub-subparagraphs (d)2.a.-d., the  
 147 court must dismiss the order and the owner of the vehicle will  
 148 incur no costs.

149 (6) A person who violates paragraph (2)(f) shall be  
 150 assessed a civil penalty of \$5,000 if the violation results in  
 151 any judicial disposition other than acquittal or dismissal. Of  
 152 the proceeds from each penalty assessed under this subsection,  
 153 the first \$500 shall be paid to the circuit court administrator  
 154 for the sole purpose of paying the administrative costs of  
 155 treatment-based drug court programs provided under s. 397.334.  
 156 The remainder of the penalty assessed shall be deposited in the

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157 Operations and Maintenance Trust Fund of the Department of  
158 Children and Families for the sole purpose of funding safe  
159 houses and safe foster homes as provided in s. 409.1678.

160 Section 2. Subsections (2) and (7) and paragraph (a) of  
161 subsection (8) of section 943.0583, Florida Statutes, are  
162 amended to read:

163 943.0583 Human trafficking victim expunction.—

164 (2) Notwithstanding any other provision of law, a circuit  
165 court in the circuit in which the petitioner was arrested ~~the~~  
166 ~~court of original jurisdiction over the crime sought to be~~  
167 ~~expunged~~ may order a criminal justice agency to expunge the  
168 criminal history record of a victim of human trafficking who  
169 complies with the requirements of this section. This section  
170 does not confer any right to the expunction of any criminal  
171 history record, and any request for expunction of a criminal  
172 history record may be denied at the discretion of the court.

173 (7)(a) In judicial proceedings under this section, a copy  
174 of the completed petition to expunge shall be served upon the  
175 appropriate state attorney or the statewide prosecutor and upon  
176 the arresting agency; however, it is not necessary to make any  
177 agency other than the state a party. The appropriate state  
178 attorney or the statewide prosecutor and the arresting agency  
179 may respond to the court regarding the completed petition to  
180 expunge.

181 (b) The petitioner or the petitioner's attorney may appear  
182 at any hearing under this section telephonically, via video

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183 conference, or by other electronic means.

184 (c) The court shall allow an advocate from a state  
 185 attorney's office, law enforcement agency, safe house or safe  
 186 foster home as defined in s. 409.1678(1), or a residential  
 187 facility offering services to adult victims of human trafficking  
 188 to be present with the petitioner during any court proceedings  
 189 or hearings under this section, if the petitioner has made such  
 190 a request and the advocate is able to be present.

191 (d)~~(e)~~ If relief is granted by the court, the clerk of the  
 192 court shall certify copies of the order to the appropriate state  
 193 attorney or the statewide prosecutor and the arresting agency.  
 194 The arresting agency is responsible for forwarding the order to  
 195 any other agency listed in the court order to which the  
 196 arresting agency disseminated the criminal history record  
 197 information to which the order pertains. The department shall  
 198 forward the order to expunge to the Federal Bureau of  
 199 Investigation. The clerk of the court shall certify a copy of  
 200 the order to any other agency that the records of the court  
 201 reflect has received the criminal history record from the court.

202 (8)(a) Any criminal history record of a minor or an adult  
 203 that is ordered expunged ~~by the court of original jurisdiction~~  
 204 ~~over the charges sought to be expunged~~ pursuant to this section  
 205 must be physically destroyed or obliterated by any criminal  
 206 justice agency having custody of such record, except that any  
 207 criminal history record in the custody of the department must be  
 208 retained in all cases.

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209 Section 3. 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	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative Spano offered the following:

**Amendment (with directory amendment)**

Remove lines 164-172 and insert:

6 (2) Notwithstanding any other provision of law, upon the  
 7 filing of a petition as provided in this section, any court in  
 8 the circuit in which the petitioner was arrested, so long as the  
 9 court has jurisdiction over the class of offense or offenses  
 10 sought to be expunged, the court of original jurisdiction over  
 11 the crime sought to be expunged may order a criminal justice  
 12 agency to expunge the criminal history record of a victim of  
 13 human trafficking who complies with the requirements of this  
 14 section. A petition need not be filed in the court where the  
 15 petitioner's criminal proceeding or proceedings originally  
 16 occurred. This section does not confer any right to the  
 17 expunction of any criminal history record, and any request for





Amendment No. 1

18 expunction of a criminal history record may be denied at the  
19 discretion of the court.

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**D I R E C T O R Y   A M E N D M E N T**

24

Remove lines 16-18 and insert:

25

that any court in the circuit in which the petitioner was

26

arrested may expunge the criminal history record of a victim of

27

human trafficking;



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 467 Pub. Rec./Human Trafficking Victims  
**SPONSOR(S):** Spano and others  
**TIED BILLS:** CS/HB 465 **IDEN./SIM. BILLS:** SB 1108

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N	Aziz	Cunningham
2) Government Operations Subcommittee	11 Y, 0 N	Toliver	Williamson
3) Judiciary Committee		Aziz <i>PA</i>	Havlicak <i>RH</i>

### SUMMARY ANALYSIS

Currently, s. 119.071(2)(h), F.S., makes specified criminal intelligence information or criminal investigative information confidential and exempt from public records requirements. Similarly, s. 943.0583, F.S., provides a public records exemption for criminal history records of a human trafficking victim that have been ordered expunged.

This bill, which is linked to the passage of HB 465, amends s. 119.071(2)(h), F.S., to expand the types of criminal intelligence and criminal investigative information that are confidential and exempt from public records requirements to include:

- Any information that reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services proscribed in s. 787.06(3)(a), F.S.;
- Any information that may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), or (g), F.S.; and
- A photograph, videotape, or image of any part of the body of a victim of a crime of human trafficking involving commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), or (g), F.S.

The bill also amends s. 943.0583, F.S., making the above-described criminal intelligence and criminal investigative information confidential and exempt from public records requirements under the section providing expunction for human trafficking victims.

The bill authorizes release of the confidential and exempt information by a law enforcement agency in certain instances. It also provides for retroactive application of the public records exemptions.

The bill provides for repeal of the exemptions on October 2, 2020, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill could have a minimal fiscal impact on state and local governments.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands public records exemptions; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Public Records Laws**

###### Florida Constitution

Article I, Section 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may exempt records from the requirements of Article I, Section 24 of the Florida Constitution, provided the exemption is passed by two-thirds vote of each chamber and:

- States with specificity the public necessity justifying the exemption (public necessity statement); and
- Is no broader than necessary to meet that public purpose.<sup>2</sup>

###### Florida Statutes

Florida Statutes also address the public policy regarding access to government records through a variety of statutes in ch. 119, F.S. Section 119.07, F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act<sup>3</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose *and* the "[l]egislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>4</sup> However, the exemption may be no broader than is necessary to meet one of the following purposes:<sup>5</sup>

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protects trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a public record exemption on October 2<sup>nd</sup> of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup> The Act also requires specified questions to be considered during the review process.<sup>7</sup>

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<sup>1</sup> Article I, Sec. 24(a), FLA. CONST.

<sup>2</sup> Article I, Sec. 24(c), FLA. CONST.

<sup>3</sup> s. 119.15, F.S.

<sup>4</sup> s. 119.15(6)(b), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> s. 119.15(3), F.S.

<sup>7</sup> Section 119.15(6)(a), F.S., states that the specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

## Public Record Exemption for Certain Agency Investigation Information

Currently, s. 119.071(2)(h), F.S., makes specified criminal intelligence information<sup>8</sup> or criminal investigative information<sup>9</sup> confidential and exempt<sup>10</sup> from public records requirements. This information includes:<sup>11</sup>

- Any information, including the photograph, name, address, or other fact, which reveals the identity of the victim of the crime of child abuse as defined by ch. 827, F.S. (child abuse);
- Any information, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in ch. 794, F.S. (sexual battery), ch. 796, F.S. (prostitution); ch. 800, F.S. (lewdness and indecent exposure); ch. 827, F.S. (abuse of children), or ch. 847, F.S. (obscenity); and
- A photograph, videotape, or image of any part of the body of the victim of a sexual offense prohibited under ch. 794, F.S. (sexual battery), ch. 796, F.S. (prostitution), ch. 800, F.S. (lewdness and indecent exposure), s. 810.145, F.S. (video voyeurism), ch. 827, F.S. (abuse of children), or ch. 847, F.S. (obscenity), regardless of whether the photograph, videotape, or image identifies the victim.

Confidential and exempt criminal investigative and criminal intelligence information may be disclosed by a law enforcement agency:<sup>12</sup>

- In the furtherance of its official duties and responsibilities;
- For print, publication, or broadcast if the law enforcement agency determines that such release would assist in locating or identifying a person that such agency believes to be missing or endangered;<sup>13</sup> or
- To another governmental agency in the furtherance of its official duties and responsibilities.

This public records exemption is scheduled to repeal on October 2, 2016, pursuant to the Open Government Sunset Review Act.<sup>14</sup>

## Human Trafficking Victim Expunction

In 2013, the Legislature passed legislation that authorized a victim of human trafficking to petition the court<sup>15</sup> for the expunction of any *conviction* for an offense<sup>16</sup> committed while he or she was a victim of human trafficking.<sup>17</sup> In 2014, the Legislature expanded what could be expunged to include records

<sup>8</sup> Section 119.011(3)(a), F.S., defines “criminal intelligence information” to mean information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity.

<sup>9</sup> Section 119.011(3)(b), F.S., defines “criminal investigative information” to mean information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance.

<sup>10</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied, 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute. See Op. Att’y Gen. Fla. 85-62 (1985).

<sup>11</sup> Section 119.071(2)(h)3., F.S., requires the exemption to apply to confidential and exempt criminal intelligence and criminal investigative information held by a law enforcement agency before, on, or after the effective date of the exemption.

<sup>12</sup> s. 119.071(2)(h)2., F.S.

<sup>13</sup> Section 119.071(2)(h)2.c., F.S., provides the information disclosed should be limited to that needed to identify or locate the victim and not include the sexual nature of the offense committed against the person.

<sup>14</sup> s. 119.071(2)(h)4., F.S.

<sup>15</sup> Section 943.0583(4), F.S., requires a petition under this section to be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking, subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition or for other reasons consistent with the purpose of s. 943.0583, F.S.

<sup>16</sup> Except an offense listed in s. 775.084(1)(b)1., F.S.

<sup>17</sup> Ch. 2013-98, Laws of Fla.; codified as s. 943.0583, F.S.

resulting from the *arrest or filing of charges* for an offense committed or reported to have been committed while he or she was a victim of human trafficking.<sup>18</sup>

Persons who have had their human trafficking criminal history records expunged may lawfully deny or fail to acknowledge the arrests covered by the expunged record and not face perjury charges or otherwise be liable for giving a false statement for failing to acknowledge an expunged criminal record unless they are a candidate for employment with a criminal justice agency or a defendant in a criminal prosecution.<sup>19</sup> However, persons are required to acknowledge such arrests when applying for future sealing or expunctions under ss. 943.059, 943.0585, or 943.0583, F.S.<sup>20</sup>

Section 943.0583, F.S., provides a public records exemption for criminal history records of a victim of human trafficking that have been ordered expunged. Such records are retained by FDLE, but are confidential and exempt from public records requirements and can only be made available to criminal justice agencies for their respective criminal justice purposes. A criminal justice agency may retain a notation indicating compliance with an order to expunge. This exemption repeals on October 2, 2018, unless reviewed and saved from repeal by the Legislature.

### **Effect of the Bill**

The bill, which is linked to the passage of HB 465, amends s. 119.071(2)(h), F.S., to expand the types of criminal intelligence and criminal investigative information that are confidential and exempt from public records requirements to include:

- Any information that reveals the identity of a person under the age of 18 who is the victim of a crime of human trafficking for labor or services proscribed in s. 787.06(3)(a), F.S.;
- Any information that may reveal the identity of a person who is the victim of a crime of human trafficking for commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), or (g), F.S.; and
- A photograph, videotape, or image of any part of the body of a victim of a crime of human trafficking involving commercial sexual activity proscribed in s. 787.06(3)(b), (d), (f), or (g), F.S.

The bill also amends s. 943.0583, F.S., providing that the above-described criminal intelligence and criminal investigative information related to victims of human trafficking that is made confidential and exempt from public records requirements in s. 119.071(2)(h), F.S., is also made confidential and exempt from public records requirements under the section providing expunction for human trafficking victims.

The bill authorizes release of the confidential and exempt information by a law enforcement agency:

- In the furtherance of its official duties and responsibilities.
- For print, publication, or broadcast if the law enforcement agency determines that release would assist in locating or identifying a person the agency believes to be missing or endangered. The information provided should be limited to information needed to identify or locate the victim.

The bill provides for retroactive application of the public records exemptions.<sup>21</sup>

The bill provides for repeal of the exemptions on October 2, 2020, unless both exemptions are reviewed and saved from repeal by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.<sup>22</sup>

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<sup>18</sup> Ch. 2014-160, Laws of Fla.

<sup>19</sup> s. 943.0583, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses such intent. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 2001).

<sup>22</sup> Article 1, Sec. 24(c), FLA. CONST.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

Section 2. Amends s. 943.0583, F.S., relating to human trafficking victim expunction.

Section 3. Provides a public necessity statement.

Section 4. Provides an effective date that is the same as that of HB 465 or similar legislation, if such legislation is passed during the same session and becomes law.

**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 government revenues.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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

2. Expenditures:

See Fiscal Comments.

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

None.

**D. FISCAL COMMENTS:**

The bill could create a minimal fiscal impact on law enforcement agencies because staff responsible for complying with public record requests could require training related to expansion of the public record exemption. In addition, law enforcement agencies could incur costs associated with redacting the confidential and exempt criminal intelligence information or criminal investigative information prior to releasing a record. These costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

**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:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption limited to expunged criminal records of victims of human trafficking. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

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**

None.



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1                                   A bill to be entitled  
 2           An act relating to public records; amending s.  
 3           119.071, F.S.; revising an exemption from public  
 4           records requirements for certain criminal intelligence  
 5           and investigative information to exempt information  
 6           that reveals the identity of a victim of certain human  
 7           trafficking offenses; amending s. 943.0583, F.S.;  
 8           providing an exemption from public records  
 9           requirements for investigative information relating to  
 10          criminal history records of human trafficking victims  
 11          that have been ordered expunged; providing for future  
 12          legislative review and repeal of the exemption;  
 13          providing a statement of public necessity; providing a  
 14          contingent effective date.

15  
 16   Be It Enacted by the Legislature of the State of Florida:

17  
 18           Section 1. Paragraph (h) of subsection (2) of section  
 19           119.071, Florida Statutes, is amended to read:

20           119.071 General exemptions from inspection or copying of  
 21           public records.—

22           (2) AGENCY INVESTIGATIONS.—

23           (h)1. The following criminal intelligence information or  
 24           criminal investigative information is confidential and exempt  
 25           from s. 119.07(1) and s. 24(a), Art. I of the State  
 26           Constitution:

27           a. Any information ~~that, including the photograph, name,~~  
 28 ~~address, or other fact, which~~ reveals the identity of the victim  
 29 of the crime of child abuse as defined by chapter 827 or that  
 30 reveals the identity of a person under the age of 18 who is the  
 31 victim of the crime of human trafficking proscribed in s.  
 32 787.06(3)(a).

33           b. Any information that ~~which~~ may reveal the identity of a  
 34 person who is a victim of any sexual offense, including a sexual  
 35 offense proscribed in s. 787.06(3)(b), (d), (f), or (g), chapter  
 36 794, chapter 796, chapter 800, chapter 827, or chapter 847.

37           c. A photograph, videotape, or image of any part of the  
 38 body of the victim of a sexual offense prohibited under s.  
 39 787.06(3)(b), (d), (f), or (g), chapter 794, chapter 796,  
 40 chapter 800, s. 810.145, chapter 827, or chapter 847, regardless  
 41 of whether the photograph, videotape, or image identifies the  
 42 victim.

43           2. Criminal investigative information and criminal  
 44 intelligence information made confidential and exempt under this  
 45 paragraph may be disclosed by a law enforcement agency:

46           a. In the furtherance of its official duties and  
 47 responsibilities.

48           b. For print, publication, or broadcast if the law  
 49 enforcement agency determines that such release would assist in  
 50 locating or identifying a person that such agency believes to be  
 51 missing or endangered. The information provided should be  
 52 limited to that needed to identify or locate the victim and not

53 include the sexual nature of the offense committed against the  
 54 person.

55 c. To another governmental agency in the furtherance of  
 56 its official duties and responsibilities.

57 3. This exemption applies to such confidential and exempt  
 58 criminal intelligence information or criminal investigative  
 59 information held by a law enforcement agency before, on, or  
 60 after the effective date of the exemption.

61 4. This paragraph is subject to the Open Government Sunset  
 62 Review Act in accordance with s. 119.15, and shall stand  
 63 repealed on October 2, 2020 ~~2016~~, unless reviewed and saved from  
 64 repeal through reenactment by the Legislature.

65 Section 2. Subsection (11) is added to section 943.0583,  
 66 Florida Statutes, to read:

67 943.0583 Human trafficking victim expunction.—

68 (11)(a) The following criminal intelligence information or  
 69 criminal investigative information is confidential and exempt  
 70 from s. 119.07(1) and s. 24(a), Art. I of the State  
 71 Constitution:

72 1. Any information that reveals the identity of a person  
 73 who is a victim of human trafficking whose criminal history  
 74 record has been expunged under this section.

75 2. Any information that may reveal the identity of a  
 76 person who is a victim of human trafficking whose criminal  
 77 history record has been ordered expunged under this section.

78 (b) Criminal investigative information and criminal

79 intelligence information made confidential and exempt under this  
 80 subsection may be disclosed by a law enforcement agency:

81 1. In the furtherance of its official duties and  
 82 responsibilities.

83 2. For print, publication, or broadcast if the law  
 84 enforcement agency determines that such release would assist in  
 85 locating or identifying a person that the agency believes to be  
 86 missing or endangered. The information provided should be  
 87 limited to that needed to identify or locate the victim.

88 3. To another governmental agency in the furtherance of  
 89 its official duties and responsibilities.

90 (c) This exemption applies to such confidential and exempt  
 91 criminal intelligence information or criminal investigative  
 92 information held by a law enforcement agency before, on, or  
 93 after the effective date of the exemption.

94 (d) This subsection is subject to the Open Government  
 95 Sunset Review Act in accordance with s. 119.15 and shall stand  
 96 repealed on October 2, 2020, unless reviewed and saved from  
 97 repeal through reenactment by the Legislature.

98 Section 3. The Legislature finds that it is a public  
 99 necessity to make confidential and exempt from public records  
 100 requirements certain criminal intelligence information or  
 101 criminal investigative information that reveals the identity of  
 102 a victim of the crime of human trafficking of a minor for labor  
 103 or any victim of human trafficking for commercial sexual  
 104 activity. The Legislature finds that it is important to

105 strengthen the protections afforded victims of human trafficking  
106 for labor who are minors and victims of human trafficking for  
107 commercial sexual activity, regardless of age, in order to  
108 ensure their privacy and to prevent their revictimization by  
109 making such information confidential and exempt. The identity of  
110 these victims is information of a sensitive personal nature. As  
111 such, this exemption serves to minimize the trauma to victims  
112 because the release of such information would compound the  
113 tragedy already visited upon their lives and would be defamatory  
114 to or cause unwarranted damage to the good name or reputation of  
115 the victims. Protecting the release of identifying information  
116 of such victims protects them from further embarrassment,  
117 harassment, or injury. The Legislature also finds that it is a  
118 public necessity that information in the investigative or  
119 intelligence records related to a criminal history record  
120 ordered expunged under s. 943.0583, Florida Statutes, which  
121 would or could reasonably be expected to reveal the identity of  
122 a person who is a victim of human trafficking whose criminal  
123 history record has been ordered expunged under s. 943.0583,  
124 Florida Statutes, be made confidential and exempt from s.  
125 119.07(1), Florida Statutes, and s. 24(a), Article I of the  
126 State Constitution. Persons who are victims of human trafficking  
127 and who have been charged with crimes allegedly committed at the  
128 behest of their traffickers are themselves victims of crimes.  
129 Such victims face barriers to employment and other life  
130 opportunities as long as these criminal charges remain on record

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131 and accessible to potential employers and others. Therefore, it  
132 is necessary that these records be made confidential and exempt  
133 in order for human trafficking victims to have the chance to  
134 rebuild their lives and reenter society.

135 Section 4. This act shall take effect on the same date  
136 that HB 465 or similar legislation relating to human trafficking  
137 takes effect, if such legislation is adopted in the same  
138 legislative session or an extension thereof and becomes a law.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 469 Pub. Rec./Residential Facilities Serving Victims of Sexual Exploitation  
**SPONSOR(S):** Spano and others  
**TIED BILLS:** CS/HB 465 **IDEN./SIM. BILLS:** SB 1110

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N	Aziz	Cunningham
2) Government Operations Subcommittee	12 Y, 0 N	Toliver	Williamson
3) Judiciary Committee		Aziz <i>PA</i>	Havlicak <i>RA</i>

### SUMMARY ANALYSIS

Human trafficking is a form of modern-day slavery, which involves the exploitation of persons for commercial sex or forced labor. Safe homes, safe foster homes, and other residential facilities provide services and residential care to child victims of sexual exploitation. Adult victims of human trafficking involving commercial sexual activity can be served in residential facilities as well.

This bill, which is linked to the passage of HB 465, creates public record exemptions for information about the location of safe houses, safe foster homes, other residential facilities serving child victims of sexual exploitation, and residential facilities serving adult victims of human trafficking involving commercial sexual activity. Specifically, the bill provides that the information regarding the location of these facilities that is held by an agency is confidential and exempt from public record requirements. However, the bill allows this information to be provided to any agency in order to maintain health and safety standards and to address emergency situations.

The bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill may have a minimal fiscal impact on state and local governments.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.**



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

##### Public Records

Article I, s. 24(a), of the Florida Constitution, sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may exempt records from the requirements of Article I, s. 24 of the Florida Constitution, provided the exemption is passed by two-thirds vote of each chamber and:

- States with specificity the public necessity justifying the exemption; and
- Is no broader than necessary to meet that public purpose.<sup>2</sup>

Florida Statutes also address the public policy regarding access to government records through a variety of statutes in chapter 119, F.S. Section 119.07, F.S., guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act<sup>3</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose *and* the “[l]egislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.”<sup>4</sup> However, the exemption may be no broader than is necessary to meet one of the following purposes:<sup>5</sup>

- Allows the state or political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protects trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a public record exemption on October 2<sup>nd</sup> of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>6</sup> The Act also requires specified questions to be considered during the review process.<sup>7</sup>

##### Human Trafficking

Florida law defines human trafficking as “soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person.”<sup>8</sup> Human trafficking is a form of modern-day slavery, which involves the exploitation of persons for commercial

<sup>1</sup> Article I, s. 24(a), FLA. CONST.

<sup>2</sup> Article I, s. 24(c), FLA. CONST.

<sup>3</sup> s. 119.15, F.S.

<sup>4</sup> s. 119.15(6)(b), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> s. 119.15(3), F.S.

<sup>7</sup> Section 119.15(6)(a), F.S., states that the specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>8</sup> s. 787.06 (2)(d), F.S.

sex or forced labor.<sup>9</sup> Trafficking subjects victims to force, fraud, or coercion.<sup>10</sup> Individuals experiencing this type of sexual exploitation often become bonded with their exploiters and do not see themselves as victims. These individuals experience trauma and are exposed to danger but are often unable to leave their exploiter to seek help.<sup>11</sup>

## Residential Treatment for Victims of Human Trafficking

### *Safe Houses*

Section 409.1678, F.S., defines the term “sexually exploited child” as a child who has suffered sexual exploitation<sup>12</sup> and is ineligible for relief and benefits under the federal Trafficking Victims Protection Act.<sup>13</sup> In 2012, Florida passed the Safe Harbor Act,<sup>14</sup> which established “safe houses.” Sexually exploited children older than six who have been adjudicated dependent or delinquent may be placed in a safe house by the Department of Children and Families (DCF) if an assessment indicates such placement is appropriate.<sup>15</sup>

Safe houses must provide a living environment that has set aside gender-specific, separate, and distinct living quarters for sexually exploited children and must have staff members who are awake and on duty 24 hours a day.<sup>16</sup> A safe house serving children who have been sexually exploited must have available staff or contract personnel who have the clinical expertise, credentials, and training to provide a variety of services (e.g., security, crisis intervention services, residential care, and transportation).<sup>17</sup>

### *Safe Foster Homes*

Legislation passed in 2014 created the term “safe foster home,” and defines the term as “a foster home certified by [DCF] to care for sexually exploited children.”<sup>18</sup> The State requires safe foster homes to provide the same services and meet the same requirements as safe houses, except for the requirement to have staff awake and on duty 24 hours a day.<sup>19</sup>

### *Additional Residential Facilities*

Traditional residential facilities serve both children and adults who are victims of sexual exploitation. If these facilities serve adults, they cannot be designated safe houses or safe foster homes.<sup>20</sup>

If a trafficker learned the location of a safe house, safe foster home, or other residential facility and went to such location, the staff as well as the individuals residing in those locations could be in danger of physical or emotional harm.

## **Effect of the Bill**

The bill creates a public record exemption for information about the location of safe houses, safe foster homes, residential facilities serving victims of sexual exploitation, and residential facilities serving adult victims of human trafficking. Specifically, the bill provides that information regarding the location of

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<sup>9</sup> s. 787.06(1)(a), F.S.

<sup>10</sup> U.S. Department of Health and Human Services, Administration for Children and Families, *About Human Trafficking*, available at <http://www.acf.hhs.gov/trafficking/about/index.html#> (last visited on February 3, 2015).

<sup>11</sup> See Adam S. Butkus, *Ending Modern-Day Slavery in Florida: Strengthening Florida's Legislation in Combating Human Trafficking*, 37 STETSON L. REV. 297, 307 (2007).

<sup>12</sup> As defined in s. 39.01(69)(g), F.S.

<sup>13</sup> 22 U.S.C. ss. 7101 et seq.

<sup>14</sup> Ch. 2012-105, Laws of Fla.

<sup>15</sup> s. 39.524, F.S.

<sup>16</sup> s. 409.1678 (2)(c), F.S. Safe houses also must hold a license as a family foster home or residential child-caring agency, be appropriately licensed in this state as a residential child-caring agency as defined in s. 409.175, F.S., and have applied for accreditation within 1 year after being licensed (according to DCF, currently there are no entities that accredit safe houses and safe houses are not sure what type of accreditation is required. No safe houses have applied for accreditation at this time).

<sup>17</sup> s. 409.1678, F.S.

<sup>18</sup> s. 409.1678(1) (a), F.S.

<sup>19</sup> s. 409.1678(2)(c), F.S.

<sup>20</sup> s. 409.1678(1)(a) and (b), F.S. The definitions of “safe foster home” and “safe house” are specifically restricted to “sexually exploited children.”

these facilities held by an agency, as defined in s.119.011, F.S.,<sup>21</sup> is confidential and exempt<sup>22</sup> from s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution. However, the confidential and exempt information may be provided to any agency as necessary to maintain health and safety standards and to address emergency situations in the residential facility.

The bill provides that the public record exemption is subject to the Open Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 409.1678, F.S., relating to specialized residential options for children who are victims of sexual exploitation.

Section 2. Amends s. 787.06, F.S., relating to human trafficking.

Section 3. Provides a public necessity statement.

Section 4. Provides an effective date to be the same as that of HB 465 or similar legislation, if such legislation is passed during the same session and becomes law.

**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 government revenues.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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

2. Expenditures:

See Fiscal Comments.

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

None.

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<sup>21</sup> Agency is defined in s. 119.011, F.S., as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of [chapter 119, F.S.], the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>22</sup> There is a difference between records the Legislature has determined to be exempt from public record requirements and those that have been determined to be confidential and exempt. If the Legislature has determined the information to be confidential and exempt then the information is not subject to inspection. Also, if the information is deemed to be confidential and exempt it may only be released to those person and entities designated in statute. However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt from public record requirements. *See WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991); *see Op. Att’y Gen. Fla. 85-62* (1985).

D. FISCAL COMMENTS:

The bill could create a minimal fiscal impact on agencies because staff responsible for complying with public record requests could require training related to creation of the public record exemptions. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record. These costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

**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:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill creates public record exemptions; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly-created or expanded public record or public meeting exemption. The bill creates public record exemptions; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates public record exemptions for information relating to the identification and location of safe houses. The exemption does not appear to be in conflict with the constitutional requirement that the exemption must be no broader than necessary to accomplish its purpose.

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**

None.



27 s. 39.01(69)(g), which is held by an agency, as defined in s.  
 28 119.011, is confidential and exempt from s. 119.07(1) and s.  
 29 24(a), Art. I of the State Constitution.

30 (b) Information about the location of a safe house, safe  
 31 foster home, or other residential facility serving victims of  
 32 sexual exploitation, as defined in s. 39.01(69)(g), may be  
 33 provided to an agency, as defined in s. 119.011, as necessary to  
 34 maintain health and safety standards and to address emergency  
 35 situations in the safe house, safe foster home, or other  
 36 residential facility.

37 (c) This subsection is subject to the Open Government  
 38 Sunset Review Act in accordance with s. 119.15 and shall stand  
 39 repealed on October 2, 2020, unless reviewed and saved from  
 40 repeal through reenactment by the Legislature.

41 Section 2. Subsection (9) is added to section 787.06,  
 42 Florida Statutes, to read:

43 787.06 Human trafficking.—

44 (9)(a) Information about the location of a residential  
 45 facility offering services for adult victims of human  
 46 trafficking involving commercial sexual activity, which is held  
 47 by an agency, as defined in s. 119.011, is confidential and  
 48 exempt from s. 119.07(1) and s. 24(a), Art. I of the State  
 49 Constitution.

50 (b) Information about the location of a residential  
 51 facility offering services for adult victims of human  
 52 trafficking involving commercial sexual activity may be provided

53 to an agency, as defined in s. 119.011, as necessary to maintain  
 54 health and safety standards and to address emergency situations  
 55 in the residential facility.

56 (c) This subsection is subject to the Open Government  
 57 Sunset Review Act in accordance with s. 119.15 and shall stand  
 58 repealed on October 2, 2020, unless reviewed and saved from  
 59 repeal through reenactment by the Legislature.

60 Section 3. The Legislature finds that it is a public  
 61 necessity that information about the location of safe houses,  
 62 safe foster homes, and other residential facilities serving  
 63 victims of sexual exploitation, as defined in s. 39.01(69)(g),  
 64 Florida Statutes, or adult victims of human trafficking  
 65 involving commercial sexual activity, held by an agency, as  
 66 defined in s. 119.011, Florida Statutes, be made confidential  
 67 and exempt from s. 119.07(1), Florida Statutes, and s. 24(a),  
 68 Article I of the State Constitution. Safe houses, safe foster  
 69 homes, and other residential facilities serving victims of  
 70 sexual exploitation, as defined in s. 39.01(69)(g), Florida  
 71 Statutes, or adult victims of human trafficking involving  
 72 commercial sexual activity, are intended as refuges for sexually  
 73 exploited victims from those who exploited them. If the  
 74 individuals who victimized these people were able to learn the  
 75 location of such facilities, they may attempt to contact their  
 76 victims, exploit their vulnerabilities, and return them to the  
 77 situations in which they were victimized. Even without the  
 78 return of these victims to their former situations, additional

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79 contact with those who victimized them would have the effect of  
80 continuing their victimization and inhibiting their recoveries.  
81 Additionally, knowledge about the location of safe houses, safe  
82 foster homes, and other residential facilities serving victims  
83 of sexual exploitation, as defined in s. 39.01(69)(g), Florida  
84 Statutes, or adult victims of human trafficking involving  
85 commercial sexual activity, could enable other individuals to  
86 locate and attempt to victimize the residents. Therefore, it is  
87 the finding of the Legislature that such information must be  
88 made confidential and exempt from public records requirements.

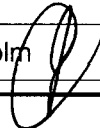
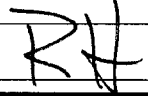
89 Section 4. This act shall take effect on the same date  
90 that HB 465 or similar legislation relating to human trafficking  
91 takes effect, if such legislation is adopted in the same  
92 legislative session or an extension thereof and becomes a law.





**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/HB 531 Limited Liability Companies  
**SPONSOR(S):** Economic Development & Tourism Subcommittee; Civil Justice Subcommittee; McGhee and Spano  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 554

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Economic Development & Tourism Subcommittee	11 Y, 0 N, As CS	Lukis	Duncan
3) Judiciary Committee		Malcolm 	Havlicak 

**SUMMARY ANALYSIS**

In 2013, the Legislature enacted the Florida Revised Limited Liability Company Act to replace its predecessor, the Florida Limited Liability Company Act. These acts regulate the formation and operation of limited liability companies (LLCs) in Florida. The Florida LLC Act was repealed effective January 1, 2015.

The bill deletes or replaces obsolete references to the Florida Limited Liability Company Act and makes technical, grammatical, and stylistic changes due to the repeal of the Florida Limited Liability Company Act.

The bill also makes the following changes to the Revised LLC Act:

- provides that a third-party does not have notice of a person's lack of authority to transfer real property on behalf of the LLC unless the limitation of authority is in certain public records of the real property transfer;
- allows for actions that require the vote or consent of members to be taken without a meeting subject to certain conditions;
- requires a member-managed LLC to respond to a member demand for certain information within 10 days;
- repeals a provision that resulted in confusion regarding which document—between an LLC's articles of organization and an LLC's operating agreement—is controlling if there is a conflict of language with respect to the LLC's management structure;
- repeals a provision that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC;
- repeals the exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction; and
- specifies information administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement.

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

The bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining provisions of the bill have an effective date of July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Current Law**

In 2013, the Legislature enacted the Florida Revised Limited Liability Company Act,<sup>1</sup> Ch. 605, F.S., to replace its predecessor act, Ch. 608, F.S., which regulated the formation and operation of limited liability companies (LLCs) in Florida. The Revised LLC Act was based in large part on the Revised Uniform Limited Liability Act of 2006 developed by the National Conference of Commissioners on Uniform State Laws with some deviations to reflect unique circumstances in Florida. Because the Revised LLC Act did not apply to all LLCs in Florida until January 1, 2015, the predecessor act in Ch. 608, F.S., remained in effect until that date.

LLC statutes were created because neither corporations nor partnerships were ideal types of business organizations in some cases. A partnership carries with it full joint and several liability for each of the members, and a corporation is often too complex for a smaller business and must pay state corporation taxes. The LLC has been described as a quasi-partnership that provides limited liability with the management structure of a general partnership and the income tax structure of a partnership.<sup>2</sup>

The bill makes the following substantive changes to Ch. 608, F.S., the Revised LLC Act:

##### **Notice of Authority to Transfer Real Property**

Section 605.0103(4), F.S., generally provides that a person who is not a member of an LLC is deemed to have notice of the LLC's grant or limitation of authority to a person to act on behalf of the LLC if such grant or limitation is contained in the LLC's articles of organization.

The bill amends s. 605.0103(4), F.S., to provide that any provisions in the LLC's articles of organization that limit the authority of a person to transfer real property held in the name of the LLC are not effective to put third parties on notice of that limited authority, unless the limitation of authority appears in an affidavit, certificate, or other instrument, recorded in the office for recording transfers of real property.

##### **Voting Rights of Members and Managers**

Section 605.04073(4), F.S., provides that any action that requires the vote or consent of the members of the LLC may be taken without a meeting. The bill amends subsection (4) to provide that an action requiring the vote or consent of members and managers may be taken without a meeting if the action was approved by the members with at least the minimum number of votes necessary to take the action at a meeting and a record of the action is made.

##### **Member Demand for Records and Information**

Generally, an LLC must make its corporate records and documents available for inspection to its members. Specifically, s. 605.0410(2), F.S., provides that a member-managed LLC must, on demand of a member, provide information concerning the company's activities, affairs, financial condition, and other circumstances that the LLC is not otherwise required to provide.

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<sup>1</sup> ch. 2013-180, Laws of Fla.

<sup>2</sup> McGinty, A. Edward, *Olmstead – A Lever from Member's Creditor to Full Multi-member LLC Membership?* Fla. Bar J., Vol. 85, No. 3, p. 42 (March 2011).

The bill amends s. 605.0410(2), F.S., to require a member-managed LLC that has received a demand for information to respond within 10 days of the demand either with the information demanded or with an explanation why the LLC will not provide the information.

### **Application of Revised LLC Act to LLCs formed under the Prior LLC Act**

Section 605.1108, F.S., provided for the one year phase in of the Revised LLC Act and allowed LLCs formed under the previous act before January 1, 2014, to remain under the previous act until January, 1, 2015, at which date all Florida LLCs became subject to the Revised LLC Act exclusively. For member-managed LLCs formed under the prior LLC Act, section 605.1108(3)(b), F.S., provides that the language in the company's articles of organization designating the company's management structure operates as if that language were in the operating agreement.

In some situations, a company's articles of organization may differ from its operating agreement in how the company's management structure is designated. Consequently, there may be confusion as to which language controls the company's management structure. To remedy this problem, the bill deletes s. 605.1108(3)(b), F.S.

### **Repeal of Ch. 608, F.S., the Florida Limited Liability Act**

As noted above, Ch. 608, F.S., the Florida Limited Liability Company Act, was repealed by Ch. 2013-180, L.O.F., effective January 1, 2015, and replaced by Ch. 605, F.S., the Revised LLC Act. Since Ch. 608, F.S., was not repealed by a "current session" of the Legislature, it may be omitted from the 2015 Florida Statutes only through a bill duly enacted by the current Legislature.<sup>3</sup> Accordingly, the bill repeals Ch. 608, F.S., the Florida Limited Liability Company Act.

The bill also deletes obsolete references to Ch. 608, F.S., and replaces them with references to Ch. 605, F.S. Where necessary to retain references to Ch. 608, F.S., the bill adds the word "former" before the reference. The bill also makes technical, grammatical, and stylistic changes due to the repeal of Ch. 608, F.S.

### **Power to Dissociate as a Member of an LLC**

Section 605.0601(1), F.S., provides that a person has the power to dissociate as a member of an LLC at any time. A member who dissociates loses right to participate as a member in the management and conduct of the LLC's activities and affairs.<sup>4</sup> Currently, s. 605.0105, F.S., provides that certain matters, including a member's power to dissociate under s. 605.0601, F.S., cannot be modified in an LLC's operating agreement.

The bill repeals the provision in s. 605.0105, F.S., that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC. Consequently, an LLC's operating agreement may limit or vary a person's power to dissociate as a member of the LLC in ways that differ from the default dissociation provision in s. 605.0601, F.S.

### **Other Effects of the Bill**

The bill amends the definition of "majority-in-interest" to provide that the determination of what constitutes an action taken by a "majority-in-interest" is based on the percentage interest in the LLC's profits owned by all the members of the LLC.

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<sup>3</sup> See ss. 11.242(5)(b) and (i), F.S.

<sup>4</sup> s. 605.0603(1)(a), F.S.

The bill provides that in order for the exception to a member or manager's duty of loyalty to apply in cases of conflict of interest transactions, the conflict of interest transaction provisions in s. 605.04092, F.S., must be satisfied.

The bill repeals the provision in s. 605.1072(2), F.S., that provides an exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction. This repeal makes the limitation of remedies in appraisal events comparable to the limitations in other business entity statutes.

The bill specifies information that administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement. The bill also provides for an alternative to filing an application for such reinstatement.

To correct technical errors associated with the 2013 enactment of the Revised LLC Act and the January 1, 2015 repeal of the prior LLC Act, the bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining substantive provisions of the bill have an effective date of July 1, 2015.

#### B. SECTION DIRECTORY:

Section 1 amends s. 605.0103, F.S., related to knowledge and notice.

Section 2 amends s. 605.0105, F.S., related to operating agreements; scope, function, and limitations.

Section 3 amends s. 605.04073, F.S., related to voting rights of members and managers.

Section 4 amends s. 605.0410, F.S., related to records to be kept and the rights of members, managers, and persons dissociated to information.

Section 5 amends s. 605.0715, F.S., related to reinstatement of an administratively dissolved LLC.

Section 6 amends s. 605.0909, F.S., related to reinstatement of an administratively dissolved foreign LLC.

Section 7 amends s. 605.1072, F.S., related to limits on other remedies.

Section 8 amends s. 605.1108, F.S., related to the application of ch. 605, F.S., to an LLC formed under the Florida LLC Act.

Section 9 repeals Ch. 608, F.S., the former statutes governing LLCs.

Section 10 amends s. 15.16, F.S., related to the reproduction of records, admissibility of evidence, electronic receipt and transmission of records, certifications, and acknowledgments.

Section 11 amends s. 48.062, F.S., related to service on an LLC.

Section 12 amends s. 213.758, F.S., related to transfer of tax liabilities.

Section 13 amends s. 220.02, F.S., related to legislative intent.

Section 14 amends s. 220.03, F.S., related to definitions.

Section 15 amends s. 220.13, F.S., related to the definition of "adjusted federal income."

Section 16 amends s. 310.181, F.S., related to corporate powers.

Section 17 amends s. 440.02, F.S., related to definitions.

Section 18 amends s. 605.0102, F.S., related to definitions.

Section 19 amends s. 605.0401, F.S., related to becoming a member.

Section 20 amends s. 605.04074, F.S., related to agency rights of members and managers.

Section 21 amends s. 605.04091, F.S., related to standards of conduct for members and managers.

Section 22 amends s. 605.0712, F.S., related to other claims against a dissolved LLC.

Section 23 amends s. 605.0717, F.S., related to the effect of dissolution.

Section 24 amends s. 605.0805, F.S., related to proceeds and expenses.

Section 25 amends s. 606.06, F.S., related to uniform business reports.

Section 26 amends s. 607.1108, F.S., related to the merger of a domestic corporation and other business entity.

Section 27 amends s. 607.1109, F.S., related to articles of merger.

Section 28 amends s. 607.11101, F.S., related to the effect of a merger of a domestic corporation and other business entity.

Section 29 amends s. 621.12, F.S., related to identification with individual shareholders or members.

Section 30 amends s. 636.204, F.S., related to license requirements.

Section 31 amends s. 655.0201, F.S., related to service of process, notice, or demand on financial institutions.

Section 32 amends s. 658.2953, F.S., related to interstate branching.

Section 33 amends s. 694.16, F.S., related to conveyances by a merger or conversion of business entities.

Section 34 amends s. 1002.395, F.S., related to the Florida Tax Credit Scholarship Program.

Section 35 provides 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 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:

The bill provides a retroactive effective date of January 1, 2015 for those provisions related to the repeal of the Florida LLC Act. The remaining provisions of the bill have an effective date of July 1, 2015.

Retroactive application of a statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.<sup>5</sup>

To determine whether a statute should be retroactively applied, courts apply two interrelated inquiries. First, courts determine whether there is clear evidence of legislative intent to apply the statute retrospectively. If so, then courts determine whether retroactive application is constitutionally permissible.<sup>6</sup> The first prong of the test appears to clearly be met by those sections of the bill that contain an explicit statement of retroactivity.

The second prong looks to see if a vested right is impaired. To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.<sup>7</sup> It must be an immediate, fixed right of present or future enjoyment.<sup>8</sup>

"Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes."<sup>9</sup>

<sup>5</sup> *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1216 (Fla. 2d DCA 2004).

<sup>6</sup> *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

<sup>7</sup> *R.A.M.* at 1218.

<sup>8</sup> *Florida Hosp. Waterman, Inc. v. Buster*, 948 So. 2d 478, 490 (Fla. 2008).

<sup>9</sup> *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961).

**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 an amended proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- repealing Ch. 608, F.S., the Florida Limited Liability Company Act;
- providing a retroactive effective date of January 1, 2015 for those provisions related to the repeal of Ch. 608, F.S.;
- repealing the provision in s. 605.0105, F.S., that prohibits an LLC's operating agreement from varying the power of a person to dissociate from the LLC;
- repealing the provision in s. 605.1072(2), F.S., that provides an exception to the limitation of remedies in appraisal events if the appraisal event is an interested transaction; and
- making technical and drafting corrections and conforming cross-references.

On March 10, 2015, the Economic Development & Tourism Subcommittee adopted an amendment to the bill. The amendment specifies information that administratively dissolved LLCs (domestic and foreign) must include on their application when applying for reinstatement. The amendment also provides for an alternative to filing an application for such reinstatement.

This analysis is drafted to the committee substitute as passed by the Economic Development & Tourism Subcommittee.





27 submit to the Department of State as part of an  
 28 application for reinstatement after revocation of  
 29 certificate of authority; amending s. 605.1072, F.S.;  
 30 deleting a provision providing an exception to the  
 31 limitation of remedies for appraisal events under  
 32 specified circumstances; amending s. 605.1108, F.S.;  
 33 deleting a provision requiring that, for a limited  
 34 liability company formed before a specified date,  
 35 certain language in the company's articles of  
 36 organization operates as if it were in the operating  
 37 agreement; repealing chapter 608, F.S., relating to  
 38 the Florida Limited Liability Company Act; amending  
 39 ss. 15.16, 48.062, 213.758, 220.02, 220.03, 220.13,  
 40 310.181, 440.02, 605.0401, 605.04074, 605.04091,  
 41 606.06, 607.1108, 607.1109, 607.11101, 621.12,  
 42 636.204, 655.0201, 658.2953, 694.16, and 1002.395,  
 43 F.S.; conforming provisions to the repeal of the  
 44 Florida Limited Liability Company Act; providing  
 45 retroactive applicability; amending ss. 605.0102,  
 46 605.0712, 605.0717, and 605.0805, F.S.; revising a  
 47 definition; conforming cross-references; providing  
 48 effective dates.

49  
 50 Be It Enacted by the Legislature of the State of Florida:  
 51  
 52 Section 1. Paragraph (b) of subsection (4) of section

53 | 605.0103, Florida Statutes, is amended to read:

54 |       605.0103 Knowledge; notice.—

55 |       (4) A person who is not a member is deemed to:

56 |       (b) Have notice of a limited liability company's:

57 |       1. Dissolution, 90 days after the articles of dissolution  
58 | filed under s. 605.0707 become effective;

59 |       2. Termination, 90 days after a statement of termination  
60 | filed under s. 605.0709(7) becomes effective;

61 |       3. Participation in a merger, interest exchange,  
62 | conversion, or domestication, 90 days after the articles of  
63 | merger, articles of interest exchange, articles of conversion,  
64 | or articles of domestication under s. 605.1025, s. 605.1035, s.  
65 | 605.1045, or s. 605.1055, respectively, become effective;

66 |       4. Declaration in its articles of organization that it is  
67 | manager-managed in accordance with s. 605.0201(3)(a); however,  
68 | if such a declaration has been added or changed by an amendment  
69 | or amendment and restatement of the articles of organization,  
70 | notice of the addition or change may not become effective until  
71 | 90 days after the effective date of such amendment or amendment  
72 | and restatement; and

73 |       5. Grant of authority to or limitation imposed on the  
74 | authority of a person holding a position or having a specified  
75 | status in a company, or grant of authority to or limitation  
76 | imposed on the authority of a specific person, if the grant of  
77 | authority or limitation imposed on the authority is described in  
78 | the articles of organization in accordance with s.

79 605.0201(3)(d); however, if that description has been added or  
 80 changed by an amendment or an amendment and restatement of the  
 81 articles of organization, notice of the addition or change may  
 82 not become effective until 90 days after the effective date of  
 83 such amendment or amendment and restatement. A provision of the  
 84 articles of organization that limits the authority of a person  
 85 to transfer real property held in the name of the limited  
 86 liability company is not notice of such limitation to a person  
 87 who is not a member or manager of the company, unless such  
 88 limitation appears in an affidavit, certificate, or other  
 89 instrument that bears the name of the limited liability company  
 90 and is recorded in the office for recording transfers of such  
 91 real property.

92 Section 2. Paragraph (i) of subsection (3) of section  
 93 605.0105, Florida Statutes, is amended to read:

94 605.0105 Operating agreement; scope, function, and  
 95 limitations.-

96 (3) An operating agreement may not do any of the  
 97 following:

98 ~~(i) Vary the power of a person to dissociate under s.~~  
 99 ~~605.0601, except to require that the notice under s. 605.0602(1)~~  
 100 ~~be in a record.~~

101 Section 3. Subsection (4) of section 605.04073, Florida  
 102 Statutes, is amended to read:

103 605.04073 Voting rights of members and managers.-

104 (4) An action requiring the vote or consent of members

105 under this chapter may be taken without a meeting if the action  
 106 is approved in a record by members with at least the minimum  
 107 number of votes that would be necessary to authorize or take the  
 108 action at a meeting of the members.~~and~~ A member may appoint a  
 109 proxy or other agent to vote or consent for the member by  
 110 signing an appointing record, personally or by the member's  
 111 agent. On an action taken by fewer than all of the members  
 112 without a meeting, notice of the action must be given to those  
 113 members who did not consent in writing to the action or who were  
 114 not entitled to vote on the action within 10 days after the  
 115 action was taken.

116 Section 4. Subsection (2), paragraph (a) of subsection  
 117 (3), and subsection (4) of section 605.0410, Florida Statutes,  
 118 are amended to read:

119 605.0410 Records to be kept; rights of member, manager,  
 120 and person dissociated to information.—

121 (2) In a member-managed limited liability company, the  
 122 following rules apply:

123 (a) Upon reasonable notice, a member may inspect and copy  
 124 during regular business hours, at a reasonable location  
 125 specified by the company:

- 126 1. The records described in subsection (1); and
- 127 2. Each other record maintained by the company regarding
- 128 the company's activities, affairs, financial condition, and
- 129 other circumstances, to the extent the information is material
- 130 to the member's rights and duties under the operating agreement

131 or this chapter.

132 (b) The company shall furnish to each member:

133 1. Without demand, any information concerning the  
 134 company's activities, affairs, financial condition, and other  
 135 circumstances that the company knows and is material to the  
 136 proper exercise of the member's rights and duties under the  
 137 operating agreement or this chapter, except to the extent the  
 138 company can establish that it reasonably believes the member  
 139 already knows the information; and

140 2. On demand, other information concerning the company's  
 141 activities, affairs, financial condition, and other  
 142 circumstances, except to the extent the demand or information  
 143 demanded is unreasonable or otherwise improper under the  
 144 circumstances.

145 (c) Within 10 days after receiving a demand pursuant to  
 146 subparagraph (b)2., the company shall provide to the member who  
 147 made the demand a record of:

148 1. The information that the company will provide in  
 149 response to the demand and when and where the company will  
 150 provide such information.

151 2. For any demanded information that the company is not  
 152 providing, the reasons that the company will not provide the  
 153 information.

154 (d)~~(e)~~ The duty to furnish information under this  
 155 subsection also applies to each member to the extent the member  
 156 knows any of the information described in this subsection.

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157           (3) In a manager-managed limited liability company, the  
158 following rules apply:

159           (a) The informational rights stated in subsection (2) and  
160 the duty stated in paragraph (2)(d) ~~(2)(e)~~ apply to the managers  
161 and not to the members.

162           (4) Subject to subsection (10) ~~(9)~~, on 10 days' demand  
163 made in a record received by a limited liability company, a  
164 person dissociated as a member may have access to information to  
165 which the person was entitled while a member if:

166           (a) The information pertains to the period during which  
167 the person was a member;

168           (b) The person seeks the information in good faith; and

169           (c) The person satisfies the requirements imposed on a  
170 member by paragraph (3)(b).

171           Section 5. Section 605.0715, Florida Statutes, is amended  
172 to read:

173           605.0715 Reinstatement.—

174           (1) A limited liability company that is administratively  
175 dissolved under s. 605.0714 or former s. 608.4481 may apply to  
176 the department for reinstatement at any time after the effective  
177 date of dissolution. The company must submit ~~a form of~~  
178 ~~application for reinstatement prescribed and furnished by the~~  
179 ~~department and provide all of the information required by the~~  
180 ~~department, together with~~ all fees and penalties then owed by  
181 the company at the rates provided by law at the time the company  
182 applies for reinstatement together with an application for

183 reinstatement prescribed and furnished by the department, which  
 184 is signed by both the registered agent and an authorized  
 185 representative of the company and states:

186 (a) The name of the limited liability company.

187 (b) The street address of the company's principal office  
 188 and mailing address.

189 (c) The date of the company's organization.

190 (d) The company's federal employer identification number  
 191 or, if none, whether one has been applied for.

192 (e) The name, title or capacity, and address of at least  
 193 one person who has authority to manage the company.

194 (f) Additional information that is necessary or  
 195 appropriate to enable the department to carry out this chapter.

196 (2) In lieu of the requirement to file an application for  
 197 reinstatement as described in subsection (1), an  
 198 administratively dissolved limited liability company may submit  
 199 all fees and penalties owed by the company at the rates provided  
 200 by law at the time the company applies for reinstatement,  
 201 together with a current annual report, signed by both the  
 202 registered agent and an authorized representative of the  
 203 company, which contains the information described in subsection  
 204 (1).

205 (3)~~(2)~~ If the department determines that an application  
 206 for reinstatement contains the information required under  
 207 subsection (1) or subsection (2) and that the information is  
 208 correct, upon payment of all required fees and penalties, the



209 department shall reinstate the limited liability company.

210 (4)~~(3)~~ When reinstatement under this section becomes  
 211 effective:

212 (a) The reinstatement relates back to and takes effect as  
 213 of the effective date of the administrative dissolution.

214 (b) The limited liability company may resume its  
 215 activities and affairs as if the administrative dissolution had  
 216 not occurred.

217 (c) The rights of a person arising out of an act or  
 218 omission in reliance on the dissolution before the person knew  
 219 or had notice of the reinstatement are not affected.

220 (5)~~(4)~~ The name of the dissolved limited liability company  
 221 is not available for assumption or use by another business  
 222 entity until 1 year after the effective date of dissolution  
 223 unless the dissolved limited liability company provides the  
 224 department with a record executed as required pursuant to s.  
 225 605.0203 permitting the immediate assumption or use of the name  
 226 by another limited liability company.

227 Section 6. Section 605.0909, Florida Statutes, is amended  
 228 to read:

229 605.0909 Reinstatement following revocation of certificate  
 230 of authority.—

231 (1) A foreign limited liability company whose certificate  
 232 of authority has been revoked may apply to the department for  
 233 reinstatement at any time after the effective date of the  
 234 revocation. The foreign limited liability company applying for

235 reinstatement must submit ~~provide information in a form~~  
 236 ~~prescribed and furnished by the department and pay~~ all fees and  
 237 penalties then owed by the foreign limited liability company at  
 238 rates provided by law at the time the foreign limited liability  
 239 company applies for reinstatement together with an application  
 240 for reinstatement prescribed and furnished by the department,  
 241 which is signed by both the registered agent and an authorized  
 242 representative of the company and states:

243 (a) The name under which the foreign limited liability  
 244 company is registered to transact business in this state.

245 (b) The street address of the company's principal office  
 246 and its mailing address.

247 (c) The jurisdiction of the company's formation and the  
 248 date on which it became qualified to transact business in this  
 249 state.

250 (d) The company's federal employer identification number  
 251 or, if none, whether one has been applied for.

252 (e) The name, title or capacity, and address of at least  
 253 one person who has authority to manage the company.

254 (f) Additional information that is necessary or  
 255 appropriate to enable the department to carry out this chapter.

256 (2) In lieu of the requirement to file an application for  
 257 reinstatement as described in subsection (1), a foreign limited  
 258 liability company whose certificate of authority has been  
 259 revoked may submit all fees and penalties owed by the company at  
 260 the rates provided by law at the time the company applies for

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261 reinstatement, together with a current annual report, signed by  
 262 both the registered agent and an authorized representative of  
 263 the company, which contains the information described in  
 264 subsection (1).

265 (3)~~(2)~~ If the department determines that an application  
 266 for reinstatement contains the information required under  
 267 subsection (1) or subsection (2) and that the information is  
 268 correct, upon payment of all required fees and penalties, the  
 269 department shall reinstate the foreign limited liability  
 270 company's certificate of authority.

271 (4)~~(3)~~ When a reinstatement becomes effective, it relates  
 272 back to and takes effect as of the effective date of the  
 273 revocation of authority and the foreign limited liability  
 274 company may resume its activities in this state as if the  
 275 revocation of authority had not occurred.

276 (5)~~(4)~~ The name of the foreign limited liability company  
 277 whose certificate of authority has been revoked is not available  
 278 for assumption or use by another business entity until 1 year  
 279 after the effective date of revocation of authority unless the  
 280 limited liability company provides the department with a record  
 281 executed pursuant to s. 605.0203 which authorizes the immediate  
 282 assumption or use of its name by another limited liability  
 283 company.

284 (6)~~(5)~~ If the name of the foreign limited liability  
 285 company applying for reinstatement has been lawfully assumed in  
 286 this state by another business entity, the department shall

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287 require the foreign limited liability company to comply with s.  
288 605.0906 before accepting its application for reinstatement.

289 Section 7. Paragraph (c) of subsection (2) of section  
290 605.1072, Florida Statutes, is amended to read:

291 605.1072 Other remedies limited.—

292 (2) Subsection (1) does not apply to an appraisal event  
293 that:

294 ~~(c) Is an interested transaction, unless it has been~~  
295 ~~approved in the same manner as is provided in s. 605.04092 or is~~  
296 ~~fair to the limited liability company as defined in s.~~  
297 ~~605.04092(1)(c).~~

298 Section 8. Subsection (3) of section 605.1108, Florida  
299 Statutes, is amended to read:

300 605.1108 Application to limited liability company formed  
301 under the Florida Limited Liability Company Act.—

302 (3) For the purpose of applying this chapter to a limited  
303 liability company formed before January 1, 2014, under the  
304 Florida Limited Liability Company Act, former ss. 608.401-  
305 608.705, +

306 ~~(a)~~ the company's articles of organization are deemed to  
307 be the company's articles of organization under this chapter~~+~~  
308 ~~and~~

309 ~~(b) For the purpose of applying s. 605.0102(39), the~~  
310 ~~language in the company's articles of organization designating~~  
311 ~~the company's management structure operates as if that language~~  
312 ~~were in the operating agreement.~~

313           Section 9. Effective upon this act becoming a law, chapter  
 314 608, Florida Statutes, consisting of sections 608.401, 608.402,  
 315 608.403, 608.404, 608.405, 608.406, 608.407, 608.408, 608.4081,  
 316 608.4082, 608.409, 608.4101, 608.411, 608.4115, 608.415,  
 317 608.416, 608.4211, 608.422, 608.4225, 608.4226, 608.4227,  
 318 608.4228, 608.4229, 608.423, 608.4231, 608.4232, 608.4235,  
 319 608.4236, 608.4237, 608.4238, 608.425, 608.426, 608.4261,  
 320 608.427, 608.428, 608.431, 608.432, 608.433, 608.434, 608.4351,  
 321 608.4352, 608.4353, 608.4354, 608.4355, 608.4356, 608.4357,  
 322 608.43575, 608.4358, 608.43585, 608.4359, 608.43595, 608.438,  
 323 608.4381, 608.4382, 608.4383, 608.439, 608.4401, 608.4402,  
 324 608.4403, 608.4404, 608.441, 608.4411, 608.4421, 608.4431,  
 325 608.444, 608.445, 608.446, 608.447, 608.448, 608.4481, 608.4482,  
 326 608.4483, 608.449, 608.4491, 608.4492, 608.4493, 608.4511,  
 327 608.452, 608.455, 608.461, 608.462, 608.463, 608.471, 608.501,  
 328 608.502, 608.503, 608.504, 608.505, 608.506, 608.507, 608.508,  
 329 608.509, 608.5101, 608.511, 608.512, 608.513, 608.5135, 608.514,  
 330 608.601, 608.701, 608.702, 608.703, 608.704, and 608.705, is  
 331 repealed.

332           Section 10. Effective upon this act becoming a law and  
 333 operating retroactively to January 1, 2015, subsection (3) of  
 334 section 15.16, Florida Statutes, is amended to read:

335           15.16 Reproduction of records; admissibility in evidence;  
 336 electronic receipt and transmission of records; certification;  
 337 acknowledgment.—

338           (3) The Department of State may cause to be received

339 electronically any records that are required to be filed with it  
 340 pursuant to chapter 55, chapter 117, chapter 118, chapter 495,  
 341 chapter 605, chapter 606, chapter 607, ~~chapter 608~~, chapter 610,  
 342 chapter 617, chapter 620, chapter 621, chapter 679, chapter 713,  
 343 or chapter 865, through facsimile or other electronic transfers,  
 344 for the purpose of filing such records. The originals of all  
 345 such electronically transmitted records must be executed in the  
 346 manner provided in paragraph (5)(b). The receipt of such  
 347 electronic transfer constitutes delivery to the department as  
 348 required by law. The department may use electronic transmissions  
 349 for purposes of notice in the administration of chapters 55,  
 350 117, 118, 495, 605, 606, 607, ~~608~~, 610, 617, 620, 621, 679, and  
 351 713 and s. 865.09. The Department of State may collect e-mail  
 352 addresses for purposes of notice and communication in the  
 353 performance of its duties and may require filers and registrants  
 354 to furnish such e-mail addresses when presenting documents for  
 355 filing.

356 Section 11. Effective upon this act becoming a law and  
 357 operating retroactively to January 1, 2015, subsections (1) and  
 358 (2) of section 48.062, Florida Statutes, are amended to read:

359 48.062 Service on a limited liability company.—

360 (1) Process against a limited liability company, domestic  
 361 or foreign, may be served on the registered agent designated by  
 362 the limited liability company under chapter 605 ~~or chapter 608~~.  
 363 A person attempting to serve process pursuant to this subsection  
 364 may serve the process on any employee of the registered agent

365 during the first attempt at service even if the registered agent  
 366 is a natural person and is temporarily absent from his or her  
 367 office.

368 (2) If service cannot be made on a registered agent of the  
 369 limited liability company because of failure to comply with  
 370 chapter 605 ~~or chapter 608~~ or because the limited liability  
 371 company does not have a registered agent, or if its registered  
 372 agent cannot with reasonable diligence be served, process  
 373 against the limited liability company, domestic or foreign, may  
 374 be served:

375 (a) On a member of a member-managed limited liability  
 376 company;

377 (b) On a manager of a manager-managed limited liability  
 378 company; or

379 (c) If a member or manager is not available during regular  
 380 business hours to accept service on behalf of the limited  
 381 liability company, he, she, or it may designate an employee of  
 382 the limited liability company to accept such service. After one  
 383 attempt to serve a member, manager, or designated employee has  
 384 been made, process may be served on the person in charge of the  
 385 limited liability company during regular business hours.

386 Section 12. Effective upon this act becoming a law and  
 387 operating retroactively to January 1, 2015, paragraph (c) of  
 388 subsection (1) of section 213.758, Florida Statutes, is amended  
 389 to read:

390 213.758 Transfer of tax liabilities.—

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

392 (c) "Insider" means:

393 1. Any person included within the meaning of insider as  
394 used in s. 726.102; or

395 2. A manager of, ~~a managing member of,~~ or a person who  
396 controls a transferor that is, a limited liability company, or a  
397 relative as defined in s. 726.102 of any such persons.

398 Section 13. Effective upon this act becoming a law and  
399 operating retroactively to January 1, 2015, subsection (1) of  
400 section 220.02, Florida Statutes, is amended to read:

401 220.02 Legislative intent.—

402 (1) It is the intent of the Legislature in enacting this  
403 code to impose a tax upon all corporations, organizations,  
404 associations, and other artificial entities which derive from  
405 this state or from any other jurisdiction permanent and inherent  
406 attributes not inherent in or available to natural persons, such  
407 as perpetual life, transferable ownership represented by shares  
408 or certificates, and limited liability for all owners. It is  
409 intended that any limited liability company that is classified  
410 as a partnership for federal income tax purposes and is defined  
411 in and organized pursuant to ~~formed under~~ chapter 605 ~~608~~ or  
412 qualified to do business in this state as a foreign limited  
413 liability company not be subject to the tax imposed by this  
414 code. It is the intent of the Legislature to subject such  
415 corporations and other entities to taxation hereunder for the  
416 privilege of conducting business, deriving income, or existing



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417 within this state. This code is not intended to tax, and shall  
418 not be construed so as to tax, any natural person who engages in  
419 a trade, business, or profession in this state under his or her  
420 own or any fictitious name, whether individually as a  
421 proprietorship or in partnership with others, or as a member or  
422 a manager of a limited liability company classified as a  
423 partnership for federal income tax purposes; any estate of a  
424 decedent or incompetent; or any testamentary trust. However, a  
425 corporation or other taxable entity which is or which becomes  
426 partners with one or more natural persons shall not, merely by  
427 reason of being a partner, exclude from its net income subject  
428 to tax its respective share of partnership net income. This  
429 statement of intent shall be given preeminent consideration in  
430 any construction or interpretation of this code in order to  
431 avoid any conflict between this code and the mandate in s. 5,  
432 Art. VII of the State Constitution that no income tax be levied  
433 upon natural persons who are residents and citizens of this  
434 state.

435 Section 14. Effective upon this act becoming a law and  
436 operating retroactively to January 1, 2015, paragraph (e) of  
437 subsection (1) of section 220.03, Florida Statutes, is amended  
438 to read:

439 220.03 Definitions.—

440 (1) SPECIFIC TERMS.—When used in this code, and when not  
441 otherwise distinctly expressed or manifestly incompatible with  
442 the intent thereof, the following terms shall have the following

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443 meanings:

444 (e) "Corporation" includes all domestic corporations;  
445 foreign corporations qualified to do business in this state or  
446 actually doing business in this state; joint-stock companies;  
447 limited liability companies, under chapter 605 ~~608~~; common-law  
448 declarations of trust, under chapter 609; corporations not for  
449 profit, under chapter 617; agricultural cooperative marketing  
450 associations, under chapter 618; professional service  
451 corporations, under chapter 621; foreign unincorporated  
452 associations, under chapter 622; private school corporations,  
453 under chapter 623; foreign corporations not for profit which are  
454 carrying on their activities in this state; and all other  
455 organizations, associations, legal entities, and artificial  
456 persons which are created by or pursuant to the statutes of this  
457 state, the United States, or any other state, territory,  
458 possession, or jurisdiction. The term "corporation" does not  
459 include proprietorships, even if using a fictitious name;  
460 partnerships of any type, as such; limited liability companies  
461 that are taxable as partnerships for federal income tax  
462 purposes; state or public fairs or expositions, under chapter  
463 616; estates of decedents or incompetents; testamentary trusts;  
464 or private trusts.

465 Section 15. Effective upon this act becoming a law and  
466 operating retroactively to January 1, 2015, paragraph (j) of  
467 subsection (2) of section 220.13, Florida Statutes, is amended  
468 to read:

469 220.13 "Adjusted federal income" defined.—

470 (2) For purposes of this section, a taxpayer's taxable  
 471 income for the taxable year means taxable income as defined in  
 472 s. 63 of the Internal Revenue Code and properly reportable for  
 473 federal income tax purposes for the taxable year, but subject to  
 474 the limitations set forth in paragraph (1)(b) with respect to  
 475 the deductions provided by ss. 172 (relating to net operating  
 476 losses), 170(d)(2) (relating to excess charitable  
 477 contributions), 404(a)(1)(D) (relating to excess pension trust  
 478 contributions), 404(a)(3)(A) and (B) (to the extent relating to  
 479 excess stock bonus and profit-sharing trust contributions), and  
 480 1212 (relating to capital losses) of the Internal Revenue Code,  
 481 except that, subject to the same limitations, the term:

482 (j) "Taxable income," in the case of a limited liability  
 483 company, other than a limited liability company classified as a  
 484 partnership for federal income tax purposes, as defined in and  
 485 organized pursuant to chapter 605 ~~608~~ or qualified to do  
 486 business in this state as a foreign limited liability company or  
 487 other than a similar limited liability company classified as a  
 488 partnership for federal income tax purposes and created as an  
 489 artificial entity pursuant to the statutes of the United States  
 490 or any other state, territory, possession, or jurisdiction, if  
 491 such limited liability company or similar entity is taxable as a  
 492 corporation for federal income tax purposes, means taxable  
 493 income determined as if such limited liability company were  
 494 required to file or had filed a federal corporate income tax

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495 return under the Internal Revenue Code;

496 Section 16. Effective upon this act becoming a law and  
 497 operating retroactively to January 1, 2015, section 310.181,  
 498 Florida Statutes, is amended to read:

499 310.181 Corporate powers.—All the rights, powers, and  
 500 liabilities conferred or imposed by the laws of Florida relating  
 501 to corporations for profit organized under part I of chapter 607  
 502 or under former chapter 608 before January 1, 1976, or to  
 503 corporations organized under chapter 621 apply to corporations  
 504 organized pursuant to s. 310.171.

505 Section 17. Effective upon this act becoming a law and  
 506 operating retroactively to January 1, 2015, subsection (9) of  
 507 section 440.02, Florida Statutes, is amended to read:

508 440.02 Definitions.—When used in this chapter, unless the  
 509 context clearly requires otherwise, the following terms shall  
 510 have the following meanings:

511 (9) "Corporate officer" or "officer of a corporation"  
 512 means any person who fills an office provided for in the  
 513 corporate charter or articles of incorporation filed with the  
 514 Division of Corporations of the Department of State or as  
 515 authorized or required under part I of chapter 607. The term  
 516 "officer of a corporation" includes a member owning at least 10  
 517 percent of a limited liability company as defined in and  
 518 organized pursuant to ~~created and approved under~~ chapter 605  
 519 ~~608~~.

520 Section 18. Subsection (37) of section 605.0102, Florida

521 Statutes, is amended to read:

522 605.0102 Definitions.—As used in this chapter, the term:

523 (37) "Majority-in-interest" means those members who hold  
 524 more than 50 percent of the then-current percentage or other  
 525 interest in the profits of the limited liability company owned  
 526 by all of its members ~~and who have the right to vote~~; however,  
 527 as used in ss. 605.1001-605.1072, the term means:

528 (a) In the case of a limited liability company with only  
 529 one class or series of members, the holders of more than 50  
 530 percent of the then-current percentage or other interest in the  
 531 profits of the company owned by all of its members who have the  
 532 right to approve the a merger, interest exchange, or conversion,  
 533 as applicable, under the organic law or the organic rules of the  
 534 company; and

535 (b) In the case of a limited liability company having more  
 536 than one class or series of members, the holders in each class  
 537 or series of more than 50 percent of the then-current percentage  
 538 or other interest in the profits of the company owned by all of  
 539 the members of that class or series who have the right to  
 540 approve the a merger, interest exchange, or conversion, as  
 541 applicable, under the organic law or the organic rules of the  
 542 company, unless the company's organic rules provide for the  
 543 approval of the transaction in a different manner.

544 Section 19. Effective upon this act becoming a law and  
 545 operating retroactively to January 1, 2015, subsection (3) of  
 546 section 605.0401, Florida Statutes, is amended to read:

547           605.0401   Becoming a member.—

548           (3)   After formation of a limited liability company, a  
549 person becomes a member:

550           (a)   As provided in the operating agreement;

551           (b)   As the result of a merger, interest exchange,  
552 conversion, or domestication under ss. 605.1001-605.1072, as  
553 applicable;

554           (c)   With the consent of all the members; or

555           (d)   As provided in s. 605.0701(3).

556           Section 20.   Effective upon this act becoming a law and  
557 operating retroactively to January 1, 2015, paragraph (a) of  
558 subsection (1) of section 605.04074, Florida Statutes, is  
559 amended to read:

560           605.04074   Agency rights of members and managers.—

561           (1)   In a member-managed limited liability company, the  
562 following rules apply:

563           (a)   Except as provided in subsection (3), each member is  
564 an agent of the limited liability company for the purpose of its  
565 activities and affairs, ~~and~~ an act of a member, including  
566 signing an agreement or instrument of transfer in the name of  
567 the company for apparently carrying on in the ordinary course of  
568 the company's activities and affairs or activities and affairs  
569 of the kind carried on by the company, binds the company unless  
570 the member had no authority to act for the company in the  
571 particular matter and the person with whom the member was  
572 dealing knew or had notice that the member lacked authority.

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573 Section 21. Effective upon this act becoming a law and  
 574 operating retroactively to January 1, 2015, paragraph (b) of  
 575 subsection (2) of section 605.04091, Florida Statutes, is  
 576 amended to read:

577 605.04091 Standards of conduct for members and managers.—

578 (2) The duty of loyalty is limited to:

579 (b) Refraining from dealing with the company in the  
 580 conduct or winding up of the company's activities and affairs  
 581 as, or on behalf of, a person having an interest adverse to the  
 582 company, except to the extent that a transaction satisfies the  
 583 requirements of s. 605.04092 ~~this section~~; and

584 Section 22. Subsection (3) of section 605.0712, Florida  
 585 Statutes, is amended to read:

586 605.0712 Other claims against a dissolved limited  
 587 liability company.—

588 (3) A claim that is not barred by this section, ~~s.~~  
 589 ~~608.0711~~, or another statute limiting actions, may be enforced:

590 (a) Against a dissolved limited liability company, to the  
 591 extent of its undistributed assets; and

592 (b) Except as otherwise provided in s. 605.0713, if assets  
 593 of the limited liability company have been distributed after  
 594 dissolution, against a member or transferee to the extent of  
 595 that person's proportionate share of the claim or of the  
 596 company's assets distributed to the member or transferee after  
 597 dissolution, whichever is less, but a person's total liability  
 598 for all claims under this subsection may not exceed the total

599 amount of assets distributed to the person after dissolution.

600 Section 23. Subsection (2) of section 605.0717, Florida  
601 Statutes, is amended to read:

602 605.0717 Effect of dissolution.—

603 (2) Except as provided in s. 605.0715(5) ~~605.0715(4)~~, the  
604 name of the dissolved limited liability company is not available  
605 for assumption or use by another business entity until 120 days  
606 after the effective date of dissolution or filing of a statement  
607 of termination, if earlier.

608 Section 24. Subsection (2) of section 605.0805, Florida  
609 Statutes, is amended to read:

610 605.0805 Proceeds and expenses.—

611 (2) If a derivative action ~~under s. 608.0802~~ is successful  
612 in whole or in part, the court may award the plaintiff  
613 reasonable expenses, including reasonable attorney fees and  
614 costs, from the recovery of the limited liability company.

615 Section 25. Effective upon this act becoming a law and  
616 operating retroactively to January 1, 2015, subsection (2) of  
617 section 606.06, Florida Statutes, is amended to read:

618 606.06 Uniform business report.—The department may use the  
619 uniform business report:

620 (2) As a substitute for any annual report or renewal  
621 filing required by chapters 495, 605, 607, ~~608~~, 609, 617, 620,  
622 621, and 865.

623 Section 26. Effective upon this act becoming a law and  
624 operating retroactively to January 1, 2015, paragraph (c) of



625 subsection (2) of section 607.1108, Florida Statutes, is amended  
 626 to read:

627       607.1108 Merger of domestic corporation and other business  
 628 entity.—

629       (2) Pursuant to a plan of merger complying and approved in  
 630 accordance with this section, one or more domestic corporations  
 631 may merge with or into one or more other business entities  
 632 formed, organized, or incorporated under the laws of this state  
 633 or any other state, the United States, foreign country, or other  
 634 foreign jurisdiction, if:

635       (c) Each domestic limited liability company that is a  
 636 party to the merger complies with the applicable provisions of  
 637 chapter 605 ~~608~~.

638       Section 27. Effective upon this act becoming a law and  
 639 operating retroactively to January 1, 2015, paragraph (d) of  
 640 subsection (1) of section 607.1109, Florida Statutes, is amended  
 641 to read:

642       607.1109 Articles of merger.—

643       (1) After a plan of merger is approved by each domestic  
 644 corporation and other business entity that is a party to the  
 645 merger, the surviving entity shall deliver to the Department of  
 646 State for filing articles of merger, which shall be executed by  
 647 each domestic corporation as required by s. 607.0120 and by each  
 648 other business entity as required by applicable law, and which  
 649 shall set forth:

650       (d) A statement that the plan of merger was approved by

651 each domestic limited liability company that is a party to the  
 652 merger in accordance with the applicable provisions of chapter  
 653 605 ~~608~~.

654 Section 28. Effective upon this act becoming a law and  
 655 operating retroactively to January 1, 2015, subsection (7) of  
 656 section 607.11101, Florida Statutes, is amended to read:

657 607.11101 Effect of merger of domestic corporation and  
 658 other business entity.—When a merger becomes effective:

659 (7) The shares, partnership interests, interests,  
 660 obligations, or other securities, and the rights to acquire  
 661 shares, partnership interests, interests, obligations, or other  
 662 securities, of each domestic corporation and other business  
 663 entity that is a party to the merger shall be converted into  
 664 shares, partnership interests, interests, obligations, or other  
 665 securities, or rights to such securities, of the surviving  
 666 entity or any other domestic corporation or other business  
 667 entity or, in whole or in part, into cash or other property as  
 668 provided in the plan of merger, and the former holders of  
 669 shares, partnership interests, interests, obligations, or other  
 670 securities, or rights to such securities, shall be entitled only  
 671 to the rights provided in the plan of merger and to their  
 672 appraisal rights, if any, under s. 605.1006, ss. 605.1061-  
 673 605.1072, ss. 607.1301-607.1333, ~~ss. 608.4351-608.43595,~~ ss.  
 674 620.2114-620.2124, or other applicable law.

675 Section 29. Effective upon this act becoming a law and  
 676 operating retroactively to January 1, 2015, paragraph (b) of

677 subsection (2) of section 621.12, Florida Statutes, is amended  
 678 to read:

679       621.12 Identification with individual shareholders or  
 680 individual members.—

681       (2) The name shall also contain:

682       (b)1. In the case of a professional corporation, the words  
 683 "professional association" or the abbreviation "P.A."; or

684       2. In the case of a professional limited liability company  
 685 formed before January 1, 2014, the words "professional limited  
 686 company" or "professional limited liability company," the  
 687 abbreviation "P.L." or "P.L.L.C." or the designation "PL" or  
 688 "PLLC," in lieu of the words "limited company" or "limited  
 689 liability company," or the abbreviation "L.C." or "L.L.C." or  
 690 the designation "LC" or "LLC" as otherwise required under s.  
 691 605.0112 or former s. 608.406.

692       3. In the case of a professional limited liability company  
 693 formed on or after January 1, 2014, the words "professional  
 694 limited liability company," the abbreviation "P.L.L.C." or the  
 695 designation "PLLC," in lieu of the words "limited liability  
 696 company," or the abbreviation "L.L.C." or the designation "LLC"  
 697 as otherwise required under s. 605.0112.

698       Section 30. Effective upon this act becoming a law and  
 699 operating retroactively to January 1, 2015, subsection (1) of  
 700 section 636.204, Florida Statutes, is amended to read:

701       636.204 License required.—

702       (1) Before doing business in this state as a discount

703 medical plan organization, an entity must be a corporation, a  
 704 limited liability company, or a limited partnership,  
 705 incorporated, organized, formed, or registered under the laws of  
 706 this state or authorized to transact business in this state in  
 707 accordance with chapter 605, part I of chapter 607, ~~chapter 608~~,  
 708 chapter 617, chapter 620, or chapter 865, and must be licensed  
 709 by the office as a discount medical plan organization or be  
 710 licensed by the office pursuant to chapter 624, part I of this  
 711 chapter, or chapter 641.

712 Section 31. Effective upon this act becoming a law and  
 713 operating retroactively to January 1, 2015, subsection (1) of  
 714 section 655.0201, Florida Statutes, is amended to read:

715 655.0201 Service of process, notice, or demand on  
 716 financial institutions.—

717 (1) Process against any financial institution authorized  
 718 by federal or state law to transact business in this state may  
 719 be served in accordance with chapter 48, chapter 49, chapter  
 720 605, or part I of chapter 607, ~~or chapter 608~~, as appropriate.

721 Section 32. Effective upon this act becoming a law and  
 722 operating retroactively to January 1, 2015, paragraph (c) of  
 723 subsection (11) of section 658.2953, Florida Statutes, is  
 724 amended to read:

725 658.2953 Interstate branching.—

726 (11) DE NOVO INTERSTATE BRANCHING BY STATE BANKS.—

727 (c) An out-of-state bank may establish and maintain a de  
 728 novo branch or acquire a branch in this state upon compliance

729 with chapter 605 or part I of chapter 607 ~~or chapter 608~~  
 730 relating to doing business in this state as a foreign business  
 731 entity, including maintaining a registered agent for service of  
 732 process and other legal notice pursuant to s. 655.0201.

733 Section 33. Effective upon this act becoming a law and  
 734 operating retroactively to January 1, 2015, section 694.16,  
 735 Florida Statutes, is amended to read:

736 694.16 Conveyances by merger or conversion of business  
 737 entities.—As to any merger or conversion of business entities  
 738 prior to June 15, 2000, the title to all real estate, or any  
 739 interest therein, owned by a business entity that was a party to  
 740 a merger or a conversion is vested in the surviving entity  
 741 without reversion or impairment, notwithstanding the requirement  
 742 of a deed which was previously required by s. 607.11101, former  
 743 s. 608.4383, former s. 620.204, former s. 620.8904, or former s.  
 744 620.8906.

745 Section 34. Effective upon this act becoming a law and  
 746 operating retroactively to January 1, 2015, paragraph (f) of  
 747 subsection (2) of section 1002.395, Florida Statutes, is amended  
 748 to read:

749 1002.395 Florida Tax Credit Scholarship Program.—

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

751 (f) "Eligible nonprofit scholarship-funding organization"  
 752 means a state university; or an independent college or  
 753 university that is eligible to participate in the William L.  
 754 Boyd, IV, Florida Resident Access Grant Program, located and

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755 chartered in this state, is not for profit, and is accredited by  
756 the Commission on Colleges of the Southern Association of  
757 Colleges and Schools; or is a charitable organization that:

758 1. Is exempt from federal income tax pursuant to s.  
759 501(c)(3) of the Internal Revenue Code;

760 2. Is a Florida entity formed under chapter 605, chapter  
761 607, ~~chapter 608~~, or chapter 617 and whose principal office is  
762 located in the state; and

763 3. Complies with subsections (6) and (16).

764 Section 35. Except as otherwise expressly provided in this  
765 act and except for this section, which shall take effect upon  
766 this act becoming a law, this act shall take effect July 1,  
767 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		

1 Committee/Subcommittee hearing bill: Judiciary Committee  
 2 Representative McGhee offered the following:

**Amendment**

5 Remove lines 289-293 and insert:

6 Section 7. Subsection (2) of section 605.1072, Florida  
 7 Statutes, is amended to read:

8 605.1072 Other remedies limited.—

9 (2) Subsection (1) does not apply to an appraisal event  
 10 that:

11 (a) Was not authorized and approved in accordance with the  
 12 applicable provisions of this chapter, the organic rules of the  
 13 limited liability company, or the resolutions of the members  
 14 authorizing the appraisal event; or

15 (b) Was procured as a result of fraud, a material  
 16 misrepresentation, or an omission of a material fact that is



COMMITTEE/SUBCOMMITTEE AMENDMENT

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17 necessary to make statements made, in light of the circumstances  
18 in which they were made, not misleading. ~~or~~





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 619 Service of Process  
SPONSOR(S): Rouson  
TIED BILLS: None IDEN./SIM. BILLS: SB 570

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

SUMMARY ANALYSIS

Traditionally, a witness in a trial was required to be personally served with a subpoena in order to require that witness to appear at a hearing or trial. Current law allows, however, for service of witness subpoena by regular mail in certain felony, misdemeanor and criminal traffic cases. A witness subpoena served by mail cannot be enforced by contempt of court.

This bill adds civil traffic cases to the types of action in which a witness subpoena may be served by regular mail.

This bill appears to have an unknown significant positive fiscal impact on local government expenditures. This bill does not appear to have a fiscal impact on local governments.

The effective date of the bill is July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

The role of a process server is to serve summons, subpoenas, and other forms of process in civil and criminal actions.<sup>1</sup> The term “to serve” means to make legal delivery of a notice or a pleading.<sup>2</sup> A summons is a writ or a process beginning a plaintiff’s legal action and requiring a defendant to appear in court to answer the summons.<sup>3</sup> A subpoena is a legal writ or order commanding a person to appear before a court or other tribunal.<sup>4</sup> A subpoena can command a person to be present for a deposition or for a court appearance.

In general, service of process is accomplished by personal delivery upon a person. However, service of process of a witness subpoena may be accomplished through United States mail for criminal traffic, misdemeanors, third degree felonies, and second degree felonies.<sup>5</sup>

To serve a subpoena on a witness by mail, the subpoena must be sent to the last known address of the witness at least 7 days before the appearance required in the subpoena. If a witness fails to appear in response to a subpoena served by mail, the court may not find the person in contempt of court.

Civil traffic offenses are only punishable by a fine, and thus are generally regarded as being less serious than criminal traffic, misdemeanor or felony cases. Yet, current law does not allow service of a subpoena by mail in civil traffic cases, requiring instead the more expensive service of process by personal delivery.

##### Effect of the Bill

The bill adds civil traffic cases to the list of court cases for which service of process of a witness subpoena may be accomplished by United States mail.

#### B. SECTION DIRECTORY:

Section 1 amends s. 48.031, F.S., regarding service of process generally and service of witness subpoenas.

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.

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<sup>1</sup> ss. 48.011 and 48.021, F.S.

<sup>2</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> s. 48.031(3)(a), F.S.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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

2. Expenditures:

This bill may result in a cost savings for local sheriffs by giving them the option of serving witness subpoenas by mail for appearances in civil traffic cases. The statewide cost savings is indeterminate. As an example, however, Hillsborough County delivered 5,878 witness subpoenas in civil traffic cases in 2014. That county alone estimates a cost savings from this bill of almost \$100,000 a year in manpower costs.<sup>6</sup>

The Office of the State Courts Administrator anticipates a minimal fiscal impact from the bill.<sup>7</sup>

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

A person who challenges a civil traffic citation bears the costs of service of process for witness subpoenas should the person require the attendance of a witness. The fee for in-person service of a witness subpoena is \$40.<sup>8</sup> Allowing witness subpoenas to be served by mail may decrease the costs of challenging a civil traffic citation.

**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**

None.

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<sup>6</sup> Email correspondence from Lorelei Bowden, Manager, Legislative Affairs and Grants, Hillsborough County Sheriff's Office, dated February 27, 2015. (on file with Civil Justice Subcommittee).

<sup>7</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement on [companion bill] SB 570* (February 20, 2015).

<sup>8</sup> Section 30.231(1)(c), F.S.

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1                                   A bill to be entitled  
 2           An act relating to service of process; amending s.  
 3           48.031, F.S.; authorizing service of witness subpoenas  
 4           in civil traffic cases by United States mail;  
 5           providing requirements; providing an effective date.  
 6

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

9           Section 1. Paragraph (a) of subsection (3) of section  
 10          48.031, Florida Statutes, is amended to read:

11          48.031 Service of process generally; service of witness  
 12          subpoenas.—

13          (3)(a) The service of process of witness subpoenas,  
 14          whether in criminal cases or civil actions, shall be made as  
 15          provided in subsection (1). However, service of a subpoena on a  
 16          witness in a civil traffic case, a criminal traffic case, a  
 17          misdemeanor case, or a second degree or third degree felony may  
 18          be made by United States mail directed to the witness at the  
 19          last known address, and the service must be mailed at least 7  
 20          days prior to the date of the witness's required appearance.  
 21          Failure of a witness to appear in response to a subpoena served  
 22          by United States mail that is not certified may not be grounds  
 23          for finding the witness in contempt of court.

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



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 625 Florida Civil Rights Act  
**SPONSOR(S):** Cortes, B.; Berman and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 982

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 1 N	Robinson	Bond
2) State Affairs Committee	16 Y, 0 N	Moore	Camechis
3) Judiciary Committee		Robinson <i>TR</i>	Havlicak <i>RH</i>

### SUMMARY ANALYSIS

Title II of the federal Civil Rights Act of 1964 (Title II) prohibits discrimination on the basis of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the federal Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Title VII was amended in 1978 to specifically include discrimination based on pregnancy, childbirth, and related medical conditions as prohibited forms of sex discrimination in employment.

Patterned after Title II and Title VII, but providing even broader protections, the Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..." in places of public accommodation and employment. However, although Title VII expressly includes pregnancy status as a component of sex discrimination in employment, the FCRA does not. The fact that the FCRA is patterned after Title VII but does not expressly prohibit discrimination based on pregnancy status has caused division among both federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status in employment. In 2014, the Florida Supreme Court concluded that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in employment practices, consistent with the express provisions of Title VII. The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

The bill codifies the Florida Supreme Court decision by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FRCA to prohibit discrimination on the basis of pregnancy in places of public accommodation.

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

The effective date of the bill is July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### **Title II and VII of the Civil Rights Act of 1964<sup>1</sup>**

Title II of the federal Civil Rights Act of 1964 (Title II) prohibits discrimination on the basis of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees<sup>2</sup> and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, national origin, or sex.<sup>3</sup>

##### **Pregnancy Discrimination Act<sup>4</sup>**

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*<sup>5</sup> that Title VII did not include pregnancy discrimination as a form of sex discrimination under its prohibition against unlawful employment practices. In response to the decision, Congress passed the Pregnancy Discrimination Act (PDA) in 1978. The PDA amended Title VII to expressly define the terms “because of sex” and “on the basis of sex,” to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.<sup>6</sup> Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, or any other term or condition of employment.<sup>7</sup>

##### **Florida Civil Rights Act of 1992**

Patterned after Title II and Title VII, but providing broader protections, the Florida Civil Rights Act of 1992 (FCRA) was enacted to “secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status...”<sup>8</sup> in employment and public accommodations.<sup>9</sup> Similar to Title VII, the FCRA provides a number of actions that, if undertaken because of or on the basis of an individual's race, color, religion, sex, national origin, age, handicap, or marital status, are considered unlawful employment practices, including:<sup>10</sup>

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<sup>1</sup> 42 U.S.C. § 2000a *et seq.*; 42 U.S.C. § 2000e *et seq.*

<sup>2</sup> 42 U.S.C. § 2000e(b)

<sup>3</sup> 42 U.S.C. § 2000e-2(a).

<sup>4</sup> Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978), codified as 42 U.S.C. § 2000e(k).

<sup>5</sup> 429 U.S. 125, 145 (1976).

<sup>6</sup> The PDA defines the terms “because of sex” or “on the basis of sex” to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so affected but has similar ability or inability to work.

<sup>7</sup> For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, <http://www.eeoc.gov/facts/fs-preg.html> (last visited February 24, 2015).

<sup>8</sup> s. 760.01, F.S.

<sup>9</sup> “Public accommodations” means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. s. 760.02(11), F.S.

<sup>10</sup> s. 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.



- Failing to hire an individual, or otherwise discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment;
- Limiting, segregating, or classifying employees or applicants for employment in ways that would deprive such individuals of employment opportunities or adversely affect an individual's status as an employee;
- Failing or refusing to refer an individual for employment;
- Excluding or expelling an individual from membership in a labor organization or limiting, segregating, or classifying the membership of a labor organization;
- Discriminating in admission to, or employment in, any program established to provide apprenticeship or other training for a profession, occupation, or trade;
- Discriminating in licensing, certification, credentials, examinations, or an organizational membership required to engage in a profession, occupation, or trade; and
- Printing or publishing ads related to membership in certain labor organizations or employment that indicate a preference, limitation, specification, or discrimination.<sup>11</sup>

Unlike Title VII, the FCRA has not been amended to specifically include discrimination based on the pregnancy status of an individual as an unlawful employment practice. The FCRA also does not prohibit pregnancy discrimination in places of public accommodation.

### **Pregnancy Discrimination in Florida**

The fact that the FCRA is patterned after Title VII but has not been amended to expressly include pregnancy status as a component of sex discrimination in employment has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection from discrimination on the basis of pregnancy under state law. Thus, the ability to bring a claim based on pregnancy discrimination varied among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under Florida law was *O'Laughlin v. Pinchback*.<sup>12</sup> In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeal held that the Florida Human Rights Act<sup>13</sup> (predecessor to the FCRA) stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."<sup>14</sup> The court held that both federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII, as amended, preempted Florida law "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."<sup>15</sup> By finding the Florida Human Rights Act to be preempted by federal law, the court did not reach the question of whether the Florida law on its own prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.<sup>16</sup>

The Fourth District Court of Appeal in *Carsillo v. City of Lake Worth*<sup>17</sup> found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination.<sup>18</sup> The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent, as expressed by the PDA, was to prohibit this type of

<sup>11</sup> s. 760.10, F.S.

<sup>12</sup> 579 So. 2d 788 (Fla. 1st DCA 1991).

<sup>13</sup> This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, Chs. 69-287, 72-48, and 77-341, Laws of Fla., and which was also patterned after Title VII.

<sup>14</sup> *O'Laughlin*, at 792.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 791.

<sup>17</sup> 995 So. 2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So. 3d 848 (Fla. 2009).

<sup>18</sup> *Id.* at 1119.

discrimination, it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.<sup>19</sup>

In contrast, the Third District Court of Appeal in *Delva v. Continental Group, Inc. (Delva I)*<sup>20</sup> held that the FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status.<sup>21</sup> The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin*. The court certified the conflict<sup>22</sup> with the *Carsillo* case to the Florida Supreme Court.<sup>23</sup>

In 2014, the Florida Supreme Court reviewed the *Delva I* decision in *Delva v. Continental Group, Inc. (Delva II)*<sup>24</sup> and quashed the decision, holding that:

The statutory phrase making it an "unlawful employment practice for an employer... to discriminate...because of...sex," as used in the FCRA, includes discrimination based on pregnancy, which is a natural condition and primary characteristic unique to the female sex."<sup>25</sup>

The court reasoned that such a construction of the FCRA was consistent with legislative intent, as expressed in the FCRA itself, that the FCRA be liberally construed to further its purpose to secure for all individuals within the state freedom from discrimination because of sex.<sup>26</sup> Indeed, the court found that to conclude that the FCRA does not protect women from discrimination based on pregnancy—a primary characteristic of the female sex—would undermine the very protection provided in the FCRA to prevent an employer from discriminating against women because of their sex.<sup>27</sup> The court ascribed no legal significance to the Legislature's failure to amend the FCRA to include pregnancy discrimination after the *Gilbert* decision and rejected the argument that the failure to do so was an indication of the Legislature's intent not to include pregnancy within the meaning of sex discrimination.<sup>28</sup>

The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

### Claims and Remedies under Title VII and the FCRA

A Florida employee may now file a charge of an unlawful employment practice based upon pregnancy discrimination with either the federal Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

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<sup>19</sup> *Id.* at 1120.

<sup>20</sup> 96 So. 3d 956 (Fla. 3d DCA 2012).

<sup>21</sup> *Id.* at 958.

<sup>22</sup> *Id.*

<sup>23</sup> Federal courts interpreting the FCRA similarly wrestled with whether pregnancy status is covered by its provisions. Like the state courts, the federal courts that found that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. See *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011), and *Glass v. Captain Katanna's, Inc.*, 950 F.Supp.2d 1235 (M.D. Fla. 2013). The courts that found that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status. See *Frazier v. T-Mobile USA, Inc.*, 495 F.Supp.2d 1185 (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011).

<sup>24</sup> 137 So. 3d 371 (Fla. 2014)

<sup>25</sup> *Id.* at 372.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 375.

<sup>28</sup> *Id.*

A person who wishes to file a complaint with the EEOC must do so within 300 days of a violation in a jurisdiction with a fair employment practices agency (such as Florida, which has the FCHR).<sup>29</sup> The EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.<sup>30</sup> If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the EEOC must engage in informal conferencing, conciliation, and persuasion to remedy the unlawful employment practice.<sup>31</sup> After the EEOC concludes its investigation and issues a "right-to-sue" letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.<sup>32</sup>

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation.<sup>33</sup> The FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.<sup>34</sup> If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.<sup>35</sup> A plaintiff is required to file a state claim in civil court under the FCRA within one year of the determination of reasonable cause by the FCHR.<sup>36</sup>

Remedies available to persons who bring claims based upon pregnancy discrimination differ depending on whether the claim is brought under Title VII or under the FCRA. If a plaintiff prevails under Title VII or the FCRA, the plaintiff might be entitled to an order prohibiting the discriminatory practice, as well as reinstatement or hiring, with or without back pay.<sup>37</sup> Depending upon the number of persons employed by the defendant employer, a Title VII claimant may also recover from \$50,000 to \$300,000 in aggregated compensatory and punitive damages.<sup>38</sup> In contrast, there is no limit on compensatory damages under the FCRA, which include "damages for mental anguish, loss of dignity, and any other intangible injuries."<sup>39</sup> Punitive damages under the FCRA may not exceed \$100,000.<sup>40</sup> However, the total recovery, including back pay, for a claimant who brings a discrimination claim against the state or its subdivisions is limited under the FCRA to \$300,000.<sup>41</sup>

### **Effect of the Bill**

The bill codifies the Florida Supreme Court decision in *Delva II* by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FCRA to prohibit discrimination on the basis of pregnancy in places of public accommodation. Accordingly, pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:

- By places of public accommodation; or
- With respect to employment, provided that the discriminatory act constitutes an unlawful employment practice.

Persons injured by a violation of the FCRA due to pregnancy discrimination are entitled to all rights and remedies under the FCRA.

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<sup>29</sup> 42 U.S.C. § 2000e-5(e)(1). The enforcement procedures referenced in this paper do not apply to individuals affected by federal agencies, who have a separate process. 29 C.F.R. part 1614.

<sup>30</sup> 42 U.S.C. §. 2000e-5(b).

<sup>31</sup> *Id.*

<sup>32</sup> 42 U.S.C. § 2000e-5(f)(1).

<sup>33</sup> s. 760.11(1), F.S.

<sup>34</sup> s. 760.11(3), F.S.

<sup>35</sup> s. 760.11(4), F.S.

<sup>36</sup> s. 760.11(5), F.S.

<sup>37</sup> *Id.*; 42 U.S.C. § 2000e-5(g).

<sup>38</sup> 42 U.S.C. §1981a(b)(3)

<sup>39</sup> s. 760.11(5), F.S.

<sup>40</sup> *Id.*

<sup>41</sup> Section 760.11(5), F.S., referring to the limited waiver of sovereign immunity in s. 768.28, F.S. Unlike the FCRA, there apparently is no limitation on total recovery, including back pay, for a claimant who brings suit against the state or its subdivisions under Title VII, though the caps on compensatory and punitive damages would apply.

**B. SECTION DIRECTORY:**

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments.

Section 2 amends s. 760.01, F.S., relating to the purpose and construction of the FCRA.

Section 3 amends s. 760.05, F.S., relating to functions of the Florida Commission on Human Relations.

Section 4 amends s. 760.07, F.S., relating to remedies for unlawful discrimination.

Section 5 amends s. 760.08, F.S., relating to discrimination in places of public accommodation.

Section 6 amends s. 760.10, F.S., relating to unlawful employment practices.

Section 7 reenacts s. 760.11(1), F.S., to incorporate pregnancy discrimination into provisions relating to administrative and civil remedies for violations of the FCRA.

Section 8 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:

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**

None.

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1                           A bill to be entitled  
2       An act relating to the Florida Civil Rights Act;  
3       amending s. 509.092, F.S.; prohibiting discrimination  
4       on the basis of pregnancy in public lodging and food  
5       service establishments; amending s. 760.01, F.S.;  
6       revising the general purpose of the Florida Civil  
7       Rights Act of 1992; amending s. 760.05, F.S.; revising  
8       the function of the Florida Commission on Human  
9       Relations; amending s. 760.07, F.S.; providing civil  
10      and administrative remedies for discrimination on the  
11      basis of pregnancy; amending s. 760.08, F.S.;  
12      prohibiting discrimination on the basis of pregnancy  
13      in places of public accommodation; amending s. 760.10,  
14      F.S.; prohibiting employment discrimination on the  
15      basis of pregnancy; prohibiting discrimination on the  
16      basis of pregnancy by labor organizations, joint  
17      labor-management committees, and employment agencies;  
18      prohibiting discrimination on the basis of pregnancy  
19      in occupational licensing, certification, and  
20      membership organizations; providing an exception to  
21      unlawful employment practices based on pregnancy;  
22      reenacting s. 760.11(1), F.S., relating to  
23      administrative and civil remedies for violations of  
24      the Florida Civil Rights Act of 1992, to incorporate  
25      the amendments made to s. 760.10(5), F.S., in a  
26      reference thereto; providing an effective date.

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CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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

Section 1. Section 509.092, Florida Statutes, is amended to read:

509.092 Public lodging establishments and public food service establishments; rights as private enterprises.—Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, pregnancy, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

Section 2. Subsection (2) of section 760.01, Florida Statutes, is amended to read:

760.01 Purposes; construction; title.—

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general

53 welfare, and to promote the interests, rights, and privileges of  
 54 individuals within the state.

55 Section 3. Section 760.05, Florida Statutes, is amended to  
 56 read:

57 760.05 Functions of the commission.—The commission shall  
 58 promote and encourage fair treatment and equal opportunity for  
 59 all persons regardless of race, color, religion, sex, pregnancy,  
 60 national origin, age, handicap, or marital status and mutual  
 61 understanding and respect among all members of all economic,  
 62 social, racial, religious, and ethnic groups; and shall endeavor  
 63 to eliminate discrimination against, and antagonism between,  
 64 religious, racial, and ethnic groups and their members.

65 Section 4. Section 760.07, Florida Statutes, is amended to  
 66 read:

67 760.07 Remedies for unlawful discrimination.—Any violation  
 68 of any Florida statute making unlawful discrimination because of  
 69 race, color, religion, gender, pregnancy, national origin, age,  
 70 handicap, or marital status in the areas of education,  
 71 employment, housing, or public accommodations gives rise to a  
 72 cause of action for all relief and damages described in s.  
 73 760.11(5), unless greater damages are expressly provided for. If  
 74 the statute prohibiting unlawful discrimination provides an  
 75 administrative remedy, the action for equitable relief and  
 76 damages provided for in this section may be initiated only after  
 77 the plaintiff has exhausted his or her administrative remedy.  
 78 The term "public accommodations" does not include lodge halls or



79 other similar facilities of private organizations which are made  
 80 available for public use occasionally or periodically. The right  
 81 to trial by jury is preserved in any case in which the plaintiff  
 82 is seeking actual or punitive damages.

83 Section 5. Section 760.08, Florida Statutes, is amended to  
 84 read:

85 760.08 Discrimination in places of public accommodation.—  
 86 All persons are ~~shall be~~ entitled to the full and equal  
 87 enjoyment of the goods, services, facilities, privileges,  
 88 advantages, and accommodations of any place of public  
 89 accommodation, ~~as defined in this chapter,~~ without  
 90 discrimination or segregation on the ground of race, color,  
 91 national origin, sex, pregnancy, handicap, familial status, or  
 92 religion.

93 Section 6. Subsections (1) and (2), paragraphs (a) and (b)  
 94 of subsection (3), subsections (4) through (6), and paragraph  
 95 (a) of subsection (8) of section 760.10, Florida Statutes, are  
 96 amended to read:

97 760.10 Unlawful employment practices.—

98 (1) It is an unlawful employment practice for an employer:

99 (a) To discharge or to fail or refuse to hire any  
 100 individual, or otherwise to discriminate against any individual  
 101 with respect to compensation, terms, conditions, or privileges  
 102 of employment, because of such individual's race, color,  
 103 religion, sex, pregnancy, national origin, age, handicap, or  
 104 marital status.

105 (b) To limit, segregate, or classify employees or  
 106 applicants for employment in any way which would deprive or tend  
 107 to deprive any individual of employment opportunities, or  
 108 adversely affect any individual's status as an employee, because  
 109 of such individual's race, color, religion, sex, pregnancy,  
 110 national origin, age, handicap, or marital status.

111 (2) It is an unlawful employment practice for an  
 112 employment agency to fail or refuse to refer for employment, or  
 113 otherwise to discriminate against, any individual because of  
 114 race, color, religion, sex, pregnancy, national origin, age,  
 115 handicap, or marital status or to classify or refer for  
 116 employment any individual on the basis of race, color, religion,  
 117 sex, pregnancy, national origin, age, handicap, or marital  
 118 status.

119 (3) It is an unlawful employment practice for a labor  
 120 organization:

121 (a) To exclude or to expel from its membership, or  
 122 otherwise to discriminate against, any individual because of  
 123 race, color, religion, sex, pregnancy, national origin, age,  
 124 handicap, or marital status.

125 (b) To limit, segregate, or classify its membership or  
 126 applicants for membership, or to classify or fail or refuse to  
 127 refer for employment any individual, in any way that ~~which~~ would  
 128 deprive or tend to deprive any individual of employment  
 129 opportunities, or adversely affect any individual's status as an  
 130 employee or as an applicant for employment, because of such

131 individual's race, color, religion, sex, pregnancy, national  
 132 origin, age, handicap, or marital status.

133 (4) It is an unlawful employment practice for any  
 134 employer, labor organization, or joint labor-management  
 135 committee controlling apprenticeship or other training or  
 136 retraining, including on-the-job training programs, to  
 137 discriminate against any individual because of race, color,  
 138 religion, sex, pregnancy, national origin, age, handicap, or  
 139 marital status in admission to, or employment in, any program  
 140 established to provide apprenticeship or other training.

141 (5) Whenever, in order to engage in a profession,  
 142 occupation, or trade, it is required that a person receive a  
 143 license, certification, or other credential, become a member or  
 144 an associate of any club, association, or other organization, or  
 145 pass any examination, it is an unlawful employment practice for  
 146 any person to discriminate against any other person seeking such  
 147 license, certification, or other credential, seeking to become a  
 148 member or associate of such club, association, or other  
 149 organization, or seeking to take or pass such examination,  
 150 because of such other person's race, color, religion, sex,  
 151 pregnancy, national origin, age, handicap, or marital status.

152 (6) It is an unlawful employment practice for an employer,  
 153 labor organization, employment agency, or joint labor-management  
 154 committee to print, or cause to be printed or published, any  
 155 notice or advertisement relating to employment, membership,  
 156 classification, referral for employment, or apprenticeship or

157 other training, indicating any preference, limitation,  
 158 specification, or discrimination, based on race, color,  
 159 religion, sex, pregnancy, national origin, age, absence of  
 160 handicap, or marital status.

161 (8) Notwithstanding any other provision of this section,  
 162 it is not an unlawful employment practice under ss. 760.01-  
 163 760.10 for an employer, employment agency, labor organization,  
 164 or joint labor-management committee to:

165 (a) Take or fail to take any action on the basis of  
 166 religion, sex, pregnancy, national origin, age, handicap, or  
 167 marital status in those certain instances in which religion,  
 168 sex, condition of pregnancy, national origin, age, absence of a  
 169 particular handicap, or marital status is a bona fide  
 170 occupational qualification reasonably necessary for the  
 171 performance of the particular employment to which such action or  
 172 inaction is related.

173 Section 7. For the purpose of incorporating the amendment  
 174 made by this act to section 760.10(5), Florida Statutes, in a  
 175 reference thereto, subsection (1) of section 760.11, Florida  
 176 Statutes, is reenacted to read:

177 760.11 Administrative and civil remedies; construction.-

178 (1) Any person aggrieved by a violation of ss. 760.01-  
 179 760.10 may file a complaint with the commission within 365 days  
 180 of the alleged violation, naming the employer, employment  
 181 agency, labor organization, or joint labor-management committee,  
 182 or, in the case of an alleged violation of s. 760.10(5), the

183 person responsible for the violation and describing the  
 184 violation. Any person aggrieved by a violation of s. 509.092 may  
 185 file a complaint with the commission within 365 days of the  
 186 alleged violation naming the person responsible for the  
 187 violation and describing the violation. The commission, a  
 188 commissioner, or the Attorney General may in like manner file  
 189 such a complaint. On the same day the complaint is filed with  
 190 the commission, the commission shall clearly stamp on the face  
 191 of the complaint the date the complaint was filed with the  
 192 commission. In lieu of filing the complaint with the commission,  
 193 a complaint under this section may be filed with the federal  
 194 Equal Employment Opportunity Commission or with any unit of  
 195 government of the state which is a fair-employment-practice  
 196 agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the  
 197 complaint is filed is clearly stamped on the face of the  
 198 complaint, that date is the date of filing. The date the  
 199 complaint is filed with the commission for purposes of this  
 200 section is the earliest date of filing with the Equal Employment  
 201 Opportunity Commission, the fair-employment-practice agency, or  
 202 the commission. The complaint shall contain a short and plain  
 203 statement of the facts describing the violation and the relief  
 204 sought. The commission may require additional information to be  
 205 in the complaint. The commission, within 5 days of the complaint  
 206 being filed, shall by registered mail send a copy of the  
 207 complaint to the person who allegedly committed the violation.  
 208 The person who allegedly committed the violation may file an

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209 | answer to the complaint within 25 days of the date the complaint  
210 | was filed with the commission. Any answer filed shall be mailed  
211 | to the aggrieved person by the person filing the answer. Both  
212 | the complaint and the answer shall be verified.

213 |       Section 8. This act shall take effect July 1, 2015.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 921 Motor Vehicle Manufacturers, Factory Branches, Distributors, Importers, & Dealers

**SPONSOR(S):** Business & Professions Subcommittee; Trujillo

**TIED BILLS:** IDEN./SIM. **BILLS:** SB 1048

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N, As CS	Anstead	Luczynski
2) Judiciary Committee		Aziz PA	Havlicak RH
3) Regulatory Affairs Committee			

**SUMMARY ANALYSIS**

The bill provides additional grounds to deny, suspend, or revoke a license held by a motor vehicle manufacturer, factory branch, distributor, or importer ("manufacturer"). The bill prohibits manufacturers from taking certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers. Specifically, the manufacturer:

- May not refuse to pay a dealer who participated in a bonus program related to facility improvements or signs "any increase in benefits" between the program that the dealer participated in and a new program offered within 10 years that the dealer does not participate in;
- Is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, service-related payments and incentive payments and can only deny such a claim if the manufacturer proves that the claim is false or fraudulent;
- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless such resale or export occurred within 120 days after the date of the original sale, the manufacturer provides a written notice to the dealer within 12 months, and the manufacturer proves by clear and convincing evidence before a trier of fact that the motor vehicle dealer knowingly engaged in a pattern of conduct of selling to known exporters and that the principal of the dealer had actual knowledge that the customer intended to export or resell the motor vehicle;
- Must pay a dealer for temporary replacement vehicles provided to customers during service or repair;
- May not require or coerce a dealer to purchase goods or services from a vendor selected by the manufacturer without first making available to the dealer the option to obtain the goods or services from a vendor chosen by the dealer; and
- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool or threaten to take adverse action for refusing to do so.

The bill provides that the act shall apply to all franchise agreements entered into, renewed, or amended subsequent to October 1, 1988.

The bill provides for severability of provisions if any provision is determined to be invalid.

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

The bill shall take effect upon becoming a law.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Motor Vehicle Manufacturers and Franchise Dealerships – Generally:**

Manufacturers, distributors, and importers (“manufacturers”) enter into contractual agreements with motor vehicle dealers to sell particular vehicles that they manufacture, distribute, or import. Florida law, ch. 320, F.S., has regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Existing law requires the licensing of motor vehicle manufacturers, and regulates numerous aspects of the contracts between manufacturers and motor vehicle dealers.

Section 320.64, F.S., currently provides thirty-eight grounds for the denial, suspension, or revocation of the license of a manufacturer.

Section 320.61(1), F.S., states, in part, “[n]o manufacturer, factory branch, distributor, or importer shall engage in business in this state without a license therefor....” Section 320.61(2), F.S., allows the Department of Highway Safety and Motor Vehicles (“DHSMV”) to prescribe renewal applications pursuant to s. 320.63, F.S., which requires a manufacturer to submit the following documents to determine fitness:

- Information relating to solvency and financial standing;
- A certified copy of any warranty connected with the motor vehicles sold or any component;
- A copy of the written agreement and all supplements thereto between the motor vehicle dealer and the manufacturer;
- A list of authorized dealers or distributors and their addresses;
- An affidavit acknowledging that the provisions of an agreement are not contrary to the provisions contained in ss. 320.60-320.70, F.S.;
- A certified copy of all applicable preparation and delivery charge obligations of the dealer;
- An affidavit stating the rates which the manufacturer pays or agrees to pay any authorized motor vehicle dealer licensed in this state for the parts and labor advanced or incurred by such authorized motor vehicle dealer for or on account of any delivery and preparation obligations imposed on its dealers or relating to warranty obligations;
- An annual license fee; and
- Any other information needed to safeguard the public interest which DHSMV may, by rule, prescribe.

The requirements regulating the contractual business relationship between a motor vehicle dealer and a manufacturer are primarily found in ss. 320.60-320.071, F.S., (the Florida Automobile Dealers Act).<sup>1</sup> These sections of law specify, in part:

- The conditions and situations under which the DHSMV may grant, deny, suspend, or revoke a license;
- The process, timing, and notice requirements for manufacturers to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a change;
- The procedures a manufacturer must follow if it wants to add a dealership in an area already served by a dealer, the protest process, and the DHSMV’s role in these circumstances;

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<sup>1</sup>Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 FLA. ST. UNIV. LAW REV. 1058 (2002) (No section of the statute provides a short title; however, many courts have referred to the provisions as such.), <http://www.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf>.

- Amounts of damages that can be assessed against a manufacturer in violation of Florida statutes; and
- The DHSMV's authority to adopt rules to implement these sections of law.

### **Prohibitions for Manufacturers - Current Situation:**

There are currently 38 different criteria that could lead the DHSMV to take action against a motor vehicle manufacturer.<sup>2</sup> A violation of any of these provisions entitles a motor vehicle dealer to rights and remedies contained within the Florida Automobile Dealers Act, including an administrative protest, obtaining an injunction<sup>3</sup> against the manufacturer, and receiving treble damages and attorney's fees<sup>4</sup>, if the manufacturer is found to have violated the Act.

A manufacturer is prohibited from coercing or attempting to coerce a motor vehicle dealer into accepting delivery of motor vehicles, parts, or accessories, or any other commodities which have not been ordered by the dealer.<sup>5</sup>

A manufacturer is precluded from requiring a dealer to relocate, expand, improve, remodel, renovate, or alter previously approved facilities unless the requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations, and market.<sup>6</sup>

A manufacturer cannot withhold a bonus or other incentive that is available to its other same line-make Florida dealers if the manufacturer offers to enter into an agreement or to selectively offer incentive programs to dealers in Florida, other regions, or other states. A manufacturer may not discriminate against a dealer with respect to a program, bonus, incentive, or other benefit within a zone or region that includes Florida.<sup>7</sup>

A manufacturer may periodically audit the transactions of a motor vehicle dealer relating to certain financial operations by the dealer. Audits of warranty payments may only be performed during the one-year period immediately following the date a warranty claim was paid. Audits of incentive payments may only be performed during an 18-month period immediately following the date the incentive was paid.<sup>8</sup>

Section 320.64(26), F.S., details the types of actions against a dealer by a manufacturer if the dealer distributes cars for foreign export. This section provides that, in a legal challenge, the manufacturer must prove that the motor vehicle dealer had "actual knowledge that the customer's intent was to export or resell the motor vehicle." This section also states that if the disputed vehicle is titled in any state of the United States, there is a "conclusive presumption"<sup>9</sup> that the dealer had no actual knowledge that the customer intended to export or resell the motor vehicle.

### **Prohibitions for Manufacturers - Effect of Proposed Changes:**

The bill address several issues related to motor vehicle manufacturers, distributors, and importers, and the franchise contracts between these businesses and motor vehicle dealers. The bill provides that these provisions shall apply to all franchise agreements entered into, renewed, or amended subsequent

<sup>2</sup> s. 320.64, F.S.

<sup>3</sup> s. 320.695, F.S.

<sup>4</sup> s. 320.697, F.S.

<sup>5</sup> s. 320.64(5), F.S.

<sup>6</sup> s. 320.64(10)(b), F.S.

<sup>7</sup> s. 320.64(38), F.S.

<sup>8</sup> s. 320.64(25), F.S.

<sup>9</sup> BLACK'S LAW DICTIONARY, p. 263 (5th ed. 1979) (Defines conclusive presumption to mean "a presumption that cannot be overcome by any additional evidence or argument.").

to October 1, 1988,<sup>10</sup> and provides for severability of the provisions if any provision is determined to be invalid.

The bill amends s. 320.64, F.S., to specify that a manufacturer is prohibited from committing certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers. The bill amends three existing provisions and adds three additional provisions. Specifically, the manufacturer:

- May not refuse to pay a motor vehicle dealer who participated in a bonus program related to facility improvements or signs “any increase in benefits” between the program that the dealer participated in and a new program offered within 10 years that the dealer does not participate in and provides that a dealer whose existing facilities were approved within the last 10 years is deemed to be in full compliance with such program’s eligibility requirements during the remainder of the 10-year period following completion of the prior program;
- Is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, other service-related payments and incentive payments;
- May not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim until the manufacturer has “proven” the claim to be false or fraudulent or that the dealer failed to substantially comply with the reasonable, written, and uniformly applied procedures of the manufacturer;
- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless such resale or export occurred within 120 days after the date of the original sale and the manufacturer notifies the dealer of such within 12 months;
- May not use as a basis for termination of a motor vehicle dealer the fact that a customer resold or exported a vehicle unless the manufacturer proves by clear and convincing evidence before a trier of fact that the motor vehicle dealer knowingly engaged in a pattern of conduct of selling to “known exporters” and that the principal of the dealer had “actual knowledge” that the customer intended to export or resell the motor vehicle;
- Must pay the dealer for temporary replacement vehicles provided to customers by the dealer as a loaner vehicle during service or repair even if the dealer owns the vehicle;
- May not require or coerce a dealer to purchase goods from a vendor selected by the manufacturer without first making available to the dealer the option to obtain the goods or services from a vendor chosen by the dealer and may not unreasonably withhold consent to allow the dealer to use alternative goods and services. This does not include goods that include material subject to the intellectual property rights of the manufacturer or special tools, training or parts to be used in repairs; and

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<sup>10</sup> The DHSMV has held in an administrative decision that amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of the amendment. *See Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). In this holding, the DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act, which requires that if a dealer’s franchise agreement is terminated the manufacturer must buyback from the dealer its unsold vehicles, parts, signs, special tools, and other items, does not apply to a dealer terminated in 2008 because the dealer’s franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. *See also, In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013) (The DHSMV has indicated it will be applying this holding to every amendment to the Florida Automobile Dealers Act. That means dealers have different protections under the law depending on when they signed their franchise agreement.). The bill also adds the phrase “notwithstanding the terms of any franchise agreement” to a number of sections, which may or may not be interpreted to apply to contracts previously entered into between the manufacturers and dealers.

- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool, threaten to take adverse action for refusing to do so or preclude a dealer from entering into such a pool.

**B. SECTION DIRECTORY:**

Section 1 amends s. 320.64, F.S., prohibiting a manufacturer from taking certain actions against a motor vehicle dealer and requiring certain procedures be followed by manufacturers when dealing with motor vehicle dealers.

Section 2 provides that the act shall apply to all franchise agreements entered into, renewed, or amended subsequent to October 1, 1988.

Section 3 provides for severability of provisions if any provision is determined to be invalid.

Section 4 provides that the bill shall take effect upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The DHSMV already regulates this industry, so the additional grounds proposed in the bill for regulatory actions should result in no additional state impact. However, it is possible the DHSMV may experience an increase in the number of administrative hearings as a result of the bill. The bill may have an indeterminate fiscal impact.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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

To the extent the agreements between dealers and motor vehicle manufacturers, distributors, and importers change due to compliance with existing laws, the parties may be positively or negatively impacted. Dealers may experience increased revenue from new limitations and procedures governing the incentives, bonuses, and other benefit programs.

**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 Federal Contracts Clause provides that no state shall pass any law impairing the obligation of contracts.<sup>11</sup> However, the Contracts Clause prohibition must be weighed against the State's inherent power to safeguard its people's interests. Three factors are considered when evaluating a claim that the Contracts Clause has been violated: (1) whether the law substantially impairs a contractual relationship; (2) whether there is a significant and legitimate public purpose for the law; and (3) whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature.<sup>12</sup>

Some state laws regulating contracts between automobile manufacturers and dealers have been found to have violated the constitution while other laws have been upheld as constitutional. See *Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32 (D. Conn. 2013) (Upholding state law that revised statutory method for calculating reasonable compensation for vehicle warranty work and prohibited manufacturers from recovering any additional cost of the new method from the dealers.); *Arapahoe Motors, Inc. v. Gen. Motors Corp.*, No. CIV.A. 99 N 1985, 2001 WL 36400171, at \*13 (D. Colo. Mar. 28, 2001) (the retroactive application of state law would be unconstitutional as it would create a new obligation or impose a new duty upon General Motors.).

B. RULE-MAKING AUTHORITY:

The DHSMV already regulates this industry, and has rule making authority. The additional grounds proposed in the bill for regulatory actions may result in some additional rule making.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Business & Professions Subcommittee considered a strike-all substitute amendment and reported the bill favorably as a committee substitute. The adopted strike-all amendment made the following changes to the filed version of the bill:

- Provides that a manufacturer may not refuse to pay a dealer who participated in a bonus program related to facility improvements or signs "any increase in benefits" between the program that the dealer participated in and a new program offered within 10 years that the dealer does not participate in;
- Provides that a manufacturer is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, other service-related payments and incentive payments;
- Provides that a manufacturer may not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim until the manufacturer has "proven" it to be false or fraudulent;
- Deletes from the bill a provision related to paying 80 percent of a bonus;
- Changes a time limitation related to the resale of a vehicle from 90 days to 120 days;
- Deletes a provision that required the manufacturer to provide a written statement or notice disclosing whether the manufacturer has an ownership interest in a prescribed vendor;
- Provides that a manufacturer must prove by clear and convincing evidence before a trier of fact that the motor vehicle dealer knowingly engaged in a pattern of conduct of selling to known exporters;

<sup>11</sup> U.S. CONST. art I, s. 10.

<sup>12</sup> *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F.3d 1427, 1433 (11th Cir. 1998).

- Deletes a provision related to the vicarious liability of a dealer when loaning out a replacement vehicle to a customer;
- Adds a provision providing that the act shall apply to all franchise agreements entered into, renewed, or amended subsequent to October 1, 1988; and
- Adds a provision providing for severability of provisions if any provision is determined to be invalid.

The staff analysis is drafted to reflect the committee substitute.

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1                                   A bill to be entitled  
 2           An act relating to motor vehicle manufacturers,  
 3           factory branches, distributors, importers, and  
 4           dealers; amending s. 320.64, F.S.; revising provisions  
 5           that prohibit applicants and licensees from certain  
 6           adverse actions against motor vehicle dealers;  
 7           revising provisions relating to dealer facility and  
 8           signage requirements; revising provisions that  
 9           prohibit and limit audits of certain payments and  
 10          denial or reduction of such payments; revising  
 11          provisions that restrict adverse action against a  
 12          dealer when a vehicle that was delivered to a customer  
 13          is resold or exported out of state; prohibiting  
 14          failing to make payment for a replacement vehicle  
 15          provided by a dealer to a customer; prohibiting  
 16          coercing a dealer to use a particular vendor for  
 17          certain goods and services; prohibiting requiring a  
 18          dealer to make certain payments for advertising or  
 19          participate in certain advertising groups; providing  
 20          definitions; providing applicability; providing  
 21          severability; providing an effective date.

22  
 23   Be It Enacted by the Legislature of the State of Florida:

24  
 25           Section 1. Paragraph (h) of subsection (10) and  
 26           subsections (25) and (26) of section 320.64, Florida Statutes,

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27 are amended, and subsections (39), (40), and (41) are added to  
 28 that section, to read:

29 320.64 Denial, suspension, or revocation of license;  
 30 grounds.—A license of a licensee under s. 320.61 may be denied,  
 31 suspended, or revoked within the entire state or at any specific  
 32 location or locations within the state at which the applicant or  
 33 licensee engages or proposes to engage in business, upon proof  
 34 that the section was violated with sufficient frequency to  
 35 establish a pattern of wrongdoing, and a licensee or applicant  
 36 shall be liable for claims and remedies provided in ss. 320.695  
 37 and 320.697 for any violation of any of the following  
 38 provisions. A licensee is prohibited from committing the  
 39 following acts:

40 (10)

41 (h) If an applicant or licensee offers any bonus,  
 42 incentive, rebate, or other program, standard, or policy that is  
 43 available to a motor vehicle dealer in this state which is  
 44 premised, wholly or in part, on dealer facility improvements,  
 45 renovations, expansion, remodeling, alterations, or installation  
 46 of signs or other image elements, a motor vehicle dealer who  
 47 completes an approved facility in reliance upon such offer is  
 48 deemed to be in full compliance with all of the applicant's or  
 49 licensee's facility, sign, and image-related requirements for  
 50 the duration of a 10-year period following such completion. If  
 51 during such 10-year period, an applicant or licensee establishes  
 52 a program, standard, or policy that offers a new bonus,



53 incentive, rebate, or other benefit, a motor vehicle dealer that  
 54 had completed an approved facility in reliance upon the prior  
 55 program, standard, or policy but does not comply with the  
 56 facility, sign, or image-related provisions under the new  
 57 program, standard, or policy, except as provided in this  
 58 paragraph, is not eligible for benefits under the facility,  
 59 sign, or image-related provisions of the new program, standard,  
 60 or policy but remains entitled to all of the benefits under the  
 61 prior program, standard, or policy plus any increase in the  
 62 benefits between the old and new programs, standards, or  
 63 policies during the remainder of the 10-year period. This  
 64 subsection does not obviate, affect, or alter subsection (38).

65 (i) A violation of paragraphs (b) through (h) ~~(g)~~ is not a  
 66 violation of s. 320.70 and does not subject any licensee to any  
 67 criminal penalty under s. 320.70.

68 (25) The applicant or licensee has undertaken or engaged  
 69 in an audit of warranty, maintenance, and other service-related  
 70 payments or incentive payments, including payments to a motor  
 71 vehicle dealer under any licensee-issued program, policy, or  
 72 other benefit, which previously have been paid to a motor  
 73 vehicle dealer in violation of this section or has failed to  
 74 comply with any of its obligations under s. 320.696. An  
 75 applicant or licensee may reasonably and periodically audit a  
 76 motor vehicle dealer to determine the validity of paid claims as  
 77 provided in s. 320.696. Audits of warranty, maintenance, and  
 78 other service-related payments shall be performed by an

79 applicant or licensee only during the 12-month ~~1-year~~ period  
 80 immediately following the date the claim was paid. ~~Audits~~ Audit  
 81 of incentive payments shall ~~only~~ be performed only during the  
 82 12-month ~~for an 18-month~~ period immediately following the date  
 83 the incentive was paid. As used in this section, the term  
 84 "incentive" includes any bonus, incentive, or other monetary or  
 85 nonmonetary thing of value. After such time periods have  
 86 elapsed, all warranty, maintenance, and other service-related  
 87 payments and incentive payments shall be deemed final and  
 88 incontrovertible for any reason notwithstanding any otherwise  
 89 applicable law, and the motor vehicle dealer shall not be  
 90 subject to any charge-back or repayment. An applicant or  
 91 licensee may deny a claim or, as a result of a timely conducted  
 92 audit, impose a charge-back against a motor vehicle dealer for  
 93 warranty, maintenance, or other service-related payments or  
 94 incentive payments only if the applicant or licensee can show  
 95 that the warranty, maintenance, or other service-related claim  
 96 or incentive claim was false or fraudulent or that the motor  
 97 vehicle dealer failed to substantially comply with the  
 98 reasonable written and uniformly applied procedures of the  
 99 applicant or licensee for such repairs or incentives but only  
 100 for that portion of the claim so shown. Notwithstanding the  
 101 terms of any franchise agreement, guideline, program, policy, or  
 102 procedure, an applicant or licensee may only deny or charge back  
 103 that portion of a warranty, maintenance, or other service-  
 104 related claim or incentive claim which the applicant or licensee

105 has proven to be false or fraudulent or for which the dealer  
 106 failed to substantially comply with the reasonable, written, and  
 107 uniformly applied procedures of the applicant or licensee for  
 108 such repairs or incentives as provided in this subsection. An  
 109 applicant or licensee may not charge a motor vehicle dealer back  
 110 subsequent to the payment of a warranty, maintenance, or  
 111 service-related claim or incentive claim unless, within 30 days  
 112 after a timely conducted audit, a representative of the  
 113 applicant or licensee first meets in person, by telephone, or by  
 114 videoteleconference with an officer or employee of the dealer  
 115 designated by the motor vehicle dealer. At such meeting the  
 116 applicant or licensee must provide a detailed explanation, with  
 117 supporting documentation, as to the basis for each of the claims  
 118 for which the applicant or licensee proposed a charge-back to  
 119 the dealer and a written statement containing the basis upon  
 120 which the motor vehicle dealer was selected for audit or review.  
 121 Thereafter, the applicant or licensee must provide the motor  
 122 vehicle dealer's representative a reasonable period after the  
 123 meeting within which to respond to the proposed charge-backs,  
 124 with such period to be commensurate with the volume of claims  
 125 under consideration, but in no case less than 45 days after the  
 126 meeting. The applicant or licensee is prohibited from changing  
 127 or altering the basis for each of the proposed charge-backs as  
 128 presented to the motor vehicle dealer's representative following  
 129 the conclusion of the audit unless the applicant or licensee  
 130 receives new information affecting the basis for one or more

131 charge-backs and that new information is received within 30 days  
132 after the conclusion of the timely conducted audit. If the  
133 applicant or licensee claims the existence of new information,  
134 the dealer must be given the same right to a meeting and right  
135 to respond as when the charge-back was originally presented.  
136 After all internal dispute resolution processes provided through  
137 the applicant or licensee have been completed, the applicant or  
138 licensee shall give written notice to the motor vehicle dealer  
139 of the final amount of its proposed charge-back. If the dealer  
140 disputes that amount, the dealer may file a protest with the  
141 department within 30 days after receipt of the notice. If a  
142 protest is timely filed, the department shall notify the  
143 applicant or licensee of the filing of the protest, and the  
144 applicant or licensee may not take any action to recover the  
145 amount of the proposed charge-back until the department renders  
146 a final determination, which is not subject to further appeal,  
147 that the charge-back is in compliance with the provisions of  
148 this section. In any hearing pursuant to this subsection, the  
149 applicant or licensee has the burden of proof that its audit and  
150 resulting charge-back are in compliance with this subsection.

151 (26) Notwithstanding the terms of any franchise agreement,  
152 including any licensee's program, policy, or procedure, the  
153 applicant or licensee has refused to allocate, sell, or deliver  
154 motor vehicles; charged back or withheld payments or other  
155 things of value for which the dealer is otherwise eligible under  
156 a sales promotion, program, or contest; prevented a motor

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157 | vehicle dealer from participating in any promotion, program, or  
158 | contest; or has taken or threatened to take any adverse action  
159 | against a dealer, including charge-backs, reducing vehicle  
160 | allocations, or terminating or threatening to terminate a  
161 | franchise because the dealer sold or leased a motor vehicle to a  
162 | customer who exported the vehicle to a foreign country or who  
163 | resold the vehicle, unless the licensee proves that the dealer  
164 | knew or reasonably should have known that the customer intended  
165 | to export or resell the motor vehicle. There is a rebuttable  
166 | presumption that the dealer neither knew nor reasonably should  
167 | have known of its customer's intent to export or resell the  
168 | vehicle if the vehicle is titled or registered in any state in  
169 | this country. A licensee may not take any action against a motor  
170 | vehicle dealer, including reducing its allocations or supply of  
171 | motor vehicles to the dealer, or charging back a dealer for an  
172 | incentive payment previously paid, unless the licensee first  
173 | meets in person, by telephone, or video conference with an  
174 | officer or other designated employee of the dealer. At such  
175 | meeting, the licensee must provide a detailed explanation, with  
176 | supporting documentation, as to the basis for its claim that the  
177 | dealer knew or reasonably should have known of the customer's  
178 | intent to export or resell the motor vehicle. Thereafter, the  
179 | motor vehicle dealer shall have a reasonable period,  
180 | commensurate with the number of motor vehicles at issue, but not  
181 | less than 15 days, to respond to the licensee's claims. If,  
182 | following the dealer's response and completion of all internal

183 dispute resolution processes provided through the applicant or  
 184 licensee, the dispute remains unresolved, the dealer may file a  
 185 protest with the department within 30 days after receipt of a  
 186 written notice from the licensee that it still intends to take  
 187 adverse action against the dealer with respect to the motor  
 188 vehicles still at issue. If a protest is timely filed, the  
 189 department shall notify the applicant or licensee of the filing  
 190 of the protest, and the applicant or licensee may not take any  
 191 action adverse to the dealer until the department renders a  
 192 final determination, which is not subject to further appeal,  
 193 that the licensee's proposed action is in compliance with the  
 194 provisions of this subsection. In any hearing pursuant to this  
 195 subsection, the applicant or licensee has the burden of proof on  
 196 all issues raised by this subsection. In addition to the  
 197 requirements, protections, and procedures of this subsection, an  
 198 applicant or licensee, by agreement, program, rule, policy,  
 199 standard, or otherwise, may not take adverse action against a  
 200 motor vehicle dealer, including, without limitation, reducing  
 201 allocations, product deliveries, or planning volumes or imposing  
 202 any penalty or charge-back, because a motor vehicle that was  
 203 sold, leased, or delivered to a customer was resold or exported  
 204 more than 120 days after it was delivered to the customer. The  
 205 motor vehicle dealer is not subject to any adverse action if the  
 206 applicant or licensee does not provide written notification to  
 207 the motor vehicle dealer of such resale or export within 12  
 208 months after the date that the motor vehicle dealer delivered

209 the vehicle to the customer. Notwithstanding any franchise  
 210 agreement, program, policy, or procedure, a motor vehicle  
 211 dealer's franchise agreement may not be terminated, canceled,  
 212 discontinued, or nonrenewed by an applicant or licensee on the  
 213 basis of any act related to a customer's exporting or reselling  
 214 of a motor vehicle unless the applicant or licensee proves by  
 215 clear and convincing evidence before a trier of fact that the  
 216 motor vehicle dealer knowingly engaged in a pattern of conduct  
 217 of selling to known exporters and that the majority owner or, if  
 218 there is no majority owner, the person designated as the dealer-  
 219 principal or a person similarly designated in the franchise  
 220 agreement, at the time the motor vehicle was sold, leased ,or  
 221 delivered, had actual knowledge that the customer intended to  
 222 export or resell the motor vehicle.

223 (39) Notwithstanding any agreement, program, incentive,  
 224 bonus, policy, or rule, an applicant or licensee fails to make  
 225 any payment pursuant to any agreement, program, incentive,  
 226 bonus, policy, or rule for any temporary replacement motor  
 227 vehicle loaned, rented, or provided by a motor vehicle dealer to  
 228 or for its service or repair customers, even if the temporary  
 229 replacement motor vehicle has been leased, rented, titled, or  
 230 registered to the motor vehicle dealer's rental or leasing  
 231 division or an entity that is owned or controlled by the motor  
 232 vehicle dealer.

233 (40) Notwithstanding any franchise agreement, the  
 234 applicant or licensee has required or coerced, or attempted to

235 require or coerce, a motor vehicle dealer to purchase goods or  
 236 services from a vendor selected, identified, or designated by an  
 237 applicant or licensee or one of its parents, subsidiaries,  
 238 divisions, or affiliates by agreement, standard, policy,  
 239 program, incentive provision, or otherwise without making  
 240 available to the motor vehicle dealer the option to obtain the  
 241 goods or services of like kind, design, and quality from a  
 242 vendor chosen by the motor vehicle dealer. If the motor vehicle  
 243 dealer exercises such option, the dealer must provide to the  
 244 licensee or applicant written notice of its desire to use the  
 245 alternative goods or services along with samples or clear  
 246 descriptions of the alternative goods or services that the  
 247 dealer desires to use. The licensee or applicant shall have the  
 248 opportunity to evaluate the alternative good or service for up  
 249 to 30 days and provide its written consent to use such good or  
 250 service. Such consent may not be unreasonably withheld by the  
 251 applicant or licensee. If the motor vehicle dealer does not  
 252 receive a response from the applicant or licensee within the 30-  
 253 day period, consent to use the alternative goods or services is  
 254 deemed to be granted. If a dealer using such alternative goods  
 255 or services complies with this subsection, the dealer shall  
 256 qualify and be eligible for all benefits described in such  
 257 agreement, standard, policy, program, incentive provision, or  
 258 otherwise. For purposes of this subsection, the term "goods and  
 259 services" is limited to goods and services used to construct or  
 260 renovate dealership facilities or furniture and fixtures at the



261 dealership facilities but does not include:

262 (a) Any intellectual property of the licensee or  
 263 applicant, including, without limitation, signage incorporating  
 264 the licensee's or applicant's trademark or copyright, any  
 265 facility or building materials protected by the licensee's or  
 266 applicant's trademark or trade dress rights;

267 (b) Any special tools and training as required by the  
 268 licensee or applicant; or

269 (c) Parts to be used in repairs under warranty obligations  
 270 of a licensee or applicant.

271 (41)(a) An applicant or licensee, by agreement, policy,  
 272 program, standard, or otherwise, may not require a motor vehicle  
 273 dealer, directly or indirectly, to advance, or pay or reimburse  
 274 the applicant or licensee for, any costs related to the  
 275 creation, development, showing, or publication in any media of  
 276 any advertisement for a motor vehicle or require a motor vehicle  
 277 dealer to participate in, contribute to, affiliate with, or join  
 278 a dealer advertising or marketing group, fund, pool,  
 279 association, or other entity and may not take or threaten to  
 280 take any adverse action against a motor vehicle dealer that  
 281 refuses to join or participate in such group, fund, pool,  
 282 association, or other entity. For purposes of this subsection,  
 283 the term "adverse action" includes, without limitation,  
 284 reduction of allocations, charging fees for a licensee's or  
 285 dealer's advertising or a marketing group's advertising or  
 286 marketing, termination of or threatening to terminate the motor

287 vehicle dealer's franchise, reducing any incentive for which the  
 288 motor vehicle dealer is eligible, or any action that fails to  
 289 take into account the equities of the motor vehicle dealer.

290 (b) An applicant or licensee may not require a dealer to  
 291 participate in, and may not preclude only a portion of its motor  
 292 vehicle dealers in a designated market area from establishing, a  
 293 voluntary motor vehicle dealer advertising or marketing group,  
 294 fund, pool, association, or other entity. Except as provided in  
 295 an agreement, when motor vehicle dealers choose to form an  
 296 independent advertising or marketing group, an applicant or  
 297 licensee is not required to fund such group.

298 (c) This subsection does not prohibit an applicant or  
 299 licensee from offering advertising or promotional materials to a  
 300 motor vehicle dealer for a fee or charge if the use of such  
 301 advertising or promotional materials is voluntary for the motor  
 302 vehicle dealer.

303  
 304 A motor vehicle dealer who can demonstrate that a violation of,  
 305 or failure to comply with, any of the preceding provisions by an  
 306 applicant or licensee will or can adversely and pecuniarily  
 307 affect the complaining dealer, shall be entitled to pursue all  
 308 of the remedies, procedures, and rights of recovery available  
 309 under ss. 320.695 and 320.697.

310 Section 2. This act applies to all franchise agreements  
 311 entered into, renewed, or amended after October 1, 1988.

312 Section 3. If any provision of this act or its application

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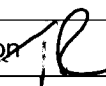
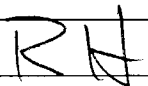
313 to any person or circumstances is held invalid, the invalidity  
314 does not affect other provisions or applications of this act  
315 which can be given effect without the invalid provision or  
316 application, and to this end the provisions of this act are  
317 severable.

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



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 961 Electronic Noticing of Trust Accounts  
**SPONSOR(S):** Civil Justice Subcommittee; Broxson  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1314

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

### SUMMARY ANALYSIS

A Florida trustee has a duty to keep the qualified beneficiaries (hereinafter "beneficiaries") of an irrevocable trust reasonably informed of the trust and its administration. Specifically, the trustee must provide beneficiaries with an accounting of the trust at specified periods, disclosure of documents related to the trust, and notice of specific events related to the administration of the trust.

The Florida Trust Code currently provides that the only permissible methods of sending notice or a document to such persons are by first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed facsimile or other electronic message. However, for many reasons, some beneficiaries prefer to receive, store, and access correspondence and documents through secured websites and accounts. Trustees also prefer to provide sensitive financial information through secured web accounts rather than through electronic messages which carry greater security risks. Although financial institutions commonly use secure websites for providing statements and other disclosures related to bank or credit accounts, such methods are rarely used for trust accounts due to a perceived lack of authorization within current law.

The bill authorizes a trustee to post required documents to a secure website or account if a beneficiary opts in to receiving electronic documents through a secure website or account. The bill also specifies when notice or the delivery of a document by electronic message or posting is complete and presumed received by the intended recipient for purposes of commencing a limitations period for breach of trust claims.

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:

##### **Background**

"A trust is a fiduciary relationship<sup>1</sup> with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."<sup>2</sup> A trust involves three interest holders: the settlor<sup>3</sup> who establishes the trust; the trustee<sup>4</sup> who holds legal title to the property held for the benefit of the beneficiary; and lastly, the beneficiary<sup>5</sup> who has an equitable interest in property held subject to the trust.

The Florida Trust Code<sup>6</sup> (the "code") requires a trustee to administer the trust "in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the] code,"<sup>7</sup> and also imposes a duty of loyalty upon the trustee.<sup>8</sup> The violation by a trustee of a duty owed to a beneficiary is a breach of trust.<sup>9</sup>

##### **Disclosure and Notice of Trust Administration**

To be able to enforce the trustee's duties, the beneficiary of a trust must know of the existence of the trust and be informed about the administration of the trust:

If there were no duty to inform and report to the beneficiary, the beneficiary might never become aware of breaches of trust or might be unaware of breaches until it is too late to obtain relief. In addition, providing information to the beneficiary protects the trustee from claims being brought long after events that allegedly constituted a breach, because the statute of limitations or the doctrine of laches will prevent the beneficiary from pursuing stale claims. As a result, the duty to inform and report to the beneficiary is fundamental to the trust relationship.<sup>10</sup>

Accordingly, section 736.0813, F.S., imposes a duty on a Florida trustee to keep the qualified beneficiaries<sup>11</sup> (hereinafter "beneficiaries") of an irrevocable trust reasonably informed of the trust and its administration. The duty includes, but is not limited to:<sup>12</sup>

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<sup>1</sup> *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. 4th DCA 2008) (trustee owes a fiduciary duty to settlor/beneficiary).

<sup>2</sup> 55A FLA. JUR.2D *Trusts* § 1.

<sup>3</sup> "Settlor" means a person, including a testator, who creates or contributes property to a trust. s. 736.0103(18), F.S.

<sup>4</sup> "Trustee" means the original trustee and includes any additional trustee, any successor trustee, and any cotrustee. s. 736.0103(18), F.S.

<sup>5</sup> "Beneficiary" means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. s. 736.0103(4), F.S.

<sup>6</sup> ch. 736, F.S.

<sup>7</sup> s. 736.0801, F.S.

<sup>8</sup> s. 736.0802(1), F.S.

<sup>9</sup> s. 736.1001(1), F.S.

<sup>10</sup> Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 Real Property, Probate and Trust J. 373 (Summer 2005), available at [http://www.americanbar.org/content/dam/aba/publications/real\\_property\\_trust\\_and\\_estate\\_law\\_journal/V40/02/2005\\_aba\\_rpte\\_journal\\_v40\\_no2\\_summer\\_master.pdf](http://www.americanbar.org/content/dam/aba/publications/real_property_trust_and_estate_law_journal/V40/02/2005_aba_rpte_journal_v40_no2_summer_master.pdf), (last accessed March 9, 2015).

<sup>11</sup> The term "qualified beneficiary" encompasses only a limited subset of all trust beneficiaries. The class is limited to living persons who are current beneficiaries, intermediate beneficiaries, and first-line remainder beneficiaries, whether vested or contingent. s. 736.0103(16), F.S.

<sup>12</sup> s. 736.0813, F.S.

- Notice of the existence of the irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings, and applicability of the fiduciary lawyer-client privilege.
- Notice of the acceptance of the trust, the full name and address of the trustee, and the applicability of the fiduciary lawyer-client privilege.
- Disclosure of a copy of the trust instrument upon reasonable request.
- An annual accounting of the trust to each beneficiary and an accounting on termination of the trust or on change of the trustee. The accounting must address the cash and property transactions in the accounting period and what trust assets are currently on hand.<sup>13</sup>
- Disclosure of relevant information about the assets and liabilities of the trust and the particulars relating to administration upon reasonable request.
- Such additional notices and disclosure requirements related to the trust administration as required by the Florida Trust Code.<sup>14</sup>

A beneficiary must bring an action for breach of trust as to any matter adequately disclosed within an accounting or any other written report of the trustee, also known as trust disclosure documents,<sup>15</sup> within 6 months of *receiving* the trust disclosure document or a limitation *notice*<sup>16</sup> from the trustee that applies to that trust disclosure document, whichever occurs later.<sup>17</sup> A limitation notice informs the beneficiary that an action against the trustee for breach of trust based on any matter adequately disclosed in the trust disclosure document may be barred unless the action is commenced within 6 months.

The code prescribes the permissible methods of sending a document or notice for receipt by a beneficiary.

### Methods of Disclosure or Notice

Current law requires that notice or sending a document to a person under the code must be accomplished "in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document."<sup>18</sup> However, s. 736.0109, F.S., specifies that the only permissible manners of providing notice, except notice of a judicial proceeding, or sending a document to a person under the code are:

- First-class mail;
- Personal delivery;
- Delivery to the person's last known place of residence or place of business; or
- A properly directed facsimile or other electronic message.

<sup>13</sup> ss. 736.0813 and 736.08135, F.S.

<sup>14</sup> See, e.g., s. 736.0108(6), F.S. (notice of a proposed transfer of a trust's principal place of administration); s. 736.04117(4), F.S. (notice of the trustee's exercise of the power to invade the principal of the trust); s. 736.0414(1), F.S. (notice of terminating certain minimally funded trusts); s. 736.0417(1), F.S. (notice prior to combining or dividing trusts); s. 736.0705 (notice of resignation of trustee); s. 736.0802, F.S. (disclose and provide notice of investments in funds owned or controlled by trustee; the identity of the investment instruments, and the identity and relationship to the trustee to any affiliate that owns or controls the investment instruments; and notice to beneficiaries whose share of the trust may be affected by certain legal claims); and s. 736.0902(5), F.S. (notice of the non- application of the prudent investor rule to certain transactions).

<sup>15</sup> "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter. s. 736.1008(4)(a), F.S.

<sup>16</sup> "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. s.736.1008(4)(c),F.S.

<sup>17</sup> s. 736.1008(2), F.S.

<sup>18</sup> s. 736.0109(1), F.S.

Notice of a judicial proceeding must be given as provided in the Florida Rules of Civil Procedure.<sup>19</sup>

The current methods of permissible notice or service of documents under the code restricts the ability of trustees to meet increasing beneficiary demands to receive information electronically. There is little guidance in the code as to how the sending of notice or a document by electronic message (hereinafter "email") can and should be accomplished, nor even when it is accomplished, implicating when the limitations period commences for a notice or document provided by email.<sup>20</sup>

Trustees have expressed concern regarding protecting confidential information and the privacy hazards inherent in the delivery of financial information via email.<sup>21</sup> Some trustees, sensitive to these privacy concerns, deliver required documents, such as a trust account statement, to beneficiaries by emailing notice that a trust statement is available to be viewed and downloaded on a secured website or account and providing a password for the beneficiary to access the account.<sup>22</sup> However, it is not clear that by using this method, although more secure than email, the trustee technically complies with the duty to provide a trust accounting under s. 736.0813, F.S., since the document itself is not delivered by the email but rather delivers information on how to access the document through a secured website. The failure to provide a trust accounting may be actionable as a breach of trust under the code if a beneficiary denies receipt of statements provided by this method. Further it is not clear that trust documents posted on a secured website have the benefit of the 6 months limitations period for matters adequately disclosed in a trust disclosure documents as they are provided in a manner that may not be permissible under the code. If the limitations period does not apply, a trustee may be subject to a breach of trust claim, even if the matters were adequately disclosed in the trust document, for up to four years.<sup>23</sup>

Due to the uncertainty regarding when the limitations period runs for notice or trust disclosure documents delivered by electronic message or posted on a secured website and whether attempts to provide trust disclosure documents through a secured website or account technically comply with the statutory duty to provide certain documents to a beneficiary, trustees have little incentive to respond to beneficiary requests for electronic communications. Prudent trustees that offer electronic delivery of trust disclosure documents via email or through a secured website may find it necessary to continue providing physical documents in order to comply with notice and disclosure requirements under the code and to secure the protection of the 6 months limitations period for breach of trust claims.

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<sup>19</sup> s. 736.0109(4), F.S.

<sup>20</sup> The Uniform Electronic Transactions Act ("UETA") also references the ability of a trustee to deliver notice or documents electronically (s. 668.50, F.S.). The UETA provides that information that must be delivered in writing to another person can be satisfied by delivering the information electronically if the parties have agreed to conduct a transaction by electronic means. However, the UETA may not apply to the delivery of most trust statements to beneficiaries. For the UETA to apply, the electronic records must relate to a "transaction". Under the UETA, "transaction" means an action or set of actions occurring between two or more persons relating to the *conduct of business, commercial, insurance, or governmental affairs*. To the extent that a trust administration, particularly the delivery of a trust statement, is considered the 'conduct of business', the UETA may apply. The drafters of the UETA noted that trusts can be used for both business and personal purposes, and that by virtue of the definition of "transaction", trusts used outside the area of business and commerce would not be governed by the UETA. This commentary does not consider banks or professional trustees that administer trusts as a business; although, arguably the fiduciary relationship between the trustee and the beneficiary takes the administration outside the scope of a "business" relationship. See *The Uniform Electronic Transactions Act (1999)* available at <http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf>.

<sup>21</sup> *Subcommittee Report on Electronic Delivery of Trust Statements*, provided by the Florida Banker's Association to the Civil Justice Subcommittee on March 5, 2015 (on file with the Civil Justice Subcommittee, Florida House of Representatives).

<sup>22</sup> *Id.*

<sup>23</sup> Section 736.1008(1), F.S., provides that the applicable limitations period is determined under ch. 95, F.S. That is, the normal limitations period will be the four year period described in s. 95.11(3), F.S.



## Effect of the Proposed Changes

The bill authorizes a trustee to post documents that must be provided to a person under the code to a secure website or account if the person provides written authorization. The website or account must allow the recipient to download or print the posted document. A document provided solely through electronic posting must be retained on the website or account for at least 4 years after the date it is received. The written authorization to provide electronic posting of documents must:

- Be limited solely to posting documents on the electronic account or website.
- Enumerate the documents that may be posted on the electronic website or account.
- Contain specific instructions for accessing the electronic website or account, including any security measures.
- Advise that a separate notice will be sent, and the manner in which it will be sent, when a document is posted to the electronic website or account.
- Advise that the authorization may be amended or revoked at any time and provide instructions to amend or revoke authorization.
- Advise that the posting of a document on the electronic account or website may commence a limitations period as short as 6 months even if the recipient never access the electronic account, website, or document.

The trustee is required to send a notice to a person receiving trust documents by electronic posting, which notice may be made by any permissible method of notice under the code except electronic posting, at the following intervals:

- Each time a document is posted and the notice must identify each document that has been posted and how the person may access the document.
- Every 380 days (the "annual notice") to advise such persons that posting of a document commences a limitations period as short as 6 months even if the recipient never accesses the website, account, or document. The annual notice must also address the right to amend or revoke a previous authorization to post trust documents on a website or account. The bill provides the suggested form of the annual notice, which is substantially similar to the suggested form of a limitations notice provided in s. 736.1008(4)(c), F.S. The failure of a trustee to provide the annual notice at the required time will automatically revoke the person's authorization to post trust documents on an electronic website or account.

A document delivered by electronic posting is deemed received by the recipient on the earlier of the date that notice of the document's posting is received or the date that the recipient accesses the document on the electronic account or website. The posting of a document to an electronic account or website is only effective if done in compliance with the requirements of this bill. The trustee has the burden of demonstrating compliance with such requirements. If a trustee provides notice or sends a document to a person by electronic message, notice or sending of the document is complete when sent and presumed received on the date on which it is sent unless the sender has actual knowledge the electronic message did not reach the recipient.

The bill does not preclude the sending of a document by other permissible means under the code nor does it affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810, F.S., or the time such records must be retained.

The bill also amends s. 736.0109(4), F.S., to more specifically delineate that notice and service of documents in a judicial proceeding related to a trust are governed by the Florida Rules of Civil Procedure rather than the code.

**B. SECTION DIRECTORY:**

Section 1 amends s. 736.0109, F.S., relating to methods and waiver of notice.

Section 2 provides an effect 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:**

Trustees may see a reduction in stationary, postage, and labor costs by providing required notices and documents electronically to qualified beneficiaries that opt in to receive electronic notices. The reduction may be offset by additional costs for the technology to provide electronic notices and documents.

**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 March 11, 2015, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Specified that documents may only be posted to a secure website or account.
- Required that a trustee provide notice every 380 days of the right to amend or revoke an authorization to post documents on a secure website or account.

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



27  
 28           Section 1. Subsections (3) and (4) of section 736.0109,  
 29 Florida Statutes, are renumbered as subsections (5) and (6),  
 30 respectively, present subsection (4) is amended, and new  
 31 subsections (3) and (4) are added to that section, to read:

32           736.0109 Methods and waiver of notice.—

33           (3) In addition to the methods listed in subsection (1)  
 34 for sending a document, a sender may post a document to a secure  
 35 electronic account or website where the document can be  
 36 accessed.

37           (a) Before a document may be posted to an electronic  
 38 account or website, the recipient must sign a separate written  
 39 authorization solely for the purpose of authorizing the sender  
 40 to post documents on an electronic account or website. The  
 41 written authorization must:

42           1. Enumerate the documents that may be posted in this  
 43 manner.

44           2. Contain specific instructions for accessing the  
 45 electronic account or website, including the security procedures  
 46 required to access the electronic account or website, such as a  
 47 username and password.

48           3. Advise the recipient that a separate notice will be  
 49 sent when a document is posted to the electronic account or  
 50 website and the manner in which the separate notice will be  
 51 sent.

52           4. Advise the recipient that the authorization to receive

53 documents by electronic posting may be amended or revoked at any  
54 time and include specific instructions for revoking or amending  
55 the authorization, including the address designated for the  
56 purpose of receiving notice of the revocation or amendment.

57 5. Advise the recipient that posting a document on the  
58 electronic account or website may commence a limitations period  
59 as short as 6 months even if the recipient never actually  
60 accesses the electronic account, electronic website, or the  
61 document.

62 (b) Once the recipient signs the written authorization,  
63 the sender must provide a separate notice to the recipient when  
64 a document is posted to the electronic account or website. As  
65 used in this subsection, the term "separate notice" means a  
66 notice sent to the recipient by means other than electronic  
67 posting, which identifies each document posted to the electronic  
68 account or website and provides instructions for accessing the  
69 posted document. The separate notice requirement is satisfied if  
70 the recipient accesses the document on the electronic account or  
71 website.

72 (c) A document sent by electronic posting is deemed  
73 received by the recipient on the earlier of the date that the  
74 separate notice is received or the date that the recipient  
75 accesses the document on the electronic account or website.

76 (d) At least annually after a recipient signs a written  
77 authorization, a sender shall send a notice advising recipients  
78 who have authorized one or more documents to be posted to an

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79 electronic account or website that such posting may commence a  
80 limitations period as short as 6 months even if the recipient  
81 never accesses the electronic account or website or the document  
82 and that authority to receive documents by electronic posting  
83 may be amended or revoked at any time. This notice must be given  
84 by means other than electronic posting and may not be  
85 accompanied by any other written communication. Failure to  
86 provide such notice within 380 days after the last notice is  
87 deemed to automatically revoke the authorization to receive  
88 documents in the manner permitted under this subsection 380 days  
89 after the last notice is sent.

90 (e) The notice required in paragraph (d) may be in  
91 substantially the following form: "You have authorized the  
92 receipt of documents through posting to an electronic account or  
93 website where the documents can be accessed. This notice is  
94 being sent to advise you that a limitations period, which may be  
95 as short as 6 months, may be running as to matters disclosed in  
96 a trust accounting or other written report of a trustee posted  
97 to the electronic account or website even if you never actually  
98 access the electronic account or website or the documents. You  
99 may amend or revoke the authorization to receive documents by  
100 electronic posting at any time. If you have any questions,  
101 please consult your attorney."

102 (f) A sender may rely on the recipient's authorization  
103 until the recipient amends or revokes the authorization by  
104 sending a notice to the address designated for that purpose in

105 the authorization. The recipient, at any time, may amend or  
 106 revoke an authorization to have documents posted on the  
 107 electronic account or website.

108 (g) A document provided to a recipient solely through  
 109 electronic posting must remain accessible to the recipient on  
 110 the electronic account or website for at least 4 years after the  
 111 date that the document is deemed received by the recipient. The  
 112 electronic account or website must allow the recipient to  
 113 download or print the document. This subsection does not affect  
 114 or alter the duties of a trustee to keep clear, distinct, and  
 115 accurate records pursuant to s. 736.0810 or affect or alter the  
 116 time periods for which the trustee must maintain those records.

117 (h) To be effective, the posting of a document to an  
 118 electronic account or website must be done in accordance with  
 119 this subsection. The sender has the burden of establishing  
 120 compliance with this subsection.

121 (i) This subsection does not preclude the sending of a  
 122 document by other means.

123 (4) Notice to a person under this code, or the sending of  
 124 a document to a person under this code by electronic message, is  
 125 complete when the document is sent.

126 (a) An electronic message is presumed received on the date  
 127 that the message is sent.

128 (b) If the sender has knowledge that an electronic message  
 129 did not reach the recipient, the electronic message is deemed to  
 130 have not been received. The sender has the burden to prove that



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131 another copy of the notice or document was sent by electronic  
 132 message or by other means authorized by this section.

133 (6)(4) Notice and service of documents in ~~of~~ a judicial  
 134 proceeding are governed by ~~must be given as provided in~~ the  
 135 Florida Rules of Civil Procedure.

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