Civil Justice Subcommittee

Tuesday, February 10, 2015
10:30 AM - 1:30 PM
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

Kathleen Passidomo
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time:	Tuesday, February 10, 2015 10:30 am
End Date and Time:	Tuesday, February 10, 2015 01:30 pm
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

HB 133 Sexual Offenses by Plasencia
HB 283 Transfers to Minors by Berman
HB 307 Mobile Homes by Latvala
HB 343 Estates by Moraitis
HB 383 Private Property Rights by Edwards, Perry

NOTICE FINALIZED on 02/03/2015 15:33 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 133 Sexual Offenses
SPONSOR(S): Plasencia
TIED BILLS: None **IDEN./SIM. BILLS:** None

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

SUMMARY ANALYSIS

A statute of limitations is an absolute bar to the filing of a legal case after a date set by law. The bill extends the statutes of limitation applicable to civil cases involving sexual battery where the victim is 16 years old or older to 10 years; it also extends the criminal statute of limitations for sexual battery where the victim is an adult to 10 years.

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:

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[1] 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.[2]

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.[3]

Civil Statutes of Limitations Applicable to Sexual Battery

Chapter 95, F.S., governs the statute of limitations for civil actions. In general, the statute of limitations begins when "the last element constituting the cause of action occurs."[4] The statute of limitations for most torts,[5] including those related to sexual battery,[6] is 4 years from the date of injury.[7] However, s. 95.11(9), F.S., provides that there is no limitations period for sexual battery committed on victims under age 16.[8]

Effect of Bill - Civil Cases

The bill amends s. 95.11(a), F.S., to provide that the statute of limitations for a civil action based on a sexual battery on a victim 16 years of age or older is extended from four years to 10 years after the act is committed. The extension of limitations does not apply to any action that will be barred on or before July 1, 2015.

Criminal Statutes of Limitation Applicable to Sexual Battery

Section 794.011, F.S., identifies numerous sexual battery crimes, commonly referred to as rape.[9] 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

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[1] Article I, s. 9, U.S.Const.; Article I, s. 10, Fla.Const.
[2] *Stogner v. California*, 539 U.S. 607, 632-33 (2003)
[3] 43 Days Initiative, My Story, http://www.43daysinitiative.org/#!mystory/c1lnf (last accessed Feb. 4, 2015).
[4] Section 95.031(1), F.S.
[5] A tort is a private or civil wrong or injury for which a court will provide a remedy in the form of an action for damages. An intentional tort is a tort or wrong perpetrated by one who intends to do that which the law has declared wrong.
[6] 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."
[7] Sections 95 11(3)(o), F.S.
[8] Section 95 11(9), F.S., does not apply to actions that were time-barred on or before July 1, 2010
[9] *See* Note 7 for definition of sexual battery.

appears, at the time when the course of conduct or the defendant's duplicity in the course of conduct is terminated.[10]

Under current law, there is no statute of limitations for first-degree felony sexual battery crimes where the victim is a minor.[11] Nor is there a statute of limitations for any sexual battery crime where the victim is under 16 years old.[12] 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;[13] 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.[14] 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.[15] 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.[16]

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.[17] 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.[18]

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.[19]

Effect of Bill - Criminal Cases

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 18 years of age or older is extended from three or four years as the case may be to 10 years from the date of the crime. The provision providing for no statute of limitations when the crime is report 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.

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[10] Section 775.15(3), F.S.
[11] *Id.* at (13)(b).
[12] *Id.* at (13)(c).
[13] Section 794.011(5)(c), F.S.
[14] Section 794 011(8)(a), F.S.
[15] Section 775.15(13)(a), F.S.
[16] *Id.*
[17] *Id.* at (14).
[18] 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.
[19] Section 775.15(8), F.S.

Section 2 amends s. 95.11, F.S., regarding the statute of limitations for civil actions.

Section 3 amends s. 775.15, F.S., regarding the statute of limitations for criminal actions.

Section 4 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:

   The statute of limitations in effect at the time the crime is committed controls.[20] 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.[21]

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[20] *State v. Wadsworth*, 293 So.2d 345, 347 (Fla. 1974).

[21] *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

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*,[22] 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."[23] 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. *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

N/A

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).

[22] 431 U.S. 783, 789 (1977).

[23] *Id.* at 796.

A bill to be entitled

An act relating to sexual offenses; providing a short title; amending s. 95.11, F.S.; providing an extended statute of limitations on civil actions relating to sexual battery on victims 16 years of age or older; amending s. 775.15, F.S.; revising time limitations for the criminal prosecution of specified sexual battery offenses if the victim is 18 years of age or older; providing applicability; providing an effective date.

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

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

Section 2. Subsection (9) of section 95.11, Florida Statutes, is amended to read:

95.11 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(9) SEXUAL BATTERY OFFENSES ~~ON VICTIMS UNDER AGE 16~~.—

(a) An action related to an act constituting a violation of s. 794.011 involving a victim who was under the age of 16 at the time of the act may be commenced at any time. This paragraph ~~subsection~~ applies to any such action other than one which would have been time barred on or before July 1, 2010.

(b) An action related to an act constituting a violation of s. 794.011 involving a victim who was 16 years of age or older at the time of the act may be commenced within 10 years after the violation is committed. This paragraph applies to any such action other than one which would have been time barred on or before July 1, 2015.

Section 3. Subsection (14) of section 775.15, Florida Statutes, is amended to read:

775.15 Time limitations; general time limitations; exceptions.—

(14)(a) A prosecution for a first or second degree felony violation of s. 794.011, if the victim is 18 years of age or older at the time of the offense and the offense is reported to a law enforcement agency within 72 hours after commission of the offense, may be commenced at any time. ~~If the offense is not reported within 72 hours after the commission of the offense, the prosecution must be commenced within the time periods prescribed in subsection (2).~~

(b) Except as provided in paragraph (a), a prosecution for a first or second degree felony violation of s. 794.011, if the victim is 18 years of age or older at the time of the offense, must be commenced within 10 years after the violation is committed. This paragraph applies to any such offense except an offense the prosecution of which would have been barred by subsection (2) on or before July 1, 2015.

Section 4. This act shall take effect July 1, 2015.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Plasencia offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

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

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

775.15 Time limitations; general time limitations; exceptions.—

(13)

(b) If the offense is a first degree felony violation of s. 794.011 and the victim was under 18 years of age at the time the offense was committed, a prosecution of the offense may be commenced at any time. This paragraph applies to any such

offense except an offense the prosecution of which would have been barred by subsection (2) on or before October 1, 2003.

(14)(a) A prosecution for a first or second degree felony violation of s. 794.011, if the victim is 16 ~~18~~ years of age or older at the time of the offense and the offense is reported to a law enforcement agency within 72 hours after commission of the offense, may be commenced at any time. ~~If the offense is not reported within 72 hours after the commission of the offense, the prosecution must be commenced within the time periods prescribed in subsection (2).~~

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

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

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to sexual offenses; providing a short title; amending s. 775.15, F.S.; revising time

limitations for the criminal prosecution of specified sexual battery offenses if the victim is 16 years of age or older; providing applicability; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 283 Transfers to Minors
SPONSOR(S): Berman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 630

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

SUMMARY ANALYSIS

The Uniform Gifts to Minors Act creates a simple legal custodianship, in an adult or appropriate institution, of property that would otherwise transfer directly to the minor. The purpose is to avoid the expense and complexity required by a formal trust or a legal guardianship. The Act requires full distribution of the total gifts to a minor upon reaching the age of 21.

This bill amends the Uniform Gifts to Minors Act to provide a mechanism to extend control over the gift to age 25 provided that the minor is given a brief opportunity at age 21 to opt out of such control.

This bill does not appear to have a fiscal impact on 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 - Uniform Gifts to Minors Act

Transfers of property to minors create significant problems. To begin with, most transferors do not wish to place valuable property under the control of inexperienced children. The probability of mismanagement, or no management whatsoever, remains a significant specter to those who would make such transfers. Somehow, control of the property must be retained in competent hands. Further, third parties often will not deal with minors, even if they are technically competent to manage their own affairs. Minors can disaffirm contracts, and third parties do business with them only with some risk. Yet, certain transfers to minors are very advantageous, particularly for the purposes of estate planning.[1]

A trust, in which control and management reside with a trustee, for the designated beneficiaries, offers one solution. But trusts are complex and expensive to create and manage. For smaller property transfers, they are not a satisfactory alternative. Formal guardianships or conservatorships are, also, not generally useful for the purpose. The Uniform Gifts to Minors Act creates a custodianship, in an adult or appropriate institution, of property that would otherwise transfer directly to the minor. The custodianship remains until the minor becomes 21 (or, in some instances, age 18). The custodial relationship is created by executing a rather simple document, the form of which is provided in the Act itself. The minor does not obtain control of the property. The custodian has certain statutory authority to deal with it on the minor's behalf, third parties have no occasion to be uncertain about dealing with the custodian, and the transfer is a complete and irrevocable transfer to the minor satisfying the requirements of tax law.[2]

Florida codified the Uniform Gifts to Minors Act at ch. 710, F.S.

Background - Federal Estate Tax

The federal estate tax is a tax on the value of one's estate after application of certain exclusions. The gift tax is a portion of the estate tax that imposes an estate-tax equivalent tax on certain lifetime gifts. Without the gift tax, the estate tax would in many cases be easily avoided though use of gifts to heirs.

A significant exclusion to the gift tax is the minimum dollar threshold. A gift that falls under the value of the exclusion is not subject to the gift tax. The current gift tax exemption amount is $14,000 per annum.[3] Thus, a common, simple and legal form of estate tax avoidance is the use of lifetime gifts to heirs where those gifts fall below the exemption amount.

The gift tax exclusion is only available if the gift is of a present interest. The federal tax code provides that no part of a gift to a minor (defined as an individual under age 21) is a gift of a future interest if certain conditions are met.[4] Tax regulations interpreting the section provide that a gift will still be a present interest if the "donee, upon reaching age 21, has the right to extend the term of the trust".[5] A 1974 Revenue Ruling supports the creation of an "opt-out" window at age 21 which, if not exercised by the donee, allows for an automatic extension of the restrictions on the gift to age 25.[6]

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[1] Transfers to Minors Act Summary, at http://www.uniformlaws.org/ActSummary.aspx?title=Transfers to Minors Act (last accessed February 2, 2015.
[2] *Id.*
[3] IRS Publication 559 (2013), p. 25.
[4] 26 U.S.C. § 2503(c)
[5] Regulation 25.2503-4(b)(2)
[6] Rev.Rul. 74-43, found that: "a gift to a minor in trust, with the provision that the beneficiary has, upon reaching age 21, either (1) a continuing right to compel immediate distribution of the trust corpus by giving written notice to the trustee, or to

Effect of Bill

The Uniform Gifts to Minors Act requires full distribution of the most gifts to a minor upon reaching the age of 21.[7] This bill amends the Uniform Gifts to Minors Act to provide a mechanism to extend control over such gifts to age 25 provided that the minor is given a brief opportunity at age 21 to opt out of such control.

This bill amends s. 710.123, F.S., to create the terms by which control over a gift may be extended to age 25. The terms of the custodianship must provide that it ends when the minor reaches age 25. The extension beyond the 21st birthday may only be accomplished if the custodian of the gift delivers a written notice within a 60 day period (between 30 days before the birthday and 30 days after) around the minor's 21st birthday. The notice must inform the minor that the minor may elect to terminate the custodianship and thereby receive full distribution of the gift. The minor must request termination of the custodianship no later than 30 days after receipt of the notice or 30 days after the 21st birthday, whichever is later. If the minor does not act, the custodianship will continue until age 25.

The bill also amends s. 710.105, F.S., to provide that a transfer by irrevocable gift from a revocable trust is treated as a transfer made directly by the grantor of the trust. The effect of this language is to provide that a revocable trust will be able to make a gift to a minor that can be restricted up to age 25 under s. 710.123(1), F.S. Without the language, it is arguable that such a gift would be considered one by a fiduciary (governed by s. 710.107, F.S.) that would have to be distributed at age 18 pursuant to s. 710.123(2), F.S.

The bill also provides that a financial institution acting as custodian under the Uniform Gifts to Minors Act is not liable should the institution distribute the gift at age 21.

B. SECTION DIRECTORY:

Section 1 amends s. 710.102, F.S., regarding definitions applicable to the Florida Uniform Transfers to Minors Act.

Section 2 amends s. 710.105, F.S., regarding transfer by gift or exercise of power of appointment.

Section 3 amends s. 710.123, F.S., regarding termination of custodianship.

Section 4 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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permit the trust to continue by its own terms, or (2) a right during a limited period to compel immediate distribution of the trust corpus by given written notice to the trustee which if not exercised will permit the trust to continue by its own terms, will not be considered to be the gift of a future interest as the gift satisfies the requirements of section 2503(c) of the Code "

[7] A gift from certain fiduciaries, s 710.107, F.S., or from an obligor of the minor, s. 710.108, F.S., must be distributed at age 18 pursuant to s. 710.123(2), F.S. This bill does not affect such gifts or the duty to distribute them upon attaining age 18.

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 bill appears to have a minimal indeterminate positive fiscal impact on the private sector to the extent that it can benefit individuals in their exercise of lawful federal tax avoidance.

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

n/a

A bill to be entitled

An act relating to transfers to minors; amending s. 710.102, F.S; defining the term "general power of appointment"; amending s. 710.105, F.S.; specifying that certain transfers from a trust are considered as having been made directly by the grantor of the trust; amending s. 710.123, F.S.; authorizing custodianships established by irrevocable gift and by irrevocable exercise of power of appointment to terminate when a minor attains the age of 25, subject to the minor's right in such custodianships to compel distribution of the property upon attaining the age of 21; limiting liability of financial institutions for certain distributions of custodial property; providing an effective date.

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

Section 1. Subsections (9) through (18) of section 710.102, Florida Statutes, are renumbered as subsections (10) through (19), respectively, and a new subsection (9) is added to that section to read:

710.102 Definitions.—As used in this act, the term:

(9) "General power of appointment" means a power of appointment as defined in s. 732.2025(3).

Section 2. Section 710.105, Florida Statutes, is amended

to read:

710.105 Transfer by gift or exercise of power of appointment.—A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to s. 710.111. Notwithstanding s. 710.106, a transfer by irrevocable gift from a trust over which the grantor has at the time of transfer a right of revocation, as defined in s. 733.707(3)(e), shall be treated for all purposes under this act as a transfer made directly by the grantor of the trust.

Section 3. Section 710.123, Florida Statutes, is amended to read:

710.123 Termination of custodianship.—

(1) The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

(a) ~~(1)~~ The minor's attainment of 21 years of age with respect to custodial property transferred under s. 710.105 or s. 710.106. However, a transferor can, with respect to such custodial property, create the custodianship so that it terminates when the minor attains 25 years of age;

(b) ~~(2)~~ The minor's attainment of ~~age~~ 18 years of age with respect to custodial property transferred under s. 710.107 or s. 710.108; or

(c) ~~(3)~~ The minor's death.

(2) If the transferor of a custodianship under paragraph

(1)(a) creates the custodianship to terminate when the minor attains 25 years of age, in the case of a custodianship created by irrevocable gift or by irrevocable inter vivos exercise of a general power of appointment, the minor nevertheless has the absolute right to compel immediate distribution of the entire custodial property when the minor attains 21 years of age.

(3) As to a custodianship described in subsection (2), a transferor may provide, by delivery of a written instrument to the custodian upon the creation of such custodianship, that the minor's right to compel immediate distribution of the entire custodial property will terminate upon the expiration of a fixed period that begins with the custodian's delivery of a written notice to the minor of the existence of such right. To be effective to terminate the minor's right to compel an immediate distribution of the entire custodial property when the minor attains 21 years of age, the custodian's written notice must be delivered at least 30 days before, and not later than 30 days after, the date upon which the minor attains 21 years of age, and the fixed period specified in the notice for the termination of such right cannot expire before the later of 30 days after the minor attains 21 years of age or 30 days after the custodian delivers such notice.

(4) Notwithstanding s. 710.102(11), if the transferor creates the custodianship to terminate when the minor attains 25 years of age, solely for purposes of the application of the termination provisions of this section, the term "minor" means

an individual who has not attained 25 years of age.

(5) A financial institution has no liability to a custodian or minor for distribution of custodial property to, or for the benefit of, the minor in a custodianship created by irrevocable gift or by irrevocable exercise of a general power of appointment when the minor attains 21 years of age.

Section 4. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 307 Mobile Homes
SPONSOR(S): Latvala
TIED BILLS: None **IDEN./SIM. BILLS:** SB 662

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm	Bond
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The Florida Mobile Home Act (act) regulates residential tenancies in which a mobile home is placed on a rented or leased lot in a mobile home park with 10 or more lots. The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (division) enforces the act. The bill makes the following changes to the act:

- The division is required to provide training and educational programs for mobile home owners' associations;
- Mobile home owners must comply with all building permit and construction requirements. A mobile home owner is responsible for fines imposed for violating any local codes;
- A mobile home owner's right to notice of a rental increase or change in services may not be waived;
- A homeowners' committee must make a written request for a meeting with the park owner to discuss a proposed rental increase or change in services or rules;
- Automatically renewable leases are assumable by the homeowner's spouse; however, this right of assumption may only be exercised once during the term of the lease;
- A member of the board of directors of the Florida Mobile Home Relocation Corporation must be removed immediately upon written request for removal from the association that originally nominated that member;
- A homeowners' association's bylaws must include specific provisions related to meetings, voting requirements, proxies, amending the articles of incorporation and bylaws, duties of officers and directors, vacancies on the board, and recall of directors;
- Board members must either certify that they have read the association's organizing documents, rules, and regulations and that they will faithfully discharge their fiduciary responsibility, or complete the division's educational program within one year of taking office; and
- A homeowners' association is required to retain and make available certain official records.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Chapter 723, F.S., the Florida Mobile Home Act, regulates residential tenancies in which a mobile home is placed on a rented or leased lot in a mobile home park with 10 or more lots.[1] The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (division), has the power to promulgate rules under the Mobile Home Act, the Condominium Act, and the Cooperative Act, and to investigate, enforce, and ensure compliance with those rules and the provisions of those acts.[2]

Although mobile home ownership is similar in some ways to condominium or cooperative ownership, mobile home ownership differs significantly in that the mobile homeowner does not own the underlying lot on which the home is located. Instead, the homeowner rents or leases the lot.

The bill incorporates some provisions of Condominium Act and the Cooperative Act into the Florida Mobile Home Act as well as making changes to the Mobile Home Act to address the unique tenancy aspects of mobile home ownership.

Training and Educational Programs for Mobile Home Owners' Association Board Members and Mobile Home Owners

The division is required under the Condominium Act and Cooperative Act to provide training and educational programs for association board members and owners.[3] The division may also approve education and training programs and maintain a list of approved programs and providers. No similar provisions exist in the Mobile Home Act.

The bill amends s. 723.006, F.S., to require the division to provide the same training and educational provider lists for mobile home owners' associations and owners. The cost of the training and educational programs must be borne by the providers of the programs, and the division must establish a fee structure for the training programs sufficient to recover any costs it incurs.

The bill also provides that the required information provided to board member and home owners must include the provider of the training programs, and the price, location, dates and curriculum for the programs. The curriculum must provide information about statutory and regulatory matters relating to the board of directors of the homeowners' association and their responsibilities. The educational programs may not contain editorial comments.

Mobile Home Owner's General Obligations

Currently, s. 723.023, F.S., requires a mobile home owner to comply with all building, housing, and health codes; to keep the mobile home lot clean and sanitary; to comply with park rules and regulations and require others on the premises to comply such regulations; and to conduct themselves in a manner that does not unreasonably disturb other residents of the park.

The bill amends. s. 723.023, F.S., to provide additional requirements for mobile home owners. They must comply with all building permit and construction requirements and keep the mobile home lot neat

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[1] Section 723.002(1), F.S. The Act does not apply "to any other tenancy, including a tenancy in which both a mobile home and a mobile home lot are rented or leased by the mobile home resident or a tenancy in which a rental space is offered for occupancy by recreational-vehicle-type units which are primarily designed as temporary living quarters for recreational camping or travel use and which either have their own motor power or are mounted on or drawn by another vehicle."
[2] Sections 723.005, 723.006, 718.501(1), and 719.501(1), F.S.
[3] Sections 718.501(1)(j), and 719.501(1)(k), F.S.

and maintained in compliance with all local codes. The owner is also responsible for all fines imposed for noncompliance with any local codes.

Lot Rental Increases and Homeowners' Committee Negotiations

Section 723.037, F.S., requires mobile home park owners to give written notice to mobile home owners and the board of directors of the homeowners' association at least 90 days prior to any increase in lot rental or reduction in services or utilities provided by the park owner or change in rules and regulations.

A committee of up to five people, designated by a majority of the owners or by the board of directors, and the park owner must meet within 30 days of the notice of change to discuss the reasons for the changes. If the meeting does not resolve the issue, then additional meetings may be requested. If subsequent meetings are unsuccessful, either party may petition the division to initiate mediation. If the mediation does not successfully resolve the dispute, then the parties may file an action in circuit court.[4]

The bill amends s. 723.037, F.S., to provide that a mobile home owner's right to the 90-day notice may not be waived or precluded by agreement with the park owner. Additionally, the bill provides that the homeowners' committee and the park owner must meet no later than 60 days before the effective date of the change rather than within 30 days after receipt of the notice of change as currently required. The homeowners' committee must also make a written request for a meeting with the park owner to discuss the matters in the 90-day notice and may include in the request a list of any other issue the committee intends to discuss at the meeting.

The bill defines the term "parties" for the purposes of mediation pursuant to ss. 723.037 and 723.038, F.S., to mean a park owner and a homeowners' committee selected pursuant to s. 723.037, F.S. It also defines the term "homeowners' committee" in s. 723.003, F.S., in a manner that is consistent with how the term is currently used and applied in s. 723.037, F.S.

Rights of Purchasers - Assumption of the Lease

Section 723.059(5), F.S., provides that lifetime leases to mobile home lots entered into after July 1, 1986, are not assumable unless allowed by the lot rental agreement or unless the transferee is the homeowner's spouse. Additionally, automatically renewable leases are not assumable unless provided for in the lease agreement.

The bill amends s. 723.059(5), F.S., to provide that automatically renewable leases are assumable if the transferee is the homeowner's spouse; however, the right to assume the lease by a spouse may only be exercised once during the term of the lease.

Florida Mobile Home Relocation Corporation - Removal of Members

Section 723.0611, F.S., creates the Florida Mobile Home Relocation Corporation (corporation) to provide assistance to residents of mobile home parks who receive eviction notices due to a change in land use of the mobile home park to either relocate their mobile home or abandon it.[5] The corporation is administered by a board of directors made up of six members, three of whom are appointed by the Secretary of Business and Professional Regulation (DBPR) from a list of nominees submitted by the largest nonprofit association representing mobile home owners in this state, and three of whom are appointed by the Secretary of DBPR from a list of nominees submitted by the largest nonprofit association representing the manufactured housing industry in this state.[6]

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[4] Section 723.0381, F.S.
[5] Section 723.0612, F.S.; Florida Mobile Home Relocation Corporation Website, http://www.fmhrc.org/ (last accessed Feb. 5, 2015).
[6] Section 723.0611(1), F.S.

The bill amends s. 723.0611, F.S., to provide that a member of the board of directors must be remo by the Secretary of DBPR, with or without cause, immediately after a written request for removal fr the association that originally nominated that board member. The nominating entity must include nominees for replacement with the request for removal and the Secretary must immediately fill the vacancy created by the removal. The removal process may not occur more than once in a calendar year.

Homeowners' Association Bylaws

Section 723.078, F.S., provides that in order for a mobile home owners' association to exercise its right to purchase the mobile home park pursuant to s. 723.071, F.S., the association's bylaws must contain a number of statutory provisions.

The bill amends s. 723.078, F.S., to remove the requirement that the bylaws contain the enumerated provisions for the association to exercise its right to purchase a mobile home park. The statute retains the requirement that the association's bylaws contain all the enumerated provisions, and if they do not, then they are deemed included.

The bill defines "homeowners' association" for the purposes of ch. 723, F.S., to mean

> a corporation for profit or not for profit, which is formed and operates in compliance with ss. 723.075-723.079; or, in a subdivision the homeowners' association authorized in the subdivision documents in which all home owners must be members as a condition of ownership.

Administration

Section 723.078(2)(a), F.S., provides that a board of directors of a homeowners' association must have a president, secretary, and treasurer; however, it does not indicate how those positions are to be filled. This provision also provides that the board of directors may appoint and designate other officers. The Condominium Act and the Cooperative Act contain similarly worded provisions.[7]

The bill amends s. 723.078(2)(a), F.S., to provide that the board of directors must *elect* a president secretary, and treasurer, and that the board of directors may *elect* and designate other officers.

Quorum; Voting Requirements; and Proxies

Section 723.078(2)(b)1., F.S., currently provides that a majority of the association's members constitutes a quorum.

The bill amends s. 723.078(2)(b)1., F.S., to provide that unless otherwise provided in the bylaws, 30 percent of the total membership is required to constitute a quorum.

Section 723.078(2)(b)1., F.S., also provides that the association's bylaws must provide for the use of a proxy. Any proxy given must be effective only for the specific meeting for which originally given. A proxy may be valid for up to 120 days after the date of the first meeting for which it was given. Every proxy must also be revocable at any time.

The bill amends s. 723.078(2)(b)1., F.S., to reduce the number of days a proxy may be valid from 120 days to 90 days. The bill also incorporates a number of proxy provisions found in the Condominium Act and the Cooperative Act.[8] Specifically, that:

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[7] Sections 718.112(2)(a)1. and 719.106(1)(a)1., F.S.
[8] *Id.*

- A member of the association may only vote by limited proxies that conform to a limited proxy form adopted by the division;
- Limited proxies and general proxies may be used to establish a quorum; and
- Limited proxies may be used for votes taken to amend the articles of incorporation or bylaws, and any other matters that ch. 723, F.S., requires or permits a vote of members, except that no proxy may be used in the election of board members;

The bill also provides that a member of the board of directors or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend.

Board of Directors' and Committee Meetings

Section 723.078(c), F.S., currently requires that meetings of the board of directors must be open to members, and notice of meetings must be posted in a conspicuous place on park property at least 48 hours in advance, except in an emergency. Notice of any meeting in which assessments are to be considered must contain a statement that assessments will be considered and the nature of such assessments.

The bill amends s. 723.078(c), F.S., to provide that members of the board of directors may use e-mail as a means of communication but may not cast a vote via e-mail. The bill also incorporates a number of board of directors' and committee meeting provisions found in the Condominium Act and the Cooperative Act.[9]

Specifically, the bill provides that the requirement that board and committee meetings be open to the members does not apply to meetings held for the purpose of discussing personnel matters or meetings with the association's attorney where the contents of the discussion would be governed by the attorney-client privilege.

The bill also provides that a board or committee member's participation in a meeting via telephone, videoconference, or similar communication counts toward a quorum, and he or she may vote as if physically present.

Additionally, the bill provides that the right to attend meetings of the board and its committees includes the right to speak at such meetings; however, the association may adopt reasonable written rules governing members' statements. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action must be noticed and ratified at the next regular meeting of the board. Any member may tape record or videotape meetings, and the division must adopt rules governing the tape recording and videotaping of meetings.

Vacancies on the Board of Directors

Currently, ch. 723, F.S., does not provide a procedure to fill vacancies on the association's board of directors.

The bill amends s. 723.078(2)(c), F.S., to provide a procedure to fill vacancies on the association's board of directors. It provides that except in cases of a recall vote,[10] a vacancy occurring on the board of directors may be filled by:

- The affirmative vote of the majority of the remaining directors, even though the remaining directors constitute less than a quorum;
- By the sole remaining director;

[9] Sections 718.112(2)(b) and (c) and 719.106(1)(c), F.S.
[10] *See* Recall of Board Members discussion below.

- If no director remains, by the members; or,
- By the circuit court of the county in which the registered office of the corporation is located.

The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected. A directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors, but only for the term of office continuing until the next election of directors by the members. A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date, may be filled before the vacancy occurs. However, the new director may not take office until the vacancy occurs.

Officer and Director Duties

Section 723.078(2)(i), F.S., currently provides that the officers and directors of a mobile homeowners' association only have a fiduciary relationship to the members.

The bill amends s. 723.078(2), F.S., to expand the duties of officers and directors. The bill requires a director and committee member to discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the corporation.[11]

In discharging his or her duties, a director may rely on information, opinions, reports, statements, or if prepared by officers, employees, and any other professional, such as legal counsel or accountants, who the director reasonably believes to be reliable and competent in the matters presented. However, a director is not acting in good faith if he or she has knowledge concerning the matter in question that makes such reliance unwarranted.

If a director has performed the duties of his or her office in compliance with this provision, he or she is not liable for any action taken as a director, or any failure to take any action.

Member Meetings

Section 723.078(2)(d), F.S., requires annual member meetings during which members of the board of the directors are elected. The association's bylaws may not restrict any member desiring to be a candidate for board membership from being nominated. Written notice of all meetings must be provided at least 14 days in advance of the meeting. Unless waived, the notice of the annual meeting must be sent by mail to each member.

The bill amends s. 723.078(2)(d), F.S., to provide that all nominations must be made at a meeting of the members held at least 30 days before the annual meeting. It also allows for notice of the annual meeting to be hand delivered or electronically transmitted, which is similarly allowed in the in the Condominium Act and the Cooperative Act.[12] The bill defines "electronic transmission" to mean:

> a form of communication, not directly involving the physical transmission or transfer of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient and that may be directly reproduced in a comprehensible and legible paper form by the recipient through an automated process, such as a printer or copy machine. Examples of electronic transmission include, but are not limited to, telegrams, facsimile transmission of images, and text that is sent via e-mail between computers.[13]

The term does not include oral communication by telephone.

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[11] The Condominium Act contains nearly identical language. Section 718.111(1)(d), F.S.
[12] Sections 718.112(2)(c) and 719.106(1)(c), F.S.
[13] This definition is nearly identical to the definition provided in s. 617.01401(8), F.S., in the Florida Not for Profit Corporation Act.

Minutes of Meetings

Section 723.078(2)(e), F.S., requires the minutes of all meetings of members and of the board of directors to be maintained, available for inspection, and retained for at least 7 years.

The bill requires that the minutes of all meetings of members of the association, the board of directors, and a committee must be maintained in written form and approved by the members, board, or committee, as applicable. It also requires that a vote or abstention from voting on each matter voted upon for each director present at a board meeting must be recorded in the minutes. A similar vote recording requirement is provided in the Condominium Act and the Cooperative Act.[14]

Amendment of Articles of Incorporation and Bylaws

Section 723.078(2)(h), F.S., currently requires an association's bylaws to provide a method to amend the bylaws. If the bylaws do not provide a method of amendment, they may be amended by the board of directors and approved by a majority of the membership.

The bill requires that the articles of incorporation as well as the bylaws must provide a method for their amendment. The bill also provides that if the bylaws do not provide a method of amendment, they may be amended by the board of directors and approved by a majority of members at a meeting at which a quorum is present rather than a majority of the membership as is currently required.

Additionally, notwithstanding any other provision of s. 723.078, F.S., if an amendment to the articles of incorporation or the bylaws is required by any federal, state, or local governmental authority or agency, or any law, ordinance, or rule, the board of directors may, by a majority vote, amend the articles of incorporation or bylaws without a vote of the membership.

Recall of Board Members

Currently, s. 723.08(2), F.S., provides a limited procedure for the recall of members of a mobile homeowners' association board of directors. Any member of the board of directors may be recalled and removed from office by the vote or written agreement of a majority of all members.

The bill amends s. 723.08(2), F.S., by incorporating the extensive recall provisions currently in the Condominium Act and the Cooperative Act.[15] Pursuant to these provisions, a recall may be approved by a majority vote of all members at a meeting or by a written agreement by a majority of all members. If a recall is approved by the members, the board must hold a board meeting to determine whether to certify the recall. If the board does not certify a recall, the members may file a petition for binding arbitration with the division.

A board member who has been recalled must return all records and property of the association in his or her possession within 5 business days. A board member who has been recalled may file a petition for binding arbitration with the division[16] challenging the validity of the recall. The petition must be filed within 60 days after the recall.

A vacancy on a board due to a recall may be filled by a vote of a majority of the remaining directors. If a vacancy occurs on a board due to a recall and a majority of the board members are removed, the vacancies will be filled in accordance with rules to be adopted by the division.

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[14] Sections 718.111(1)(b) and 719.104(8)(b), F.S.
[15] Sections 718.112(2)(j) and 719.106(1)(f), F.S.
[16] *Id.*

The bill also creates s. 723.1255, F.S., which requires the division to adopt rules of procedure that will govern binding recall arbitration proceedings.

Board Member Training Programs

Currently, ch. 723, F.S., does not require board members to attend training related to the association's organizing documents, rules, and statutes.

The bill creates s. 723.0781, F.S., to require board members to sign an affidavit certifying that they have read the association's organizing documents, rules, and regulations, that they will uphold such documents and policies to the best of their ability, and that they will faithfully discharge their fiduciary duty. In lieu of this, board members may complete the division's educational program within one year of taking office. Failure to comply with either requirement results in a suspension from the board until either requirement is met.

Maintenance of Records

Section 723.079(4), F.S., currently only requires mobile homeowners' associations to maintain and make available for inspection basic accounting records, such as records of all receipts and expenditures and records of assessments and payments by each member.

The bill amends s. 723.079(4), F.S., to require an association to retain and make available an extensive list of official records similar to those currently required by in the Condominium Act and the Cooperative Act.[17] The records that must be retained include articles of incorporation, bylaws, meeting minutes, insurance policies, contracts, tax documents, and financial statements. The records must be retained for at least 7 years and available for inspection. Failure to provide a member the opportunity to inspect the records may result in damages starting at $10 per day. The association may develop reasonable rules related to the inspection of documents, including charging fees for copies, and may not allow inspection of documents that is protected by lawyer-client privilege or would reveal personal identifying information other than a person's name and address.

Other Effects of the Bill

The bill defines "mobile home lot" to mean "a lot described by a park owner pursuant to the requirements of s 723.012, F.S., or in a disclosure statement pursuant to s. 723.013, F.S., as a lot intended for the placement of a mobile home."

The bill defines "offering circular" to have the same meaning as the term "prospectus."

The bill updates cross-references to the changes in ch. 723, F.S., made by the bill.

B. SECTION DIRECTORY:

Section 1 amends s. 73.072, F.S., relating to compensation for permanent improvements by mobile home owners.

Section 2 amends s. 723.003, F.S., relating to definitions.

Section 3 amends s. 723.006, F.S., relating to powers and duties of the division.

Section 4 amends s. 723.023, F.S., relating to mobile home owner's general obligations.

Section 5 amends s. 723.031, F.S., relating to mobile home lot rental agreements.

[17] Sections 718.111(12) and 719.104(2), F.S.

Section 6 amends s. 723.037, F.S., relating to lot rental increases; reduction in services or utilities; change in rules and regulations; mediation.

Section 7 amends s. 723.059, F.S., relating to rights of purchasers.

Section 8 amends s. 723.0611, F.S., relating to the Florida Mobile Home Relocation Corporation.

Section 9 amends s. 723.078, F.S., relating to bylaws of homeowners' associations.

Section 10 creates s. 723.1255, F.S., relating to alternative resolution of recall disputes.

Section 11 creates s. 723.0781, F.S., relating to board member training programs.

Section 12 amends s. 723.079, F.S., relating to the powers and duties of homeowners' associations.

Section 13 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:

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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the division to adopt rules related to vacancies on a homeowners' association board of directors due to a recall, including rules of procedure for recall arbitration proceedings.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

A bill to be entitled

An act relating to mobile homes; amending s. 73.072, F.S.; conforming a cross-reference; amending s. 723.003, F.S.; providing definitions; amending s. 723.006, F.S.; requiring the Division of Florida Condominiums, Timeshares, and Mobile Homes to approve training and educational programs for board members of mobile home owners' associations; providing duties of the division; providing requirements for education curriculum information for board member and mobile home owner training; amending s. 723.023, F.S.; revising mobile home owner's general obligations; amending s. 723.031, F.S.; conforming a cross-reference; amending s. 723.037, F.S.; providing and revising requirements for lot rental increases; amending s. 723.059, F.S.; revising provisions relating to rights of purchasers of lifetime leases; amending s. 723.0611, F.S.; providing for the removal of a member of the board of directors under certain conditions; amending s. 723.078, F.S.; revising provisions with respect to the bylaws of homeowners' associations; revising quorum and voting requirements; revising provisions relating to board of directors, committee, and member meetings; providing requirements for meeting minutes; revising requirements for the amendment of articles of incorporation and bylaws;

deleting a requirement that the officers and directors of the association have a fiduciary relationship to the members; revising requirements for the recall of board members; creating s. 723.1255, F.S.; providing requirements for the alternative resolution of recall disputes; creating s. 723.0781, F.S.; specifying certification or educational requirements for a newly elected or appointed cooperative board member; amending s. 723.079, F.S.; revising and providing requirements relating to the official records of the association; providing an effective date.

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

Section 1. Subsection (1) of section 73.072, Florida Statutes, is amended to read:

73.072 Mobile home parks; compensation for permanent improvements by mobile home owners.—

(1) When all or a portion of a mobile home park as defined in s. 723.003 ~~723.003(6)~~ is appropriated under this chapter, the condemning authority shall separately determine the compensation for any permanent improvements made to each site. This compensation shall be awarded to the mobile home owner leasing the site if:

(a) The effect of the taking includes a requirement that the mobile home owner remove or relocate his or her mobile home

from the site;

(b) The mobile home owner currently leasing the site has paid for the permanent improvements to the site; and

(c) The value of the permanent improvements on the site exceeds $1,000 as of the date of taking.

Section 2. Section 723.003, Florida Statutes, is amended to read:

723.003 Definitions.—As used in this chapter, the term ~~following words and terms have the following meanings unless clearly indicated otherwise~~:

(1)~~(14) The term~~ "Discrimination" or "discriminatory" means that a homeowner is being treated differently as to the rent charged, the services rendered, or an action for possession or other civil action being taken by the park owner, without a reasonable basis for the different treatment.

(2)~~(1) The term~~ "Division" means the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation.

(3) "Electronic transmission" means a form of communication, not directly involving the physical transmission or transfer of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient and that may be directly reproduced in a comprehensible and legible paper form by the recipient through an automated process, such as a printer or copy machine. Examples of electronic transmission include, but are not limited to, telegrams, facsimile transmission of

images, and text that is sent via e-mail between computers. Electronic transmission does not include oral communication by telephone.

(4) "Homeowners' association" means a corporation for profit or not for profit, which is formed and operates in compliance with ss. 723.075-723.079; or, in a subdivision the homeowners' association authorized in the subdivision documents in which all home owners must be members as a condition of ownership.

(5) "Homeowners' committee" means a committee, not to exceed five persons in number, designated by a majority of the affected homeowners in a mobile home park or a subdivision; or, if a homeowners' association has been formed, designated by the board of directors of the association. The homeowners' committee is designated for the purpose of meeting with the park owner or park developer to discuss lot rental increases, reduction in services or utilities, or changes in rules and regulations and any other matter authorized by the homeowners' association, or the majority of the affected home owners, and who are authorized to enter into a binding agreement with the park owner or subdivision developer, or a binding mediation agreement, on behalf of the association, its members, and all other mobile home owners in the mobile home park.

(6)~~(2) The term~~ "Lot rental amount" means all financial obligations, except user fees, which are required as a condition of the tenancy.

(7)~~(3) The term~~ "Mobile home" means a residential structure, transportable in one or more sections, which is 8 body feet or more in width, over 35 body feet in length with the hitch, built on an integral chassis, designed to be used as a dwelling when connected to the required utilities, and not originally sold as a recreational vehicle, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein.

(8) "Mobile home lot" means a lot described by a park owner pursuant to the requirements of s 723.012, or in a disclosure statement pursuant to s. 723.013, as a lot intended for the placement of a mobile home.

(9)~~(4) The term~~ "Mobile home lot rental agreement" or "rental agreement" means any mutual understanding or lease, whether oral or written, between a mobile home owner and a mobile home park owner in which the mobile home owner is entitled to place his or her mobile home on a mobile home lot for either direct or indirect remuneration of the mobile home park owner.

(10)~~(5) The term~~ "Mobile home owner" or "home owner" means a person who owns a mobile home and rents or leases a lot within a mobile home park for residential use.

(11)~~(6) The term~~ "Mobile home park" or "park" means a use of land in which lots or spaces are offered for rent or lease for the placement of mobile homes and in which the primary use of the park is residential.

(12) ~~(7) The term~~ "Mobile home park owner" or "park owner" means an owner or operator of a mobile home park.

(13) ~~(8) The term~~ "Mobile home subdivision" means a subdivision of mobile homes where individual lots are owned by owners and where a portion of the subdivision or the amenities exclusively serving the subdivision are retained by the subdivision developer.

(14) "Offering circular" has the same meaning as the term "prospectus" as it is used in this chapter.

(15) ~~(9) The term~~ "Operator of a mobile home park" means either a person who establishes a mobile home park on land that ~~which~~ is leased from another person or a person who has been delegated the authority to act as the park owner in matters relating to the administration and management of the mobile home park, including, but not limited to, authority to make decisions relating to the mobile home park.

(16) ~~(10) The term~~ "Pass-through charge" means the mobile home owner's proportionate share of the necessary and actual direct costs and impact or hookup fees for a governmentally mandated capital improvement, which may include the necessary and actual direct costs and impact or hookup fees incurred for capital improvements required for public or private regulated utilities.

(17) ~~(11) The term~~ "Proportionate share" as used in subsection (16) ~~(10)~~ means an amount calculated by dividing equally among the affected developed lots in the park the total

costs for the necessary and actual direct costs and impact or hookup fees incurred for governmentally mandated capital improvements serving the recreational and common areas and all affected developed lots in the park.

(18) ~~(15) The term~~ "Resale agreement" means a contract in which a mobile home owner authorizes the mobile home park owner, or the park owner's designee, to act as exclusive agent for the sale of the homeowner's mobile home for a commission or fee.

(19) ~~(12) The term~~ "Unreasonable" means arbitrary, capricious, or inconsistent with this chapter.

(20) ~~(13) The term~~ "User fees" means those amounts charged in addition to the lot rental amount for nonessential optional services provided by or through the park owner to the mobile home owner under a separate written agreement between the mobile home owner and the person furnishing the optional service or services.

Section 3. Subsections (12), (13), and (14) are added to section 723.006, Florida Statutes, to read:

723.006 Powers and duties of division.—In performing its duties, the division has the following powers and duties:

(12) The division shall approve training and educational programs for board members of mobile home owners' associations formed and operated pursuant to s. 723.075(1) and mobile home owners. The training may, at the division's discretion, include web-based electronic media and live training and seminars in various locations throughout the state.

(13) The division may review and approve educational curriculums and training programs for board members and mobile home owners to be offered by providers and shall maintain a current list of approved programs and providers, and make such lists available to board members in a reasonable and cost-effective manner. The cost of such programs shall be borne by the providers of the programs. The division shall establish a fee structure for the approved training programs sufficient to recover any cost incurred by the division in operating this program.

(14) Required education curriculum information for board member and mobile home owner training shall include:

(a) The provider of the training programs, which shall include the following information regarding its training and educational programs:

1. A price list, if any, for the programs and copies of all materials.

2. The physical location where programs will be available, if not web-based.

3. Dates when programs will be offered.

4. The curriculum of the program to be offered.

(b) The programs shall provide information about statutory and regulatory matters relating to the board of directors of the homeowners' association and their responsibilities to the association and to the mobile home owners in the mobile home park.

(c) Programs and materials may not contain editorial comments.

(d) The division has the right to approve and require changes to such education and training programs.

Section 4. Section 723.023, Florida Statutes, is amended to read:

723.023 Mobile home owner's general obligations.—A mobile home owner shall at all times:

(1) Comply with all obligations imposed on mobile home owners by applicable provisions of building, housing, and health codes, including compliance with all building permits and construction requirements for construction on the mobile home and lot. The home owner is responsible for all fines imposed by the local government for noncompliance with any local codes.

(2) Keep the mobile home lot which he or she occupies clean, neat, and sanitary, and maintained in compliance with all local codes.

(3) Comply with properly promulgated park rules and regulations and require other persons on the premises with his or her consent to comply with such rules ~~therewith~~ and to conduct themselves, and other persons on the premises with his or her consent, in a manner that does not unreasonably disturb other residents of the park or constitute a breach of the peace.

Section 5. Paragraph (b) of subsection (5) of section 723.031, Florida Statutes, is amended to read:

723.031 Mobile home lot rental agreements.—

(5) The rental agreement shall contain the lot rental amount and services included. An increase in lot rental amount upon expiration of the term of the lot rental agreement shall be in accordance with ss. 723.033 and 723.037 or s. 723.059(4), whichever is applicable, provided that, pursuant to s. 723.059(4), the amount of the lot rental increase is disclosed and agreed to by the purchaser, in writing. An increase in lot rental amount shall not be arbitrary or discriminatory between similarly situated tenants in the park. No lot rental amount may be increased during the term of the lot rental agreement, except:

(b) For pass-through charges as defined in s. 723.003 ~~723.003(10)~~.

Section 6. Subsection (1) and paragraph (a) of subsection (4) of section 723.037, Florida Statutes, are amended, and subsection (7) is added to that section, to read:

723.037 Lot rental increases; reduction in services or utilities; change in rules and regulations; mediation.—

(1) A park owner shall give written notice to each affected mobile home owner and the board of directors of the homeowners' association, if one has been formed, at least 90 days before ~~prior to~~ any increase in lot rental amount or reduction in services or utilities provided by the park owner or change in rules and regulations. The notice shall identify all other affected homeowners, which may be by lot number, name, group, or phase. If the affected homeowners are not identified

by name, the park owner shall make the names and addresses available upon request. The home owner's right to the 90-day notice may not be waived or precluded by a home owner, or the homeowners' committee, in an agreement with the park owner. Rules adopted as a result of restrictions imposed by governmental entities and required to protect the public health, safety, and welfare may be enforced prior to the expiration of the 90-day period but are not otherwise exempt from the requirements of this chapter. Pass-through charges must be separately listed as to the amount of the charge, the name of the governmental entity mandating the capital improvement, and the nature or type of the pass-through charge being levied. Notices of increase in the lot rental amount due to a pass-through charge shall state the additional payment and starting and ending dates of each pass-through charge. The homeowners' association shall have no standing to challenge the increase in lot rental amount, reduction in services or utilities, or change of rules and regulations unless a majority of the affected homeowners agree, in writing, to such representation.

(4)(a) A committee, not to exceed five in number, designated by a majority of the affected mobile home owners or by the board of directors of the homeowners' association, if applicable, and the park owner shall meet, at a mutually convenient time and place no later than 60 days before the effective date of the change ~~within 30 days after receipt by the homeowners of the notice of change,~~ to discuss the reasons for

the increase in lot rental amount, reduction in services or utilities, or change in rules and regulations. The negotiating committee shall make a written request for a meeting with the park owner or subdivision developer to discuss those matters addressed in the 90-day notice, and may include in the request a listing of any other issue, with supporting documentation, that the committee intends to raise and discuss at the meeting.

This subsection is not intended to be enforced by civil or administrative action. Rather, the meetings and discussions are intended to be in the nature of settlement discussions prior to the parties proceeding to mediation of any dispute.

(7) The term "parties," for purposes of mediation under this section and s. 723.038, means a park owner and a homeowners' committee selected pursuant to this section.

Section 7. Subsection (5) of section 723.059, Florida Statutes, is amended to read:

723.059 Rights of purchaser.—

(5) Lifetime leases and the renewal provisions in automatically renewable leases, both those existing and those entered into after July 1, 1986, are not assumable ~~shall be nonassumable~~ unless otherwise provided in the mobile home lot rental agreement or unless the transferee is the home owner's spouse. The right to an assumption of the lease by a spouse may be exercised only one time during the term of that lease. ~~The renewal provisions in automatically renewable leases, both those~~

~~existing and those entered into after July 1, 1986, are not assumable unless otherwise provided in the lease agreement.~~

Section 8. Subsection (1) of section 723.0611, Florida Statutes, is amended to read:

723.0611 Florida Mobile Home Relocation Corporation.—

(1)(a) There is created the Florida Mobile Home Relocation Corporation. The corporation shall be administered by a board of directors made up of six members, three of whom shall be appointed by the Secretary of Business and Professional Regulation from a list of nominees submitted by the largest nonprofit association representing mobile home owners in this state, and three of whom shall be appointed by the Secretary of Business and Professional Regulation from a list of nominees submitted by the largest nonprofit association representing the manufactured housing industry in this state. All members of the board of directors, including the chair, shall be appointed to serve for staggered 3-year terms.

(b) A member of the board of directors shall be removed from the board by the Secretary of Business and Professional Regulation, with or without cause, immediately after the written request for removal from the association in paragraph (a) that originally nominated that board member. The nominating entity must include nominees for replacement with the request for removal and the secretary must immediately fill the vacancy created by the removal. The removal process may not occur more than once in a calendar year.

Section 9. Section 723.078, Florida Statutes, is amended to read:

723.078 Bylaws of homeowners' associations.~~—In order for a homeowners' association to exercise the rights provided in s. 723.071, the bylaws of the association shall provide for the following:~~

(1) The directors of the association and the operation shall be governed by the bylaws.

(2) The bylaws shall provide and, if they do not, shall be deemed to include, the following provisions:

(a) Administration.—The form of administration of the association shall be described, providing for the titles of the officers and for a board of directors and specifying the powers, duties, manner of selection and removal, and compensation, if any, of officers and board members. Unless otherwise provided in the bylaws, the board of directors shall be composed of five members. The board of directors shall elect ~~have~~ a president, secretary, and treasurer who shall perform the duties of those offices customarily performed by officers of corporations, and these officers shall serve without compensation and at the pleasure of the board of directors. The board of directors may elect ~~appoint~~ and designate other officers and grant them those duties it deems appropriate.

(b) Quorum; voting requirements; proxies.—

1. Unless otherwise provided in the bylaws, 30 percent of the total membership is required to constitute a quorum. ~~A~~

~~majority of the members shall constitute a quorum.~~ Decisions shall be made by a majority of members represented at a meeting at which a quorum is present. ~~In addition, provision shall be made in the bylaws for definition and use of proxy. Any proxy given shall be effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 120 days after the date of the first meeting for which it was given. Every proxy shall be revocable at any time at the pleasure of the member executing it.~~

2. A member may not vote by general proxy but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. Limited proxies and general proxies may be used to establish a quorum. Limited proxies may be used for votes taken to amend the articles of incorporation or bylaws pursuant to this section, and any other matters for which this chapter requires or permits a vote of members, except that no proxy, limited or general, may be used in the election of board members. Notwithstanding the provisions of this section, members may vote in person at member meetings.

3. A proxy is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy shall be revocable at any time at the pleasure of the member executing it.

4. A member of the board of directors or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken and may not be used for the purposes of creating a quorum.

(c) Board of directors' and committee meetings.—

1. Meetings of the board of directors and meetings of its committees at which a quorum is present shall be open to all members. Notwithstanding any other provision of law, the requirement that board meetings and committee meetings be open to the members does not apply to board or committee meetings held for the purpose of discussing personnel matters or meetings between the board or a committee and the association's attorney, with respect to potential or pending litigation, where the meeting is held for the purpose of seeking or rendering legal advice, and where the contents of the discussion would otherwise be governed by the attorney-client privilege.~~, and~~ Notice of meetings shall be posted in a conspicuous place upon the park property at least 48 hours in advance, except in an emergency. Notice of any meeting in which assessments against members are to be considered for any reason shall specifically contain a statement that assessments will be considered and the nature of such assessments.

2. A board or committee member's participation in a meeting via telephone, real-time videoconferencing, or similar

real-time telephonic, electronic, or video communication counts toward a quorum, and such member may vote as if physically present. A speaker shall be used so that the conversation of those board or committee members attending by telephone may be heard by the board or committee members attending in person, as well as by members present at a meeting.

3. Members of the board of directors may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail.

4. The right to attend meetings of the board of directors and its committees includes the right to speak at such meetings with reference to all designated agenda items. The association may adopt reasonable written rules governing the frequency, duration, and manner of members' statements. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action shall be noticed and ratified at the next regular meeting of the board. Any member may tape record or videotape meetings of the board of directors and its committees. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting.

5. Except as provided in s. 723.078(2)(i), a vacancy occurring on the board of directors may be filled by the affirmative vote of the majority of the remaining directors, even though the remaining directors constitute less than a quorum; by the sole remaining director; if the vacancy is not so

filled or if no director remains, by the members; or, on the application of any person, by the circuit court of the county in which the registered office of the corporation is located.

6. The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected. A directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors, but only for the term of office continuing until the next election of directors by the members

7. A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date, may be filled before the vacancy occurs. However, the new director may not take office until the vacancy occurs.

8.a. The officers and directors of the association have a fiduciary relationship to the members.

b. A director and committee member shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the corporation.

9. In discharging his or her duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

a. One or more officers or employees of the corporation who the director reasonably believes to be reliable and

competent in the matters presented;

b. Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or

c. A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

10. A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subparagraph 9. unwarranted.

11. A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

(d) Member meetings.—

1. Members shall meet at least once each calendar year, and the meeting shall be the annual meeting. All members of the board of directors shall be elected at the annual meeting unless the bylaws provide for staggered election terms or for their election at another meeting. The bylaws shall not restrict any member desiring to be a candidate for board membership from being nominated from the floor. All nominations from the floor must be made at a duly noticed meeting of the members held at least 30 days before the annual meeting. The bylaws shall provide the method for calling the meetings of the members, including annual meetings. The method shall provide at least 14

days' written notice to each member in advance of the meeting and require the posting in a conspicuous place on the park property of a notice of the meeting at least 14 days prior to the meeting. The right to receive written notice of membership meetings may be waived in writing by a member. Unless waived, the notice of the annual meeting shall be mailed, hand delivered, or electronically transmitted ~~sent by mail~~ to each member, and shall constitute ~~the mailing constitutes~~ notice. An officer of the association shall provide an affidavit affirming that the notices were mailed or hand delivered in accordance with the provisions of this section to each member at the address last furnished to the corporation. These meeting requirements do not prevent members from waiving notice of meetings or from acting by written agreement without meetings, if allowed by the bylaws.

(e) Minutes of meetings.—

1. Minutes of all meetings of members of an association, the board of directors, and a committee must be maintained in written form and approved by the members, board, or committee, as applicable. A vote or abstention from voting on each matter voted upon for each director present at a board meeting must be recorded in the minutes.

2. All approved minutes of ~~all~~ meetings of members, committees, and ~~of~~ the board of directors shall be kept in a businesslike manner and shall be available for inspection by members, or their authorized representatives, and board members

at reasonable times. The association shall retain these minutes for a period of at least ~~not less than~~ 7 years.

(f) Manner of sharing assessments.—The share or percentage of, and manner of sharing, assessments and expenses for each member shall be stated.

(g) Annual budget.—If the bylaws provide for adoption of an annual budget by the members, the board of directors shall mail a meeting notice and copies of the proposed annual budget of expenses to the members at least ~~not less than~~ 30 days before ~~prior to~~ the meeting at which the budget will be considered. If the bylaws provide that the budget may be adopted by the board of directors, the members shall be given written notice of the time and place at which the meeting of the board of directors to consider the budget will be held. The meeting shall be open to the members. If the bylaws do not provide for adoption of an annual budget, this paragraph shall not apply.

(h) Amendment of articles of incorporation and bylaws.—

1. The method by which the articles of incorporation and bylaws may be amended consistent with the provisions of this chapter shall be stated. If the bylaws fail to provide a method of amendment, the bylaws may be amended by the board of directors and approved by a majority of members at a meeting at which a quorum is present ~~of the membership~~. No bylaw shall be revised or amended by reference to its title or number only.

2. Notwithstanding any other provision of this section, if an amendment to the articles of incorporation or the bylaws is

required by any action of any federal, state, or local governmental authority or agency, or any law, ordinance, or rule thereof, the board of directors may, by a majority vote of the board, at a duly noticed meeting of the board, amend the articles of incorporation or bylaws without a vote of the membership.

(i) ~~The officers and directors of the association have a fiduciary relationship to the members.~~

~~(j)~~ Recall of board members.—Any member of the board of directors may be recalled and removed from office with or without cause by the vote of or agreement in writing by a majority of all members. A special meeting of the members to recall a member or members of the board of directors may be called by 10 percent of the members giving notice of the meeting as required for a meeting of members, and the notice shall state the purpose of the meeting. Electronic transmission may not be used as a method of giving notice of a meeting called in whole or in part for this purpose.

1. If the recall is approved by a majority of all members by a vote at a meeting, the recall is effective as provided in this paragraph. The board shall duly notice and hold a board meeting within 5 full business days after the adjournment of the member meeting to recall one or more board members. At the meeting, the board shall either certify the recall, in which case such member or members shall be recalled effective immediately and shall turn over to the board within 5 full

business days any and all records and property of the association in their possession, or shall proceed under subparagraph 3.

2. If the proposed recall is by an agreement in writing by a majority of all members, the agreement in writing or a copy thereof shall be served on the association by certified mail or by personal service in the manner authorized by chapter 48 and the Florida Rules of Civil Procedure. The board of directors shall duly notice and hold a meeting of the board within 5 full business days after receipt of the agreement in writing. At the meeting, the board shall either certify the written agreement to recall members of the board, in which case such members shall be recalled effective immediately and shall turn over to the board, within 5 full business days, any and all records and property of the association in their possession, or shall proceed as described in subparagraph 3.

3. If the board determines not to certify the written agreement to recall members of the board, or does not certify the recall by a vote at a meeting, the board shall, within 5 full business days after the board meeting, file with the division a petition for binding arbitration pursuant to the procedures of s. 723.1255. For purposes of this paragraph, the members who voted at the meeting or who executed the agreement in writing shall constitute one party under the petition for arbitration. If the arbitrator certifies the recall of a member of the board, the recall shall be effective upon mailing of the

final order of arbitration to the association. If the association fails to comply with the order of the arbitrator, the division may take action under s. 723.006. A member so recalled shall deliver to the board any and all records and property of the association in the member's possession within 5 full business days after the effective date of the recall.

4. If the board fails to duly notice and hold a board meeting within 5 full business days after service of an agreement in writing or within 5 full business days after the adjournment of the members' recall meeting, the recall shall be deemed effective and the board members so recalled shall immediately turn over to the board all records and property of the association.

5. If the board fails to duly notice and hold the required meeting or fails to file the required petition, the member's representative may file a petition pursuant to s. 723.1255 challenging the board's failure to act. The petition must be filed within 60 days after expiration of the applicable 5-full-business-day period. The review of a petition under this subparagraph is limited to the sufficiency of service on the board and the facial validity of the written agreement or ballots filed.

6. If a vacancy occurs on the board as a result of a recall and less than a majority of the board members are removed, the vacancy may be filled by the affirmative vote of a majority of the remaining directors, notwithstanding any other

provision of this chapter. If vacancies occur on the board as a result of a recall and a majority or more of the board members are removed, the vacancies shall be filled in accordance with procedural rules to be adopted by the division, which rules need not be consistent with this chapter. The rules must provide procedures governing the conduct of the recall election as well as the operation of the association during the period after a recall but before the recall election.

7. A board member who has been recalled may file a petition pursuant to s. 723.1255 challenging the validity of the recall. The petition must be filed within 60 days after the recall is deemed certified. The association and the member's representative shall be named as the respondents.

8. The division may not accept for filing a recall petition, whether or not filed pursuant to this subsection, and regardless of whether the recall was certified, when there are 60 or fewer days until the scheduled reelection of the board member sought to be recalled or when 60 or fewer days have not elapsed since the election of the board member sought to be recalled.

(3) The bylaws may provide the following:

(a) A method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the park property.

(b) Restrictions on, and requirements respecting, the use and maintenance of mobile homes located within the park, and the

use of the park property, which restrictions and requirements are not inconsistent with the articles of incorporation.

(c) Other provisions not inconsistent with this chapter or with other documents governing the park property or mobile homes located therein.

(d) The board of directors may, in any event, propose a budget to the members at a meeting of members or in writing, and, if the budget or proposed budget is approved by the members at the meeting or by a majority of their whole number in writing, that budget shall be adopted.

(e) The manner of collecting from the members their shares of the expenses for maintenance of the park property shall be stated. Assessments shall be made against members not less frequently than quarterly, in amounts no less than are required to provide funds in advance for payments of all of the anticipated current operating expenses and for all of the unpaid operating expense previously incurred.

(4) No amendment may change the proportion or percentage by which members share in the assessments and expenses as initially established unless all the members affected by such change approve the amendment.

(5) Upon purchase of the mobile home park, the association organized under this chapter may convert to a condominium, cooperative, or subdivision. The directors shall have the authority to amend and restate the articles of incorporation and bylaws in order to comply with the requirements of chapter 718,

chapter 719, or other applicable sections of the Florida Statutes.

(6) Notwithstanding the provisions of s. 723.075(1), upon purchase of the park by the association, and conversion of the association to a condominium, cooperative, or subdivision, the mobile home owners who were members of the association prior to the conversion and who no longer meet the requirements for membership, as established by the amended or restated articles of incorporation and bylaws, shall no longer be members of the converted association. Mobile home owners, as defined in this chapter, who no longer are eligible for membership in the converted association may form an association pursuant to s. 723.075.

Section 10. Section 723.1255, Florida Statutes, is created to read:

723.1255 Alternative resolution of recall disputes.—The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation shall adopt rules of procedure to govern binding recall arbitration proceedings.

Section 11. Section 723.0781, Florida Statutes, is created to read:

723.0781 Board member training programs.—Within 90 days after being elected or appointed to the board, a newly elected or appointed director shall certify by an affidavit in writing to the secretary of the association that he or she has read the

association's current articles of incorporation, bylaws, and the mobile home park's prospectus, rental agreement, rules, regulations, and written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, within 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum approved by the division within 1 year before or 90 days after the date of election or appointment. The educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption. A director who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with this section. The board may temporarily fill the vacancy during the period of suspension. The secretary of the association shall retain a director's written certification or educational certificate for inspection by the members for 5 years after the director's election or the duration of the director's uninterrupted tenure, whichever is longer. Failure to have such written certification or educational certificate on file does not affect the validity of any board action.

Section 12. Section 723.079, Florida Statutes, is amended to read:

723.079 Powers and duties of homeowners' association.—

(1) An association may contract, sue, or be sued with respect to the exercise or nonexercise of its powers. For these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the park property.

(2) The powers and duties of an association include those set forth in this section and ss. 723.075 and 723.077 and those set forth in the articles of incorporation and bylaws and any recorded declarations or restrictions encumbering the park property, if not inconsistent with this chapter.

(3) An association has the power to make, levy, and collect assessments and to lease, maintain, repair, and replace the common areas upon purchase of the mobile home park.

(4) The association shall maintain the following items, when applicable, which constitute the official records of the association:

(a) A copy of the association's articles of incorporation and each amendment to the articles of incorporation.

(b) A copy of the bylaws of the association and each amendment to the bylaws.

(c) A copy of the written rules or policies of the association and each amendment to the written rules or policies.

(d) The approved minutes of all meetings of the members, the board of directors, and committees of the board, which minutes must be retained within the state for at least 7 years.

(e) A current roster of all members and their mailing addresses and lot identifications. The association shall also maintain the e-mail addresses and the numbers designated by members for receiving notice sent by electronic transmission of those members consenting to receive notice by electronic transmission. The e-mail addresses and numbers provided by members to receive notice by electronic transmission shall be removed from association records when consent to receive notice by electronic transmission is revoked. However, the association is not liable for an erroneous disclosure of the e-mail address or the number for receiving electronic transmission of notices.

(f) All of the association's insurance policies or copies thereof, which must be retained for at least 7 years.

(g) A copy of all contracts or agreements to which the association is a party, including, without limitation, any written agreements with the park owner, lease, or other agreements or contracts under which the association or its members has any obligation or responsibility, which must be retained for at least 7 years.

(h) The financial and accounting records of the association, kept according to good accounting practices. All financial and accounting records must be maintained for a period of at least 7 years. The financial and accounting records must include:

1. Accurate, itemized, and detailed records of all receipts and expenditures.

2. A current account and a periodic statement of the account for each member, designating the name and current address of each member who is obligated to pay dues or assessments, the due date and amount of each assessment or other charge against the member, the date and amount of each payment on the account, and the balance due.

3. All tax returns, financial statements, and financial reports of the association.

4. Any other records that identify, measure, record, or communicate financial information.

(i) All other written records of the association not specifically included in the foregoing which are related to the operation of the association.

(5) The official records shall be maintained within the state for at least 7 years and shall be made available to a member for inspection or photocopying within 10 business days after receipt by the board or its designee of a written request submitted by certified mail, return receipt requested. The requirements of this subsection are satisfied by having a copy of the official records available for inspection or copying in the park or, at the option of the association, by making the records available to a member electronically via the Internet or by allowing the records to be viewed in electronic format on a computer screen and printed upon request. If the association has a photocopy machine available where the records are maintained, it must provide a member with copies on request during the

inspection if the entire request is no more than 25 pages. An association shall allow a member or his or her authorized representative to use a portable device, including a smartphone, tablet, portable scanner, or any other technology capable of scanning or taking photographs, to make an electronic copy of the official records in lieu of the association's providing the member or his or her authorized representative with a copy of such records. The association may not charge a fee to a member or his or her authorized representative for the use of a portable device.

(a) The failure of an association to provide access to the records within 10 business days after receipt of a written request submitted by certified mail, return receipt requested, creates a rebuttable presumption that the association willfully failed to comply with this subsection.

(b) A member who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this subsection. The minimum damages are to be $10 per calendar day up to 10 days, the calculation to begin on the 11th business day after receipt of the written request, submitted by certified mail, return receipt requested.

(c) The association may adopt reasonable written rules governing the frequency, time, location, notice, records to be inspected, and manner of inspections, but may not require a member to demonstrate a proper purpose for the inspection, state

a reason for the inspection, or limit a member's right to inspect records to less than 1 business day per month. The association may impose fees to cover the costs of providing copies of the official records, including the costs of copying and for personnel to retrieve and copy the records if the time spent retrieving and copying the records exceeds 30 minutes and if the personnel costs do not exceed $20 per hour. Personnel costs may not be charged for records requests that result in the copying of 25 or fewer pages. The association may charge up to 25 cents per page for copies made on the association's photocopier. If the association does not have a photocopy machine available where the records are kept, or if the records requested to be copied exceed 25 pages in length, the association may have copies made by an outside duplicating service and may charge the actual cost of copying, as supported by the vendor invoice. The association shall maintain an adequate number of copies of the recorded governing documents, to ensure their availability to members and prospective members. Notwithstanding this paragraph, the following records are not accessible to members or home owners:

1. A record protected by the lawyer-client privilege as described in s. 90.502 and a record protected by the work-product privilege, including, but not limited to, a record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney

or the association and which was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, or in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

2. E-mail addresses, telephone numbers, facsimile numbers, emergency contact information, any addresses for a home owner other than as provided for association notice requirements, and other personal identifying information of any person, excluding the person's name, lot designation, mailing address, and property address. Notwithstanding the restrictions in this subparagraph, an association may print and distribute to home owners a directory containing the name, park address, and telephone number of each home owner. However, a home owner may exclude his or her telephone number from the directory by so requesting in writing to the association. The association is not liable for the disclosure of information that is protected under this subparagraph if the information is included in an official record of the association and is voluntarily provided by a home owner and not requested by the association.

3. A electronic security measure that is used by the association to safeguard data, including passwords.

4. The software and operating system used by the association which allows the manipulation of data, even if the home owner owns a copy of the same software used by the association. The data is part of the official records of the

association.

(6) An outgoing board or committee member must relinquish all official records and property of the association in his or her possession or under his or her control to the incoming board within 5 days after the election or removal. ~~An association shall maintain accounting records in the county where the property is located, according to good accounting practices. The records shall be open to inspection by association members or their authorized representatives at reasonable times, and written summaries of such records shall be supplied at least annually to such members or their authorized representatives. The failure of the association to permit inspection of its accounting records by members or their authorized representatives entitles any person prevailing in an enforcement action to recover reasonable attorney's fees from the person in control of the books and records who, directly or indirectly, knowingly denied access to the books and records for inspection. The records shall include, but shall not be limited to:~~

~~(a) A record of all receipts and expenditures.~~

~~(b) An account for each member, designating the name and current mailing address of the member, the amount of each assessment, the dates on which and amounts in which the assessments come due, the amount paid upon the account, and the balance due.~~

(7)~~(5)~~ An association has the power to purchase lots in the park and to acquire, hold, lease, mortgage, and convey them.

(8)~~(6)~~ An association shall use its best efforts to obtain and maintain adequate insurance to protect the association and the park property upon purchase of the mobile home park. A copy of each policy of insurance in effect shall be made available for inspection by owners at reasonable times.

(9)~~(7)~~ An association has the authority, without the joinder of any home owner, to modify, move, or create any easement for ingress and egress or for the purpose of utilities if the easement constitutes part of or crosses the park property upon purchase of the mobile home park. This subsection does not authorize the association to modify or move any easement created in whole or in part for the use or benefit of anyone other than the members, or crossing the property of anyone other than the members, without his or her consent or approval as required by law or the instrument creating the easement. Nothing in this subsection affects the rights of ingress or egress of any member of the association.

(10)~~(8)~~ Any mobile home owners' association or group of residents of a mobile home park as defined in this chapter may conduct bingo games as provided in s. 849.0931.

(11)~~(9)~~ An association organized under this chapter may offer subscriptions, for the purpose of raising the necessary funds to purchase, acquire, and operate the mobile home park, to its members or other owners of mobile homes within the park. Subscription funds collected for the purpose of purchasing the park shall be placed in an association or other escrow account

prior to purchase, which funds shall be held according to the terms of the subscription agreement. The directors shall maintain accounting records according to generally accepted accounting practices and shall, upon written request by a subscriber, furnish an accounting of the subscription fund escrow account within 60 days of the purchase of the park or the ending date as provided in the subscription agreement, whichever occurs first.

(12) ~~(10)~~ For a period of 180 days after the date of a purchase of a mobile home park by the association, the association shall not be required to comply with the provisions of part V of chapter 718, ~~or~~ part V of chapter 719, or part II of chapter 720, as to mobile home owners or persons who have executed contracts to purchase mobile homes in the park.

(13) ~~(11)~~ The provisions of subsections ~~subsection~~ (4) and (7) shall not apply to records relating to subscription funds collected pursuant to subsection (11) ~~(9)~~.

Section 13. This act shall take effect July 1, 2015.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 307 (2015)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Latvala offered the following:

Amendment (with title amendment)

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

Remove lines 27-34 and insert:

revising requirements for the recall of board members; creating s. 723.1255, F.S.; providing requirements for the alternative resolution of recall disputes; creating s. 723.0781, F.S.; specifying certification or educational requirements for a newly elected or appointed board member;

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 307 (2015)

Amendment No. 2

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Latvala offered the following:

Amendment

Between lines 104 and 105, insert:

(7)(a) "Mediation" means a process whereby a mediator appointed by the Division of Florida Condominiums, Timeshares, and Mobile Homes or mutually selected by the parties acts to encourage and facilitate the resolution of a dispute. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable agreement.

(b) For purposes of mediation, under s. 723.037 and s. 723.038, the term "parties" means a park owner as defined by s. 723.003(13) and a homeowners' committee selected pursuant to s. 723.037.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 307 (2015)

Amendment No. 3

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Latvala offered the following:

Amendment

Remove line 124 and insert:

(10) ~~(5)~~ ~~The term~~ "Mobile home owner," "mobile homeowner," ~~or~~ "home owner," or "homeowner" means

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 343 Estates
SPONSOR(S): Moraitis
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson	Bond
2) Finance & Tax Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The federal government and many states impose a tax on the estate of a decedent for the privilege of transferring property at death, known as the "estate tax." Current law provides for the apportionment and orderly collection of estate taxes imposed against a Florida decedent's estate under federal and state laws. This law has not been substantially revised since 1998 although a number of significant changes have occurred in federal and state tax laws since that time, including the elimination of the ability of Florida to collect an estate tax.

This bill substantially revises the estate tax apportionment law, to:

- Update the statute for consistency with changes in federal estate tax laws.
- Codify case law governing estate tax apportionment.
- Address "gaps" in the current statutory apportionment framework.
- Make technical, stylistic, and organizational changes.

This bill does not revive or affect the collection of estate taxes by the State of Florida.

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

This bill takes effect July 1, 2015, although portions are retroactive.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 733.817, F.S., provides for the allocation, apportionment, and orderly collection of estate tax imposed against a Florida decedent's estate under federal and state laws. The section is, like many other probate provisions, a default provision governing administration of the estate in situations where the decedent failed to properly plan for the orderly administration of the estate. Note too that the estate tax under current federal law only applies to an estate valued in excess of $5,430,000.[1]

Section 733.817, F.S. has not been substantially revised since 1998 although a number of significant changes have occurred in federal and state tax laws since that time, including the elimination of the federal credit for state death taxes and, by extension, the Florida estate tax.

This bill substantially revises s. 733.817, F.S., to:

- Update the statute for consistency with changes in federal estate tax laws.
- Codify case law governing estate tax apportionment.
- Address "gaps" in the current statutory apportionment framework.
- Make technical, stylistic, and organizational changes.

This bill does not revive or affect the collection of estate taxes by the State of Florida.

Estate Tax: Overview

The federal government imposes a tax on the estate of a decedent for the privilege of transferring property at death, known as the "estate tax."[2] In general, the tax is calculated by assessing the total fair market value of all property owned or controlled by the decedent at the time of death,[3] the "gross estate," and subtracting allowable deductions[4] to determine the "taxable estate." The value of lifetime taxable gifts is added to the "taxable estate" and the tax is computed based upon the combined amount, minus the applicable exclusion amount.[5]

Prior to 2005, Florida also imposed an estate tax "upon the transfer of the estate of every person who, at the time of death, was a resident of this state . . . ."[6] Florida also levied an estate tax on every person who at the time of death was not a resident of this state, but was a resident of the United States for the transfer of property situated in the state.[7] The Florida Constitution prescribes, in part, the parameters for the state's imposition of the estate tax, by prohibiting any estate tax upon Florida residents in excess the amount that may be credited upon or deducted from the federal estate tax or another state's estate tax.[8] Thus the tax on the estate of a Florida decedent did not increase the overall estate tax, but instead apportioned the total estate tax between the federal government and the state. The Florida estate tax was what is known as a "pick-up" tax, which only "picks-up" taxes that would have otherwise been paid to the federal government.

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[1] For tax year 2015. The amount is adjusted annually for inflation. See 26 U.S.C. § 2010(c)(3) and IR-2014-104, Oct. 30, 2014.
[2] I.R.C. §§ 2001-2801.
[3] The gross estate also includes certain life insurance proceeds, the value of certain annuities, the value of certain property transferred within three years of death, trusts or other interests in which the decedent held certain powers.
[4] Allowable deductions include the marital deduction, charitable deduction, mortgages and debt, administration expenses of the estate, and losses during estate administration.
[5] The applicable exclusion amount for estates of decedents dying in 2015 is $5,430,000.
[6] Section 198.02, F S.
[7] Section 198.03, F.S.
[8] FLA. CONST. art. VII, s. 5(a).

While the Florida estate tax provisions are still set forth in the Florida statutes,[9] Florida does not currently have a state level estate tax. In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[10] That federal legislation phased out over a 5-year period, starting in 2002, the credit for state death taxes. Because Florida's estate tax is coupled or tied to the federal estate tax, the change effectively eliminated the state estate tax. Unless Congress acts to reinstate the credit for state taxes or the Florida Constitution is amended to allow for imposition of the tax independently of the federal credit, Florida may not reinstate an estate tax.

Nevertheless, where estate taxes are due to the federal government or to another state from a Florida decedent, s. 733.817, F.S. determines how much tax is attributable to each interest included in the measure of the tax. The statute also determines who is charged with payment of the tax attributable to various interests included in the measure of the tax, determines whether a decedent has effectively directed against statutory apportionment, and resolves conflicting apportionment provisions in governing instruments.

Allocation of Estate Taxes on Gifts Made Just Prior to Death

Section 733.817(3), F.S. provides that in determining the amount of tax attributable to an interest in property, only interests included in the measure of the particular tax[11] are considered. The tax is determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax. The decedent's gross estate for estate tax purposes includes gift taxes paid on gifts made within three years of death[12] and, if the decedent dies within 5 years of a gift to a qualified tuition program (commonly known as a "529 Plan") that exceeds the gift tax annual exclusion,[13] his or her gross estate also includes the portion of such contributions properly allocable to periods after the date of death.[14]

Presently, ss. 733.817(5)(a)-(c), F.S., do not apportion the estate tax on those gift taxes, and the gift taxes are not otherwise excluded from the measure of the tax. Therefore, the net tax attributable to the gift taxes is apportionable under s. 733.817(5)(f), F.S., a "catch-all provision" which provides that the net tax that is not apportioned under s. 733.817(5)(a)-(c), F.S., be apportioned among the recipients of the remaining interests in the measure of the tax. A majority of decedents do not intend that the recipients of their gift bear the burden of the estate tax as such gifts often consist of contributions to 529 plans for minors or college aged relatives.

The bill amends s. 733.817(1)(d), F.S., the definition of "included in the measure of the tax," to exclude gift taxes paid within three years of the decedent's death and gifts to a 529 Plan. Recipients of the gift will not be allocated the estate tax upon such gifts even though the gift taxes remain a part of the amount upon which the estate tax is calculated. The effect is that the allocation of tax on all other interests remaining in the measure of the federal estate tax will be increased. The exclusion of the gift

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[9] Chapter 198, F.S.
[10] Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.
[11] "Included in the measure of the tax" means that for each separate tax that an interest may incur, only interests included in the measure of that particular tax are considered. It does not include any interest, whether passing under the will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest or interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts with respect to the federal estate tax. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed. Section 733.817(1)(d), F.S.
[12] 26 U.S.C § 2035(b)
[13] Section 529 of the Internal Revenue Code permits a donor to gift an amount in excess of the annual gift tax exclusion to a qualified tuition program on behalf of any designated beneficiary which may then be treated as having been made over a five year period.
[14] 26 U.S.C. § 529(c)(4)(C)

taxes from the measure of the tax applies only to the estates of decedents dying on or after July 1, 2015.

Apportionment of Estate Taxes

Statutory Apportionment -- Property passing under a will or trust

In the absence of an effective direction by the decedent in a governing instrument, estate taxes are apportioned pursuant to s. 733.817(5), F.S.

For property passing under a will or trust, the net tax attributable to nonresiduary devises or interests is charged to and paid from the residuary estate or portion whether or not all interests in the residuary estate or portion are included in the measure of the tax. If the residuary estate or portion is insufficient to pay the net tax attributable to all nonresiduary devises or interests, the balance of the net tax attributable to nonresiduary devises or interests is apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interests included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax. The net tax attributable to residuary devises or interests are apportioned among the recipients of the residuary devises or interests included in the measure of tax in the proportion that the value of each residuary devise or interests included in the measure of the tax bears to the total of all residuary devises or interests included in the measure of the tax.[15] The provisions are silent, however, with respect to which devises or interests would be charged with the tax if the residuary is insufficient.

The bill moves the allocation to subsection (3) and provides that if the residuary estate or portion of a will or trust is insufficient to pay the net tax attributable to all residuary devises or interests, the tax must be apportioned among the recipients of the nonresiduary devises or interests in the proportion that the value of each nonresiduary devise or interests included in the measure of the tax bears to the total of all nonresiduary devises or interests included in the measure of the tax.

Statutory Apportionment -- Protected Homestead

Section 733.817(5)(c), F.S. provides that the net tax attributable to an interest in protected homestead[16] is apportioned against the recipients of other interests in the estate or passing under any revocable trust in the following order of priority:[17]

- Class I: Recipients of interests not disposed of by the decedent's will or revocable trust that are included in the measure of the federal estate tax. This includes recipients of exempt property, the family allowance, elective share, pretermitted shares, and property passing by intestacy.

- Class II: Recipients of residuary devises and residuary interests that are included in the measure of the federal estate tax.

- Class III: Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.

Property that is not included in the measure of the tax, such as property qualifying for the marital or charitable deduction, does not bear the burden of payment of tax on protected homestead. The

[15] Section 733.817(5)(a) and (b), F.S.

[16] "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned in tenancy by the entireties or in joint tenancy with rights of survivorship is not protected homestead. Section 731.201(33), F.S.

[17] Section 733.817(5)(c), F.S.

purposes of the Probate Code provisions for exempt property, family allowance, and elective share are defeated by charging those interests with the estate tax on the protected homestead. Further, although s. 733.817(2), F.S. provides that protected homestead is exempt from tax, the statute does not specify an additional source of payment if the property designated pursuant to s. 733.817(5)(c), F.S. is insufficient.

For estates of decedents dying on or after July 1, 2015, the bill provides that the tax on exempt property and the family allowance is to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Elective share property is no longer charged with the payment of estate tax on protected homestead (and now exempt property and family allowance). However, any property passing to the spouse which is in excess of the elective share is not excused from payment of the tax to the extent the excess property is included in Class I, II or III. Under the bill, the classes charged with payment of tax on protected homestead, family allowance, and exempt property in order of priority, are:

- Class I: Recipients of property passing by intestacy.
- Class II: Recipients of residuary devises, residuary interests, and pretermitted shares.
- Class III: Recipients of nonresiduary devises and nonresiduary interests.

If the assets in Classes I, II, and III are exhausted, the remaining tax is apportioned proportionately to the protected homestead, exempt property and family allowance. However, the tax may not be apportioned against the elective share. If the balance of the net tax attributable to protected homestead, exempt property, or the family allowance not apportioned by the above is to be apportioned according to the proportion that the value of each bears to the total value of taxable interests.

Apportionment at Direction of Decedent

Section 733.817(5)(h)1., F.S. provides that a decedent may direct against statutory apportionment through the terms of a governing instrument such as a will or trust.

Specificity Requirement

For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to s. 733.817(5)(h)4., F.S., "this section", or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is effective to direct the payment from property passing under the governing instrument of taxes attributable to property not passing under the governing instrument.

The bill deletes the provision for directing against default apportionment by reference to "this section," and provides that a direction against default apportionment may only be achieved by "express direction." An express direction in the governing instruments to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is generally effective for this purpose. This requirement applies to estates of all decedents dying on or after July 1, 2015.

However, this express general direction is not effective to waive rights of recovery provided in sections 2207A, 2207B and 2603 of the Internal Revenue Code, all of which require greater specificity. Those statutes provide that the decedent may direct otherwise, but they require the decedent to specifically indicate the intent to waive the right of recovery under those statutes. The purpose of the Internal

Revenue Code provisions requiring specificity in directing against a right of recovery is not to raise revenue but to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate.

The bill describes and codifies what is sufficient to comply with the specificity requirements of sections 2207A, 2207B, and 2603 of the Internal Revenue Code. It also provides that a general statement in a decedent's will or revocable trust waiving all rights of recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in sections 2207A or 2207B of the Internal Revenue Code. Such provision reflects current law.

Adopting tax apportionment provisions in a revocable trust

The Internal Revenue Code enables the personal representative of the estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents put their tax apportionment provisions in their revocable trusts. Section 733.817(5)(h)2., F.S., provides that a provision in the will that the tax is to be apportioned as provided in the revocable trust is deemed to be a direction in the will as well as the revocable trust.

The bill requires that the provision in the will adopting the apportionment provisions of the revocable trust and the apportionment provision of the revocable trust must be express in order to be effective.

Directing that taxes are paid from revocable trust

Current law permits the decedent's will to direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision.[18] It is implicit in current law that the revocable trust that is to pay the tax must be specifically identified and that for an apportionment provision in the revocable trust to be contrary, it must be express. The bill requires that the direction in the will to pay from the revocable trust must contain a specific reference to the trust, and that for an apportionment provision in the revocable trust to be considered contrary, it must be an express direction.

Conflicting Provisions

If there is a conflict as to payment of taxes between the decedent's will and the governing instrument, the decedent's will controls, except that the governing instrument will be given effect with respect to any tax remaining unpaid after the application of the decedent's will and a direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument is effective notwithstanding any conflict with the decedent's will, unless the tax provision in the decedent's will expressly overrides the conflicting provision in the governing instrument.[19]

The bill amends s. 733.817(5)(h)5., F.S. to make it applicable to apportionment conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) and provides that the last executed governing instrument containing an effective tax apportionment clause controls to the extent of the conflict. If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective but for the conflict create a conflict. The new rule applies to estates of decedents dying on or after July 1, 2015.

[18] Section 733.817(5)(h)3., F.S.
[19] Section 733.817(5)(h)5., F.S.

Construction

Apportionment of Property Received By a Will or Trust as a Beneficiary

Property passing under a will or trust is apportioned under the provisions of s. 733.817(5)(a) and (b), F.S. This is the case even if the will or trust received the property as beneficiary of an annuity, insurance policy, IRA, or similar interest, or as recipient of appointed property. This has caused some uncertainty among practitioners as the general "catch-all" apportionment provision in s. 733.817(5)(f), F.S. would seem to apply to these interests. However, the general provisions do not apply if the recipient is the estate or trust. The statute does not contemplate a double tax on what is essentially the same property. However, property subject to a power of appointment does not pass under the will simply because the power is exercised by the will unless the property passes to the estate.[20]

The bill provides that the beneficiary of an annuity or insurance policy or the recipient of property subject to a power of appointment is the "recipient" as defined in s. 733.817(1)(i), F.S. If those interests are paid to the estate or a trust, and subsequently disposed of pursuant to the will or trust, the tax on them is to be apportioned in the manner provided for interests passing from the estate or the trust. Property passing under a general power of appointment to the decedent's creditors (or the creditors of the decedent's estate) benefits the estate and is treated as if it were appointed to the estate.

Common Instrument Construction

Under s. 733.817(5)(h)2., F.S., a decedent's will and revocable trust are construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument for the purpose of apportioning tax to recipients of residuary and non-residuary interests under the provisions regarding wills, trusts and protected homesteads. The statute applies to a will and revocable trust in which one does not pour into the other, an application that serves no purpose.

For estates of decedents dying on or after July 1, 2015, the bill requires that that a decedent's will and revocable trust (or two revocable trusts, if applicable) must pour into one another for the common instrument construction to apply. The purpose of this provision is to determine which interests are in effect pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly.

Updates in Response to Changes in Federal Tax Law

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.[21] That federal legislation phased out over a 5-year period, starting in 2002, the credit for state death taxes and effectively eliminated the Florida estate tax. The credit was replaced by a deduction for state death taxes.[22] This bill reflects the changes in federal law as follows:

- The definition of "net tax" is amended to take into account the deduction for state death taxes that replaced the credit for state death taxes. Additionally, section 733.817(2)(c), F.S. was created to allocate the state death tax deduction to the interests producing the deduction for the purpose of determining the tax attributable to the interest. This is a curative revision intended to clarify existing law and applies retroactively to all proceedings in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after July 1, 2004. It does not affect any tax payable to the state of Florida.

[20] *In re Estate of Wylie*, 342 So.2d 996 (Fla. 4th DCA 1977); *Smith v. Bank of Clearwater*, 479 So.2d 755 (Fla. 2nd DCA 1985).
[21] Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.
[22] 26 U.S.C. § 2058

- Provisions regarding the allocation of the reduction of the Florida estate tax for tax paid to others states are made contingent upon the reinstatement of the Florida estate tax.

Other Changes in Bill

- The bill defines the terms "generation skipping transfer tax" and "Section 2044 interest" as used in s. 733.817, F.S. The definitions are consistent with the terms as used in the Internal Revenue Code.[23]

- The bill provides that the generation-skipping transfer tax be apportioned in accordance with s. 2603 of the Internal Revenue Code.[24] Section 2603 provides that in the case of a taxable distribution, the tax is paid by the transferee.

- The definition of the term "tax" as used in s. 733.817, F.S. is amended to explicitly exclude any additional estate tax that may be imposed by s. 2032A(c) or s. 2057(f) of the Internal Revenue Code to recapture tax savings related to family owned farms and businesses. The payment of the recaptured tax is imposed upon the applicable beneficiaries by ss. 2032(A) and 2057 of the Internal Revenue Code and is not a part of the "tax" apportioned by s. 733.817, F.S.

- The bill fills a current gap in the law by providing that if the apportionment statute does not apportion part of the tax that was not effectively directed by a governing instrument, the court may assess liability for payment of the tax in the manner it finds equitable.

- The bill provides that taxes may only be apportioned on such part of the elective share that would pass to others but for the elective share pursuant to s. 732.2075(2), F.S., to the extent those assets do not qualify for the marital deduction. It further provides that this provision applies only to interests passing by reason of the exercise or non-exercise of a general power of appointment.

- Currently, the net tax attributable to property over which the decedent held a general power of appointment is calculated in the same manner as other property included in the measure of the tax. For estates of decedents dying on or after July 1, 2015, the bill authorizes the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate.

- The bill codifies existing law that a grant of permission or authority to pay or collect taxes is not a direction against statutory apportionment[25] and that an effective direction for payment of tax on a type of interest in a manner different from that provided in s. 733.817, F.S. is not effective as an express direction for payment of tax on other types of interests.[26]

- The bill updates references regarding notice of a petition for an order of apportionment to provide that the personal representative must give notice "in the manner of formal notice" instead of simply "formal notice" as "formal notice" is not currently required by the Florida Probate Rules.

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[23] See 26 USC §§ 2611-2612 and 26 USC § 2044

[24] The generation-skipping transfer tax is based on the value of property received by the beneficiary, i.e., net of the estate tax charged against that property. Accordingly, the estate tax apportionment provisions must be determined first. Section 733.817, F.S., does not currently give any guidance on this matter.

[25] *Nations Bank v. Brenner,* 756 So. 2d 203 (Fla. 3d DCA 2000); *In re Estate of McClaran*, 811 So.2d 799 (Fla. 2d DCA 2002).

[26] *In re Estate of McClaran*, 811 So2d. 799 (Fla. 2d DCA 2002).

Except as otherwise noted in this analysis, the bill applies retroactively to all estate proceedings pending on July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.

B. SECTION DIRECTORY:

Section 1 amends s. 733.817, F.S., relating to the apportionment of estate taxes.

Section 2 provides for applicability and retroactive application.

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 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 will have a direct economic impact on the beneficiaries of a Florida decedent's estate if the estate is subject to the federal estate tax or the estate tax of another state. The tax liability will be increased for some interests, while it will decrease or be eliminated for others.

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 takes effect on July 1, 2015, and contains a provision applying portions of the bill retroactively to estate proceedings pending on or commenced after that date in which the apportionment of taxes has not been finally determined or agreed.

Retroactive application of a statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.[27]

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.[28] The first prong of the test appears to clearly be met by Section 2 of the bill, which contains 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.[29] It must be an immediate, fixed right of present or future enjoyment.[30]

"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."[31]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The reference to the year 2004 at line 643 should perhaps reference the year 2005.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[27] *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1216 (Fla. 2nd DCA 2004).
[28] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999)
[29] *R.A.M.* at 1218.
[30] *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).
[31] *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

A bill to be entitled

An act relating to estates; amending s. 733.817, F.S.; revising and providing definitions; revising provisions for allocation of the estate tax, apportionment of the net tax attributable to specified interests, and requirements for determining how specific interests are passed for purposes of determination of net tax; providing retroactive applicability; providing an effective date.

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

Section 1. Section 733.817, Florida Statutes, is amended to read:

733.817 Apportionment of estate taxes.—

(1) DEFINITIONS.—For purposes of this section:

(a) "Fiduciary" means a person other than the personal representative in possession of property included in the measure of the tax who is liable to the applicable taxing authority for payment of the entire tax to the extent of the value of the property in possession.

(b) "Generation-skipping transfer tax" means the generation-skipping transfer tax on direct skips at death and excludes the generation-skipping transfer tax on taxable distributions or taxable terminations. The terms "direct skip," "taxable distribution," and "taxable termination" have the same

meanings as provided in the Internal Revenue Code.

(c) ~~(b)~~ "Governing instrument" means a will, trust agreement, or any other document that controls the transfer of property ~~an asset~~ on the occurrence of the event with respect to which the tax is being levied.

(d) ~~(c)~~ "Gross estate" means the gross estate, as determined by the Internal Revenue Code with respect to the federal estate tax and the Florida estate tax, and as that concept is otherwise determined by the estate, inheritance, or death tax laws of the particular state, country, or political subdivision whose tax is being apportioned.

(e) ~~(d)~~ "Included in the measure of the tax" means that for each separate tax that an interest may incur, only interests included in the measure of that particular tax are considered. The term "included in the measure of the tax" does not include:

1. Any interest, whether passing under the will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed. ~~The term "included in the measure of the tax" does not include~~

2. Interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts pursuant to s.

2001 of the Internal Revenue Code ~~with respect to the federal estate tax. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed~~.

3. Gift taxes included in the gross estate pursuant to s. 2035 of the Internal Revenue Code and the portion of any intervivos transfer included in the gross estate pursuant to s. 529 of the Internal Revenue Code, notwithstanding inclusion in the federal gross estate.

(f) ~~(e)~~ "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time.

(g) ~~(f)~~ "Net tax" means the net tax payable to the particular state, country, or political subdivision whose tax is being apportioned, after taking into account all credits against the applicable tax except as provided in this section. With respect to the federal estate tax, "net tax" is determined after taking into account all credits against the tax except for the credit for foreign death taxes and except for the credit or deduction for state tax taxes imposed by states other than Florida.

(h) ~~(g)~~ "Nonresiduary devise" means any devise that is not a residuary devise.

(i) ~~(h)~~ "Nonresiduary interest" in connection with a trust means any interest in a trust which is not a residuary interest.

(j) ~~(i)~~ "Recipient" means, with respect to property or an interest in property included in the gross estate, an heir at

law in an intestate estate, devisee in a testate estate, beneficiary of a trust, beneficiary of a life ~~an~~ insurance policy, annuity, or other contractual right, surviving tenant, taker as a result of the exercise or in default of the exercise of a general power of appointment, person who receives or is to receive the property or an interest in the property, or person in possession of the property, other than a creditor.

(k) ~~(j)~~ "Residuary devise" has the meaning set forth in s. 731.201.

(l) ~~(k)~~ "Residuary interest," in connection with a trust, means an interest in the assets of a trust which remain after provision for any distribution that is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount.

(m) ~~(l)~~ "Revocable trust" means a trust as described in s. 733.707(3).

(n) "Section 2044 interest" means an interest included in the measure of the tax by reason of s. 2044 of the Internal Revenue Code.

(o) ~~(m)~~ "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(p) ~~(n)~~ "Tax" means any estate tax, inheritance tax, generation-skipping ~~generation-skipping~~ transfer tax, or other tax levied or assessed under the laws of this or any other state, the United States, any other country, or any political

subdivision of the foregoing, as finally determined, which is imposed as a result of the death of the decedent~~t, including, without limitation, the tax assessed pursuant to s. 4980A of the Internal Revenue Code~~. The term also includes any interest and penalties imposed in addition to the tax. Unless the context indicates otherwise, the term "tax" means each separate tax. However, the term "tax" does not include any additional estate tax imposed by s. 2032A(c) or s. 2057(f) of the Internal Revenue Code or any corresponding state estate, inheritance, or death tax. The additional estate tax shall be apportioned as provided in s. 2032A or s. 2057 of the Internal Revenue Code.

(q)~~(o)~~ "Temporary interest" means an interest in income or an estate for a specific period of time or for life or for some other period controlled by reference to extrinsic events, whether or not in trust.

(r)~~(p)~~ "Tentative Florida tax" with respect to any property means the net Florida estate tax that would have been attributable to that property if no tax were payable to any other state in respect of that property.

(s)~~(q)~~ "Value" means the pecuniary worth of the interest involved as finally determined for purposes of the applicable tax after deducting any debt, expense, or other deduction chargeable to it for which a deduction was allowed in determining the amount of the applicable tax. A lien or other encumbrance is not regarded as chargeable to a particular interest to the extent that it will be paid from other

interests. The value of an interest shall not be reduced by reason of the charge against it of any part of the tax, except as provided in paragraph (3)(a).

(2) ALLOCATION OF TAX.—Except as otherwise effectively directed by the governing instrument, ~~An interest in protected homestead shall be exempt from the apportionment of taxes.~~

~~(3)~~ the net tax attributable to the interests included in the measure of each tax shall be determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax. Notwithstanding the foregoing:

(a) The net tax attributable to Section 2044 interests ~~included in the measure of the tax by reason of s. 2044 of the Internal Revenue Code~~ shall be determined in the manner provided for the federal estate tax in s. 2207A of the Internal Revenue Code, and the amount so determined shall be deducted from the tax to determine the net tax attributable to all other ~~remaining~~ interests included in the measure of the tax.

(b) The foreign tax credit allowed with respect to the federal estate tax shall be allocated among the recipients of interests finally charged with the payment of the foreign tax in reduction of any federal estate tax chargeable to the recipients of the foreign interests, whether or not any federal estate tax is attributable to the foreign interests. Any excess of the foreign tax credit shall be applied to reduce proportionately the net amount of federal estate tax chargeable to the remaining

recipients of the interests included in the measure of the federal estate tax.

(c) The reduction in the net tax attributable to the deduction for state death taxes allowed by s. 2058 of the Internal Revenue Code shall be allocated to the recipients of the interests that produced the deduction. For purposes of this paragraph, the reduction in the net tax shall be calculated in the manner provided for interests other than those described in paragraph (a).

(d) ~~(c)~~ The reduction in the Florida tax, if one is imposed, on the estate of a Florida resident for tax paid to other states shall be allocated as follows:

1. If the net tax paid to another state is greater than or equal to the tentative Florida tax attributable to the property subject to tax in the other state, none of the Florida tax shall be attributable to that property.

2. If the net tax paid to another state is less than the tentative Florida tax attributable to the property subject to tax in the other state, the net Florida tax attributable to the property subject to tax in the other state shall be the excess of the amount of the tentative Florida tax attributable to the property over the net tax payable to the other state with respect to the property.

3. Any remaining net Florida tax shall be attributable to property included in the measure of the Florida tax exclusive of property subject to tax in other states.

4. The net federal tax attributable to the property subject to tax in the other state shall be determined as if it were located in that ~~the~~ state.

(e) ~~(d)~~ The net tax attributable to a temporary interest, if any, shall be regarded as attributable to the principal that supports the temporary interest.

(3) ~~(4)(a)~~ APPORTIONMENT OF TAX.—Except as otherwise effectively directed by the governing instrument, the net tax attributable to each interest shall be apportioned as follows:

(a) Generation-skipping transfer tax.—Any federal or state generation-skipping transfer tax shall be apportioned in the manner provided in s. 2603 of the Internal Revenue Code after application of the remaining provisions of this subsection to taxes other than the generation-skipping transfer tax.

(b) Section 2044 interests.—The net tax attributable to Section 2044 interests shall be apportioned among the recipients of the Section 2044 interests in the proportion that the value of each Section 2044 interest bears to the total of all Section 2044 interests. The net tax apportioned by this paragraph to Section 2044 interests that pass in the manner described in paragraph (c) or paragraph (d) shall be apportioned to the Section 2044 interests in the manner described in those subsections before the apportionment of the net tax attributable to the other interests passing as provided in those paragraphs. The net tax attributable to the interests other than the Section 2044 interests that pass in the manner described in paragraph

(c) or paragraph (d) shall be apportioned only to the other interests pursuant to those subsections ~~if the Internal Revenue Code, including, but not limited to, ss. 2032A(c)(5), 2206, 2207, 2207A, 2207B, and 2603, applies to apportion federal tax against recipients of certain interests, all net taxes, including taxes levied by the state attributable to each type of interest, shall be apportioned against the recipients of all interests of that type in the proportion that the value of each interest of that type included in the measure of the tax bears to the total of all interests of that type included in the measure of the tax~~.

~~(b) The provisions of this subsection do not affect allocation of the reduction in the Florida tax as provided in this section with respect to estates of Florida residents which are also subject to tax in other states.~~

~~(5) Except as provided above or as otherwise directed by the governing instrument, the net tax attributable to each interest shall be apportioned as follows:~~

(c)~~(a)~~ Wills.—For property passing under the decedent's will, in the following order of priority:

1. The net tax attributable to nonresiduary devises shall be charged to and paid from the residuary estate whether or not all interests in the residuary estate are included in the measure of the tax. If the residuary estate is insufficient to pay the net tax attributable to all nonresiduary devises, the balance of the net tax attributable to nonresiduary devises

shall be apportioned among the recipients of the nonresiduary devises in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax.

2. The net tax attributable to residuary devises shall be apportioned among the recipients of the residuary devises included in the measure of tax in the proportion that the value of each residuary devise included in the measure of the tax bears to the total of all residuary devises included in the measure of the tax. If the residuary estate is insufficient to pay the net tax attributable to all residuary devises, the balance of the net tax attributable to residuary devises shall be apportioned among the recipients of the nonresiduary devises in the proportion that the value of each nonresiduary devise included in the measure of the tax bears to the total of all nonresiduary devises included in the measure of the tax.

(d) ~~(b)~~ Trusts.—For property passing under the terms of any trust other than a trust created in the decedent's will, in the following order of priority:

1. The net tax attributable to nonresiduary interests of the trust shall be charged to and paid from the residuary portion of the trust, whether or not all interests in the residuary portion are included in the measure of the tax. If the residuary portion ~~of the trust~~ is insufficient to pay the net tax attributable to all nonresiduary interests, the balance of the net tax attributable to nonresiduary interests shall be

apportioned among the recipients of the nonresiduary interests in the proportion that the value of each nonresiduary interest included in the measure of the tax bears to the total of all nonresiduary interests included in the measure of the tax.

2. The net tax attributable to residuary interests of the trust shall be apportioned among the recipients of the residuary interests of the trust included in the measure of the tax in the proportion that the value of each residuary interest included in the measure of the tax bears to the total of all residuary interests of the trust included in the measure of the tax. If the residuary portion is insufficient to pay the net tax attributable to all residuary interests, the balance of the net tax attributable to residuary interests shall be apportioned among the recipients of the nonresiduary interests in the proportion that the value of each nonresiduary interest included in the measure of the tax bears to the total of all nonresiduary interests included in the measure of the tax.

Except as provided in paragraph (g), this paragraph applies separately for each trust.

(e) ~~(c)~~ Protected homestead, exempt property, and family allowance.—

1. The net tax attributable to an interest in protected homestead, exempt property, and the family allowance as determined under s. 732.403 shall be apportioned against the recipients of other interests in the estate or passing under any

revocable trust in the following order of priority:

a.~~1.~~ Class I: Recipients of interests passing by intestacy ~~not disposed of by the decedent's will or revocable trust~~ that are included in the measure of the federal estate tax.

b.~~2.~~ Class II: Recipients of residuary devises, ~~and~~ residuary interests, and pretermitted shares pursuant to ss. 732.301 and 732.302 that are included in the measure of the federal estate tax.

c.~~3.~~ Class III: Recipients of nonresiduary devises and nonresiduary interests that are included in the measure of the federal estate tax.

2. Any ~~The~~ net tax apportioned to a class~~, if any,~~ pursuant to this paragraph shall be apportioned among each recipient ~~the recipients~~ in the class in the proportion that the value of the interest of each bears to the total value of all interests included in that class. Tax may not be apportioned under this paragraph to the portion of any interest applied in satisfaction of the elective share whether or not included in the measure of the tax. For purposes of this paragraph, if the interests described in s. 732.2075(1) exceed the amount of the elective share, the elective share shall be treated as satisfied first from interests other than those described in classes I, II, and III and, to the extent those interests are insufficient to satisfy the elective share, from the interests passing to or for the benefit of the surviving spouse described in classes I, II, and III, beginning with those described in class I, until

the elective share is satisfied. This paragraph has priority over paragraphs (a) and (h).

3. The balance of the net tax attributable to any interest in protected homestead, exempt property, and the family allowance as determined under s. 732.403 not apportioned under this paragraph shall be apportioned to the recipients of those interests included in the measure of the tax in the proportion that the value of each bears to the total value of those interests included in the measure of the tax.

(f) Construction.—For purposes of this subsection:

1. If the decedent's estate is the beneficiary of a life insurance policy, annuity, or contractual right included in the decedent's gross estate or is the taker as a result of the exercise or default in exercise of a general power of appointment held by the decedent, that interest shall be regarded as passing under the terms of the decedent's will for the purposes of paragraph (c) or by intestacy if not disposed of by will. Additionally, any interest included in the measure of the tax by reason of s. 2041 of the Internal Revenue Code passing to the decedent's creditors or the creditors of the decedent's estate shall be regarded as passing to the decedent's estate for purposes of this subparagraph.

2. If a trust is the beneficiary of a life insurance policy, annuity, or contractual right included in the decedent's gross estate or is the taker as a result of the exercise or default in exercise of a general power of appointment held by

the decedent, that interest shall be regarded as passing under the trust for purposes of paragraph (d).

(g) ~~(d)~~ Common instrument construction.—In the application of this subsection, paragraphs (b)-(f) ~~(a), (b), and (c)~~ shall be applied to apportion the net tax to the recipients under certain governing instruments ~~of the estate and the recipients of the decedent's revocable trust~~ as if all recipients under those instruments, other than the estate or revocable trust ~~trusts themselves~~, were taking under a common instrument. This construction applies to:

1. The decedent's will and revocable trust if either the estate or the revocable trust is a beneficiary of the other.

2. The decedent's revocable trust and any other revocable trust of the decedent if the revocable trust is a beneficiary of the other trust.

~~(e) The net tax imposed under s. 4980A of the Internal Revenue Code shall be apportioned among the recipients of the interests included in the measure of that tax in the proportion that the value of the interest of each bears to the total value of all interests included in the measure of that tax.~~

(h) ~~(f)~~ Other interests.—The net tax that is not apportioned to interests under paragraphs (b)-(g) ~~(a), (b), and (c)~~, including~~, but not limited to,~~ the net tax attributable to interests passing by intestacy, interests applied in satisfaction of the elective share pursuant to s. 732.2075(2), interests passing by reason of the exercise or nonexercise of a

general power of appointment, jointly held interests passing by survivorship, life insurance, properties in which the decedent held a reversionary or revocable interest, and annuities and contractual rights, shall be apportioned among the recipients of the remaining interests that are included in the measure of the tax in the proportion that the value of each such interest bears to the total value of all the remaining interests included in the measure of the tax.

(i) ~~(g)~~ Liability for payment of interest or penalties.—If the court finds that it is inequitable to apportion interest, penalties, or both~~,~~ in the manner provided in paragraphs (a)-(h) ~~(a)-(f)~~, the court may assess liability for the payment thereof in the manner it finds equitable.

(j) Liability for payment of tax.—If the court finds that this section does not apportion any tax that was not effectively directed by the governing instrument, the court may assess liability for the payment of the tax in the manner it finds equitable.

(4) DIRECTION AGAINST APPORTIONMENT.—

(a) Except as provided in this subsection, a governing instrument may not direct that taxes be paid from property other than that passing under the governing instrument.

(b) ~~(h)1.~~ For ~~To be effective as~~ a direction in a governing instrument to be effective to direct payment of taxes attributable to property passing under the governing instrument ~~for payment of tax~~ in a manner different from that provided in

this section, the direction must be express ~~governing instrument must direct that the tax be paid from assets that pass pursuant to that governing instrument, except as provided in this section~~.

~~2. If the decedent's will provides that the tax shall be apportioned as provided in the decedent's revocable trust by specific reference to the trust, the direction in the revocable trust shall be deemed to be a direction contained in the will and shall control with respect to payment of taxes from assets passing under both the will and the revocable trust.~~

~~3. A direction in the decedent's will to pay tax from the decedent's revocable trust is effective if a contrary direction is not contained in the trust agreement.~~

(c)~~4.~~ For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly direct ~~refer to this section, or expressly indicate~~ that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. Except as provided in paragraph (d), a direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise shall be effective to direct the payment from property passing under the governing instrument

of taxes attributable to property not passing under the governing instrument.

(d) In addition to satisfying the other provisions of this subsection:

1.a. For a direction in the decedent's will or revocable trust to be effective to waive the right of recovery provided in s. 2207A of the Internal Revenue Code for tax imposed by reason of s. 2044 of the Internal Revenue Code and any other tax imposed by Florida based on that provision of the Internal Revenue Code, the direction must expressly waive the right of recovery. An express direction that property passing under the will or revocable trust bear the tax imposed by s. 2044 of the Internal Revenue Code is an express waiver of the right of recovery provided in s. 2207A of the Internal Revenue Code. A reference to "qualified terminable interest property" or "QTIP" or property in which the decedent had a "qualifying income interest for life" is deemed to be a reference to property upon which tax is imposed by s. 2044 of the Internal Revenue Code and which is subject to the right of recovery provided in s. 2207A of the Internal Revenue Code.

b. If property is included in the gross estate pursuant to both ss. 2044 and 2041 of the Internal Revenue Code, the property is deemed to be included under s. 2044 but not s. 2041 for purposes of allocation and apportionment of the tax.

2. For a direction in the decedent's will or revocable trust to be effective to waive the right of recovery provided in

s. 2207B of the Internal Revenue Code for tax imposed by reason of s. 2036 of the Internal Revenue Code and any other tax imposed by Florida based on that provision of the Internal Revenue Code, the direction must expressly waive the right of recovery. An express direction that property passing under the will or revocable trust bear the tax imposed by s. 2036 of the Internal Revenue Code is deemed to be an express waiver of the right of recovery provided in s. 2207B. If property is included in the gross estate pursuant to both ss. 2038 and 2036 of the Internal Revenue Code, the property is deemed to be included under s. 2038 but not s. 2036 for purposes of allocation and apportionment of the tax, and there is no right of recovery under s. 2207B of the Internal Revenue Code.

3. A general statement in the decedent's will or revocable trust waiving all rights of reimbursement or recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in s. 2207A or s. 2207B of the Internal Revenue Code.

4. For a direction in a governing instrument to be effective to direct the payment of the generation-skipping transfer tax in a manner other than as provided in s. 2603 of the Internal Revenue Code and any other tax imposed by Florida based on that provision of the Internal Revenue Code, the direction must specifically reference the tax imposed by s. 2601 of the Internal Revenue Code. A reference to the "generation-skipping transfer tax" or s. 2603 of the Internal Revenue Code

is deemed to be a reference to property upon which tax is imposed by reason of s. 2601 of the Internal Revenue Code.

(e) If the decedent expressly directs by will, the net tax attributable to property over which the decedent held a general power of appointment may be determined in a manner different from that provided in subsection (2); however, the net tax attributable to that property may not exceed the difference between the total net tax determined pursuant to subsection (2) without regard to this paragraph and the total net tax that would have been payable if the value of the property subject to such power of appointment had not been included in the decedent's gross estate. If tax is attributable to one or more Section 2044 interests pursuant to subsection (2), the net tax attributable to the Section 2044 interests shall be calculated before the application of this paragraph unless the decedent expressly directs otherwise by will.

(f) If the decedent's will expressly provides that the tax is to be apportioned as provided in the decedent's revocable trust by specific reference to the revocable trust, an express direction in the revocable trust is deemed to be a direction contained in the will as well as the revocable trust.

(g) An express direction in the decedent's will to pay tax from the decedent's revocable trust by specific reference to the revocable trust is effective unless a contrary express direction is contained in the revocable trust.

(h) If governing instruments contain effective directions

that conflict as to payment of taxes, the most recently executed tax apportionment provision controls to the extent of the conflict. For the purpose of this subsection, if a will or other governing instrument is amended, the date of the codicil to the will or amendment to the governing instrument is regarded as the date of the will or other governing instrument only if the codicil or amendment contains an express tax apportionment provision or an express modification of the tax apportionment provision. A general statement ratifying or republishing all provisions not otherwise amended does not meet this condition. If the decedent's will and another governing instrument were executed on the same date, the will is deemed to be executed after the other governing instrument. The earlier conflicting governing instrument shall control as to any tax remaining unpaid after the application of the later conflicting governing instrument.

(i) A grant of permission or authority in a governing instrument to request payment of tax from property passing under another governing instrument is not a direction apportioning the tax to the property passing under the other governing instrument. A grant of permission or authority in a governing instrument to pay tax attributable to property not passing under the governing instrument is not a direction apportioning the tax to property passing under the governing instrument.

(j) This section applies to any tax remaining to be paid after the application of any effective express directions. An

effective express direction for the payment of tax on certain interests in a manner different from that provided in this section is not effective as an express direction for payment of tax on other interests included in the measure of the tax.

~~5. If there is a conflict as to payment of taxes between the decedent's will and the governing instrument, the decedent's will controls, except as follows:~~

~~a. The governing instrument shall be given effect with respect to any tax remaining unpaid after the application of the decedent's will.~~

~~b. A direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument shall be effective notwithstanding any conflict with the decedent's will, unless the tax provision in the decedent's will expressly overrides the conflicting provision in the governing instrument.~~

(5)~~(6)~~ TRANSFER OF PROPERTY.—The personal representative or fiduciary shall not be required to transfer to a recipient any property reasonably anticipated to be necessary for the payment of taxes. Further, the personal representative or fiduciary shall not be required to transfer any property to the recipient until the amount of the tax due from the recipient is paid by the recipient. If property is transferred before final apportionment of the tax, the recipient shall provide a bond or other security for his or her apportioned liability in the

amount and form prescribed by the personal representative or fiduciary.

(6)~~(7)~~ ORDER OF APPORTIONMENT.—

(a) The personal representative may petition at any time for an order of apportionment. If no administration has been commenced at any time after 90 days from the decedent's death, any fiduciary may petition for an order of apportionment in the court in which venue would be proper for administration of the decedent's estate. ~~Formal~~ Notice of the petition for an order of apportionment must be served on ~~shall be given to~~ all interested persons in the same manner as required for service of formal notice. At any time after 6 months from the decedent's death, any recipient may petition the court for an order of apportionment.

(b) The court shall determine all issues concerning apportionment. If the tax to be apportioned has not been finally determined, the court shall determine the probable tax due or to become due from all interested persons, apportion the probable tax, and retain jurisdiction over the parties and issues to modify the order of apportionment as appropriate until after the tax is finally determined.

(7)~~(8)~~ DEFICIENCY.—

(a) If the personal representative or fiduciary does not have possession of sufficient property otherwise distributable to the recipient to pay the tax apportioned to the recipient, whether under this section, the Internal Revenue Code, or the

governing instrument, if applicable, the personal representative or fiduciary shall recover the deficiency in tax so apportioned to the recipient:

1. From the fiduciary in possession of the property to which the tax is apportioned, if any; and

2. To the extent of any deficiency in collection from the fiduciary, or to the extent collection from the fiduciary is excused pursuant to subsection (8) ~~(9)~~ and in all other cases, from the recipient of the property to which the tax is apportioned, unless relieved of this duty as provided in subsection (8) ~~(9)~~.

(b) In any action to recover the tax apportioned, the order of apportionment shall be prima facie correct.

(c) In any action for the enforcement of an order of apportionment, the court shall award taxable costs as in chancery actions, including reasonable attorney ~~attorney's~~ fees, and may award penalties and interest on the unpaid tax in accordance with equitable principles.

(d) This subsection does ~~shall~~ not authorize the recovery of any tax from any company issuing life insurance included in the gross estate, or from any bank, trust company, savings and loan association, or similar institution with respect to any account in the name of the decedent and any other person which passed by operation of law on the decedent's death.

(8) ~~(9)~~ RELIEF FROM DUTY.—

(a) A personal representative or fiduciary who has the

duty under this section of collecting the apportioned tax from recipients may be relieved of the duty to collect the tax by an order of the court finding:

1. That the estimated court costs and attorney ~~attorney's~~ fees in collecting the apportioned tax from a person against whom the tax has been apportioned will approximate or exceed the amount of the recovery;

2. That the person against whom the tax has been apportioned is a resident of a foreign country other than Canada and refuses to pay the apportioned tax on demand; or

3. That it is impracticable to enforce contribution of the apportioned tax against a person against whom the tax has been apportioned in view of the improbability of obtaining a judgment or the improbability of collection under any judgment that might be obtained, or otherwise.

(b) A personal representative or fiduciary shall not be liable for failure to attempt to enforce collection if the personal representative or fiduciary reasonably believes it would have been economically impracticable.

(9) ~~(10)~~ UNCOLLECTED TAX.—Any apportioned tax that is not collected shall be reapportioned in accordance with this section as if the portion of the property to which the uncollected tax had been apportioned had been exempt.

(10) ~~(11)~~ CONTRIBUTION.—~~Nothing in~~ This section does not ~~shall~~ limit the right of any person who has paid more than the amount of the tax apportionable to that person, calculated as if

all apportioned amounts would be collected, to obtain contribution from those who have not paid the full amount of the tax apportionable to them, calculated as if all apportioned amounts would be collected, and that right is hereby conferred. In any action to enforce contribution, the court shall award taxable costs as in chancery actions, including reasonable attorney ~~attorney's~~ fees.

(11)~~(12)~~ FOREIGN TAX.—Nothing herein contained shall be construed to require the personal representative or fiduciary to pay any tax levied or assessed by any foreign country~~,~~ unless specific directions to that effect are contained in the will or other instrument under which the personal representative or fiduciary is acting.

Section 2. (1) The amendments made by this act to s. 733.817(1)(g) and (2)(c), Florida Statutes, are intended to clarify existing law and apply retroactively to all proceedings pending or commenced after July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after January 1, 2004.

(2) The amendments made by this act to s. 733.817(1)(e)3., (3)(e), (3)(g), (4)(b), (4)(c), (4)(d)1.b., (4)(e), (4)(h), and (6), Florida Statutes, apply to the estates of decedents dying on or after July 1, 2015.

(3) Except as otherwise provided in this section, the amendments made by this act to s. 733.817, Florida Statutes, are intended to clarify existing law and apply retroactively to all

proceedings pending on or after July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.

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

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Moraitis offered the following:

Amendment (with title amendment)

Between lines 12 and 13, insert:

Section 1. Paragraph (c) of subsection (2) and subsection (3) of section 733.212, Florida Statutes, is amended to read:

733.212 Notice of administration; filing of objections.—

(2) The notice shall state:

(c) That any interested person on whom a copy of the notice of administration is served must file on or before the date that is 3 months after the date of service of a copy of the notice of administration on that person any objection that challenges the validity of the will, ~~the qualifications of the personal representative,~~ the venue, ~~or~~ the jurisdiction of the court, or as otherwise provided by subsection (3). Except for estoppel based solely on a misstatement by the personal

representative as to the time period within which an objection must be filed, the 3 month time period may not be extended for any reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. Unless sooner barred by subsection (3), all objections to the validity of a will, or the venue or jurisdiction of the court must be filed not later than the earlier of entry of an order of final discharge of the personal representative or one year after service of notice of administration.

(3) Any interested person on whom a copy of the notice of administration is served must object to the validity of the will, ~~the qualifications of the personal representative,~~ the venue, or the jurisdiction of the court by filing a petition or other pleading requesting relief in accordance with the Florida Probate Rules on or before the date that is 3 months after the date of service of a copy of the notice of administration on the objecting person, or those objections are forever barred. Except for estoppel based solely on a misstatement by the personal representative as to the time period within which an objection must be filed, the 3 month time period may not be extended for any reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. Unless sooner barred under this subsection, all objections to the validity of a will, or the venue or jurisdiction of the court must be filed not later

than the earlier of one year after service of notice of administration or entry of an order of final discharge of the personal representative.

Section 2. Section 733.2123, Florida Statutes, is amended to read:

733.2123 Adjudication before issuance of letters.—A petitioner may serve formal notice of the petition for administration on interested persons. A copy of the will offered for probate must be attached to the notice. A person who is served with such notice before the issuance of letters or who has waived notice may not challenge the validity of the will, testacy of the decedent, ~~qualifications of the personal representative,~~ venue, or jurisdiction of the court, except in the proceedings before issuance of letters.

Section 3. Effective upon this act becoming a law, section 733.3101, Florida Statutes, is amended to read:

733.3101 Personal representative not qualified.—

(1) A personal representative shall resign immediately when the personal representative knows that he or she was not qualified to act at the time of appointment.

(2) Any time a personal representative who was qualified to act at the time of appointment knows or should have known that he or she would not be qualified for appointment if application for appointment were then made, the personal representative shall promptly file and serve a notice setting forth the reasons. The notice must state that any interested

person may petition to remove the personal representative. An interested person on whom a copy of the notice is served may file a petition within 30 days after service of the notice requesting the personal representative's removal.

(3) A personal representative who fails to comply with this section shall be personally liable for costs, including attorney's fees, incurred in any removal proceeding, if the personal representative is removed. The liability shall extend to any personal representative who does not know but should have known of the facts that would otherwise require the personal representative to resign under subsection (1) or file and serve notice under subsection (2). This liability shall be cumulative to any other provided by law.

(4) As used in this section, the term "qualified" means qualified under ss. 733.302-733.305.

Section 4. Effective upon this act becoming a law, section 733.504, Florida Statutes, is amended to read:

733.504 Removal of personal representative; causes for removal.—

(1) A personal representative shall be removed and the letters revoked if he or she was not qualified to act at the time of appointment.

(2) A personal representative may be removed and the letters revoked for any of the following causes~~, and the removal shall be in addition to any penalties prescribed by law~~:

(a)~~(1)~~ Adjudication that the personal representative is

incapacitated.

(b) ~~(2)~~ Physical or mental incapacity rendering the personal representative incapable of the discharge of his or her duties.

(c) ~~(3)~~ Failure to comply with any order of the court, unless the order has been superseded on appeal.

(d) ~~(4)~~ Failure to account for the sale of property or to produce and exhibit the assets of the estate when so required.

(e) ~~(5)~~ Wasting or maladministration of the estate.

(f) ~~(6)~~ Failure to give bond or security for any purpose.

(g) ~~(7)~~ Conviction of a felony.

(h) ~~(8)~~ Insolvency of, or the appointment of a receiver or liquidator for, any corporate personal representative.

(i) ~~(9)~~ Holding or acquiring conflicting or adverse interests against the estate that will or may interfere with the administration of the estate as a whole. This cause of removal shall not apply to the surviving spouse because of the exercise of the right to the elective share, family allowance, or exemptions, as provided elsewhere in this code.

(j) ~~(10)~~ Revocation of the probate of the decedent's will that authorized or designated the appointment of the personal representative.

(k) ~~(11)~~ Removal of domicile from Florida, if domicile was a requirement of initial appointment.

(l) ~~(12)~~ The personal representative was qualified to act at the time of appointment but would not now be entitled to

appointment.

(3) Removal pursuant to this section shall be in addition to any penalties prescribed by law.

Section 5. (1) The amendments made by this act to s. 733.212, Florida Statutes, apply to proceedings filed on or after July 1, 2015.

(2) The amendments made by this to s. 733.3101 and s. 733.504, Florida Statutes, apply to proceedings pending on the date this act becomes a law.

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

Remove line 2 and insert:

An act relating to estates; amending s. 733.212, F.S.; revising the content of a notice of administration; providing that the time to file certain objections to a notice of administration may not be extended; providing an exception; specifying the time that all objections to the validity of the will, venue, or jurisdiction of the court must be filed; amending s. 733.2123, F.S.; requiring that a copy of the will be attached to a formal notice of the petition for administration; amending s. 733.3101, F.S.; requiring a personal representative to resign under certain circumstances; requiring a personal representative to provide notice if unqualified; specifying contents of notice; authorizing interested persons to petition for the removal of unqualified personal representative; defining the term

"qualified"; amending s. 733.504, F.S.; requiring that a personal representative who was unqualified at the time of appointment be removed and have his or her letters of administration revoked; providing that a previously qualified personal represented may be removed if he or she is no longer entitled to appointment; providing for applicability; amending s. 733.817, F.S.;

Amendment No. 2

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Moraitis offered the following:

Amendment

Remove lines 638-647 and insert:

Section 2. (1) Section 733.817(1)(g) and (2)(c), Florida Statutes, are intended to clarify existing law and apply retroactively to all proceedings pending or commenced after July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after January 1, 2005.

(2) Section 733.817(1)(e)3., (3)(e), (3)(g), (4)(b), (4)(c), (4)(d)1.b., (4)(e), (4)(h), and (6), Florida Statutes, apply to the estates of decedents dying on or after July 1, 2015.

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Moraitis offered the following:

Amendment (with title amendment)

Between lines 653 and 654, insert:

Section 3. Subsection (4) of section 733.106, Florida Statutes, is amended to read:

733.106 Costs and attorney's fees.—

(4)(a) When costs and attorney's fees are to be paid from the estate pursuant to subsections (1)-(3), s. 733.6171(4), s. 736.1005, or s. 736.1006, the court, in its discretion, may direct from what part of the estate they shall be paid. If the court directs an assessment against a person's part of the estate and that part is insufficient to fully pay the assessment, the court may direct payment from the person's part of a trust, if any, if a pourover will is involved and the matter is interrelated with the trust. All or any part of costs

and attorney's fees to be paid from the estate may be assessed against one or more person's part of the estate in such proportions as the court finds to be just and proper.

(b) The court in the exercise of its discretion may consider the following factors:

1. The relative impact of an assessment on the estimated value of each person's part of the estate;

2. The amount of costs and attorney's fees to be assessed against a person's part of the estate;

3. The extent to which a person whose part of the estate is to be assessed, individually or through counsel, actively participated in the proceeding;

4. The potential benefit or detriment to a person's part of the estate expected from the outcome of the proceeding;

5. The relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the estate is to be assessed;

6. Whether a person whose part of the estate is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections;

7. Whether a person whose part of the estate is to be assessed unjustly caused an increase in the amount of attorney's fees and costs incurred by the personal representative or other interested persons in connection with the proceeding; and

8. Any other relevant fact, circumstance or equity.

(c) The court may assess a person's part of the estate without finding that the person engaged in bad faith, wrongdoing or frivolousness.

Section 4. Subsection (2) of section 736.1005, Florida Statutes, is amended to read:

736.1005 Attorney's fees for services to the trust.—

(2)(a) When ~~Whenever~~ attorney's fees are to be paid from ~~out of~~ the trust pursuant to subsection (1) or s. 736.1007(5)(a), or when the court assesses attorney's fees against a person's part of an estate under s. 733.106(4) involving a pourover will and the matter is interrelated with the trust but the person's part of the estate is insufficient to fully pay the assessment, the court, in its discretion, may direct from what part of the trust the fees shall be paid. All or any part of attorney's fees to be paid from the trust may be assessed against one or more persons' part of the trust in such proportions as the court finds to be just and proper.

(b) The court in the exercise of its discretion may consider the following factors:

1. The relative impact of an assessment or not on the estimated value of each person's part of the trust;

2. The amount of attorney's fees to be assessed against a person's part of the trust;

3. The extent to which a person whose part of the trust is to be assessed, individually or through counsel, actively participated in the proceeding;

4. The potential benefit or detriment to a person's part of the trust expected from the outcome of the proceeding;

5. The relative strength or weakness of the merits of the claims, defenses, or objections, if any, asserted by a person whose part of the trust is to be assessed;

6. Whether a person whose part of the trust is to be assessed was a prevailing party with respect to one or more claims, defenses, or objections;

7. Whether a person whose part of the trust is to be assessed unjustly caused an increase in the amount of attorney's fees incurred by the trustee or other persons in connection with the proceeding; and

8. Any other relevant fact, circumstance or equity.

(c) The court may assess a person's part of the trust without finding that the person engaged in bad faith, wrongdoing or frivolousness.

Section 5. Subsection (2) of section 736.1006, Florida Statutes, is amended to read:

736.1006 Costs in trust proceedings.—

(2) When ~~Whenever~~ costs are to be paid from ~~out of~~ the trust pursuant to subsection (1) or when the court assesses costs against a person's part of an estate under s. 733.106(4) involving a pourover will and the matter is interrelated with the trust but that person's part of the estate is insufficient to fully pay the assessment, the court, in its discretion, may direct from what part of the trust the costs shall be paid. All

or any part of costs to be paid from the trust may be assessed against one or more persons' part of the trust in such proportions as the court finds to be just and proper. The court in the exercise of its discretion may consider the factors set forth in s. 736.1005(2) as they relate to costs to be paid from the trust.

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

Remove line 9 and insert:

applicability; amending ss. 733.106, 736.1005, and 736.1006, F.S.; providing for payment of costs and attorney's fees in probate and trust proceedings from estate and trust assets; authorizing a court to assess any or all fees against the share of one or more persons in the estate or trust in a proportion found to be just and proper by the court; authorizing the court to consider certain factors in the exercise of its discretion; providing an effective date.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 343 (2015)

Amendment No. 4

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Moraitis offered the following:

Amendment

Remove line 654 and insert:

Section 3. Except as otherwise expressly provided in this act, and except for this section which shall take effect upon this act becoming a law, this act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 383 Private Property Rights
SPONSOR(S): Edwards, Perry and others
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm	Bond
2) Local Government Affairs Subcommittee			
3) Appropriations Committee			
4) Judiciary Committee			

SUMMARY ANALYSIS

The United States Supreme Court has held that a government cannot deny a land-use permit based on the landowner's refusal to accede to the government's demands to either turn over property or pay money to the government unless there is a nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use. Governmental exactions of this type are unconstitutional. However, because unconstitutional exactions do not qualify as an unconstitutional taking, the Fifth Amendment's mandated remedy of just compensation to the landowner is not required. Instead, the remedy is determined by the law of the cause of action on which the property owner based his or her claim.

Although federal law appears to provide a cause of action for unconstitutional exactions, it is unclear whether current Florida law that provides a cause of action for unconstitutional takings also applies to unconstitutional exactions by local and state governments and whether monetary damages would be available in such cases.

The bill creates a cause of action to recover monetary damages for landowners where local and state governmental entities impose conditions that rise to the level of unconstitutional exactions.

The bill also amends the Bert J. Harris, Jr., Private Property Act to provide that only those property owners whose real property is the subject of the action by a governmental entity may bring suit under the act and to provide that the safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered.

The fiscal impact of the bill on state and local governments is indeterminate.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Private Property Rights and Unconstitutional Exactions

In 2013, the United State Supreme Court, in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), held that a government cannot deny a land-use permit based on the landowner's refusal to accede to the government's demands to either turn over property or pay money to the government unless there is a nexus and rough proportionality between the government's demand on the landowner and the effect of the proposed land use.

The property owner in *Koontz* owned land consisting primarily of wetlands. He sought to develop a portion of his property, and as part of his proposal offered to grant a substantial conservation easement to the St. Johns River Water Management District (district). The district rejected his proposal, and informed him that his permit would be denied unless he agreed to either scale back his planned development and give the district a larger conservation easement or maintain the proposal, but hire contractors to make improvements to separate land owned by the district. The district offered to consider alternative approaches as well. The property owner believed the district's demands were unreasonable, and he sued under s. 373.617, F.S., which allows property owners to recover money damages in the event of a government action related to land-use permitting that is an unreasonable exercise of the state's police power that constitutes a taking without just compensation.

The Supreme Court's decision regarding the constitutionality of the exaction in *Koontz* was an extension of two prior cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.[1]

These holdings are based on the doctrine of unconstitutional conditions, which prohibits the government from denying a benefit to a person because he or she exercises or vindicates a constitutional right.[2] The Court explained that "[e]xtortionate demands for property in the land-use permitting context run afoul of the [Fifth Amendment] Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[3]

Of particular significance to the bill, the *Koontz* court found that while the government's conditions unconstitutionally burdened the landowner's Fifth Amendment rights, no constitutional taking has occurred that qualifies for the constitutionally mandated remedy of just compensation to the landowner. Instead, the Court left it up to the states to determine what remedies would be available to a landowner who has been subject to an unconstitutional demand but no actual taking has occurred.[4] The Court explained:

> Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no

[1] *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.
[2] *Koontz*, 133 S. Ct. at 2594.
[3] *Id.* at 2596.
[4] *Id.* at 2597.

> taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.[5]

Consequently, the Court left unanswered the question of whether the landowner in *Koontz* could recover damages for unconstitutional conditions claims predicated on the Takings Clause because the landowner's claim was based on Florida law, s. 373.617, F.S.[6] Specifically, because s. 373.617, F.S., allows for damages when a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation" it is a question of state law as to whether that provision covers an unconstitutional conditions claims.[7]

Remedies for Unconstitutional Conditions Claims

Currently, while federal law provides a cause of action for unconstitutional conditions claims,[8] it is unclear what type of damages would be recoverable under federal law. As noted above, s. 373.617, F.S., allows for monetary damages to be awarded to a landowner when a circuit court determines a state agency's action is "an unreasonable exercise of the state's police power constituting a taking without just compensation." However, because this provision applies to takings, it is unclear whether it provides a cause of action for monetary damages for unconstitutional conditions claims, also known as unconstitutional exactions, predicated on the Takings Clause where no taking has occurred.[9]

The bill creates s. 70.45, F.S., to provide a cause of action and monetary damages for landowners in cases of unconstitutional exactions by governmental entities. An "unconstitutional exaction" is defined as

> a permitting condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate state interest and is not roughly proportionate to the harm the governmental entity seeks to avoid, minimize, or mitigate.

The bill defines the terms "government entity" consistent with the current definition in ch. 70, F.S.,[10] and it defines the terms "property owner" and "real property" consistent with the amended definitions in ch. 70, F.S.[11]

The bill provides that a property owner may bring an action to recover damages caused by an unconstitutional exaction in addition to any other remedies that may be available in law or equity. A property owner who prevails in such an action may be awarded prejudgment interest, reasonable attorney fees and costs, and compensatory damages.[12]

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[5] *Id.*
[6] *Id.*
[7] *Id.* at 2597-98.
[8] *See O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U S. 712 (1996)
[9] Article I, s. 21 of the Florida Constitution provides "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." "This provision was intended to give life and vitality to the maxim: "For every wrong there is a remedy."" *Swain v. Curry*, 595 So. 2d 168, 174 (Fla. 1st DCA 1992) (citing *Holland v. Mayes*, 155 Fla. 129, 19 So. 2d 709 (1944)).
[10] Section 70.001(3)(c) defines "government entity" to include "an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority." It does not include the United States or any of its agencies, or an agency of the state or a local government when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.
[11] *See* Limitation of Application discussion below.
[12] Compensatory damages, also called actual damages, are awarded to compensate and make whole the prevailing party for any damages incurred as a result of the defendant's conduct.

Bert J. Harris, Jr., Private Property Rights Protection Act

Limitation of Application of the Bert J. Harris, Jr., Private Property Rights Protection Act

In 1995, the Florida Legislature enacted the Bert J. Harris, Jr., Private Property Rights Protection Act[13] (act) to provide a new cause of action for private property owners whose real property has been inordinately burdened by a specific action[14] of a governmental entity that may not rise to the level of a "taking" under the State or Federal Constitutions.[15] The inordinate burden can apply to either an existing use of real property or a vested right to a specific use.[16]

For the purposes of the act, the term "property owner" is defined as "the person who holds legal title to the real property at issue."[17] "Real property" is likewise defined as "land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest."[18]

The bill amends the definitions of "property owner" and "real property" in the act to provide that only those property owners whose real property is the subject of the action by a government entity may bring suit under the act.[19]

Safe Harbor Provisions for Settlement Agreements

Currently, the act provides for a mandatory presuit procedure in which a property owner must present written notice of his or her claim to the governmental entity at least 150 days prior to filing a lawsuit. During that 150 day period,[20] the governmental entity must make a written settlement offer.[21]

If the parties enter into a settlement agreement that would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance that would otherwise apply to the property, the agreement must protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the regulation from inordinately burdening the property.[22] If the settlement agreement would have the effect of contravening the application of a statute that would otherwise apply to the property, the parties must file an action in the circuit court seeking approval of the settlement agreement "to ensure that the relief granted protects the public interest served by the statute . . . and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."[23] These safe harbor provisions allows settlement terms that provide for the property to be immune from the application of contrary statues and local regulations.[24]

Recently, a Florida appellate court affirmed the denial of a settlement agreement between a property owner and governmental entity on the grounds that the parties failed to enter into the settlement agreement within the 150-day period provided in the act and after the property owner had filed a lawsuit

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[13] Chapter 95-181, L.O.F.; codified as s. 70.001, F.S.
[14] Section 70.001(3)(d), F.S., provides that the "term 'action of a governmental entity' means a specific action of a governmental entity which affects real property, including action on an application or permit."
[15] Sections 70.001(1) and (9), F.S.
[16] Section 70 001(2), F.S.
[17] Section 70.001(2)(f), F.S. The term does not include a governmental entity.
[18] Section 70.001(2)(g), F.S.
[19] *See* Op. Att'y Gen. Fla. 95-78 (1995) (stating that the act "does not provide recovery of damages to property that is not the subject of a governmental action or regulation, but which may have incidentally suffered a diminution in value or other loss as a result of the regulation of the subject property ")
[20] If the property is classified as agricultural, the time-period is reduced to 90 days.
[21] Section 70.001(4)(c), F.S.
[22] Section 70.001(4)(d), F.S.
[23] *Id.*
[24] *Id.*

under the act.[25] The court's ruling, in effect, limits the safe harbor provision in the act to only those settlement agreements made within the time-frame specified in the act.

The bill amends the act to provide that the safe harbor provisions for settlement agreements between a property owner and governmental entity apply regardless of when the settlement agreement was entered so long as it fully resolves all claims.

Legislative Declaration of Construction

Section 70.80, F.S., currently declares that "ss. 70.001 and 70.51[26] have separate and distinct bases, objectives, applications, and processes." It further states that it is "the intent of the Legislature that ss. 70.001 and 70.51 are not to be construed in pari materia."[27]

The bill adds the new created s. 70.45, F.S., to the legislative declaration that these sections have separate and distinct objectives, applications, and processes." It also adds s. 70.45, F.S., to the statement of legislature intent that ss. 70.001 and 70.51 are not to be construed in pari materia.

B. SECTION DIRECTORY:

Section 1 amends s. 70.001, F.S., related to private property rights protection.

Section 2 creates s. 70.45, F.S., related to governmental exactions.

Section 3 amends s. 70.80, F.S., related to construction of ss. 70.001 and 70.51, F.S.

Section 4 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:

   Indeterminate. See Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

   Indeterminate. See Fiscal Comments below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

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[25] *Collier County v. Hussey*, 147 So. 3d 35 (Fla. 2d DCA 2014).

[26] Section 70.51 is the Florida Land Use and Environmental Dispute Resolution Act, which provides a mechanism for resolving land use disputes that involve development orders or governmental enforcement actions .

[27] *In pari material* is a principle of statutory construction used by the courts. It requires related statutes to be construed together "so that they will illuminate each other and are harmonized." *Grant v. State*, 832 So. 2d 770, 773 (Fla. 5th DCA 2002).

D. FISCAL COMMENTS:

Section 1 of the bill limits causes of action against government entities, and thus appears to have a positive fiscal impact on state and local governments. In that lawsuits under s. 70.001, F.S., by neighboring properties are uncommon, the fiscal impact is anticipated to be minimal.

Section 2 creates a specific cause of action related to unconstitutional takings. The measure of damages of the state law cause of action for such lawsuits is an issue currently pending before the Florida Supreme Court, and so it is possible that Section 2 of the bill may provide a different measure of damages. However, it is clear that, if there is a cost to a government, the cost is voluntary. A state or local government entity who does not insist on unconstitutional exactions will in turn never have to pay damages for an unconstitutional exaction.

The Subcommittee has not received a fiscal impact estimate from any affected party, and thus these comments are speculative.

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

n/a

A bill to be entitled

An act relating to private property rights; amending s. 70.001, F.S.; revising the terms "property owner" and "real property"; providing that any settlement agreement reached between an owner and a governmental entity applies so long as the agreement resolves all issues; creating s. 70.45, F.S.; providing legislative intent regarding unconstitutional exactions by governmental entities; defining terms; creating a cause of action for damages caused by unconstitutional exaction of property; authorizing the award of prejudgment interest and attorney fees and costs, and compensatory damages under certain circumstances; amending s. 70.80, F.S.; specifying that an action for unconstitutional exaction is not to be construed in pari materia with certain other actions; providing an effective date.

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

Section 1. Paragraphs (f) and (g) of subsection (3) and paragraphs (c) and (d) of subsection (4) of section 70.001, Florida Statutes, are amended to read:

70.001 Private property rights protection.—

(3) For purposes of this section:

(f) The term "property owner" means the person who holds

legal title to the real property that is the subject of the action by a governmental entity ~~at issue~~. The term does not include a governmental entity.

(g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner has ~~had~~ a relevant interest. The term includes only parcels that are subject to the action by a governmental entity.

(4)

(c) During the 90-day-notice period or the 150-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of developmental rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more

comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation.

11. No changes to the action of the governmental entity.

If the property owner accepts a ~~the~~ settlement offer, either before or after filing an action, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d)1. When ~~Whenever~~ a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

2. When ~~Whenever~~ a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would

otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

This paragraph applies to any settlement reached between a property owner and a governmental entity regardless of when the settlement agreement was entered so long as the agreement fully resolves all claims asserted under this section.

Section 2. Section 70.45, Florida Statutes, is created to read:

70.45 Governmental exactions.—

(1) The Legislature recognizes that governmental entities may circumstantially impose conditions on private property which are unrelated and disproportionate to the harm caused by the use requested by the property owner. The Legislature further recognizes that such conditions may rise to a level constituting an unconstitutional exaction in contradiction of the State Constitution and United States Constitution unless the relevant governmental entity can demonstrate that the conditions imposed have an essential nexus to a legitimate state interest and rough proportionality to the harm of the proposed use that the

governmental entity is seeking to avoid, minimize, or mitigate.

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

(a) "Governmental entity" has the same meaning as provided in s. 70.001(3)(c).

(b) "Property owner" has the same meaning as provided in s. 70.001(3)(f).

(c) "Real property" has the same meaning as provided in s. 70.001(3)(g).

(d) "Unconstitutional exaction" means a permitting condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate state interest and is not roughly proportionate to the harm the governmental entity seeks to avoid, minimize, or mitigate.

(3) In addition to other remedies available in law or equity, a property owner may bring an action under this section to recover damages caused by an unconstitutional exaction.

(4) A property owner who prevails in an action under this section is entitled to an award of prejudgment interest and reasonable attorney fees and costs, in addition to other compensatory damages.

Section 3. Section 70.80, Florida Statutes, is amended to read:

70.80 Construction of ss. 70.001, 70.45, and 70.51.—It is the express declaration of the Legislature that ss. 70.001, 70.45, and 70.51 have separate and distinct bases, objectives,

applications, and processes. It is therefore the intent of the Legislature that ss. 70.001, 70.45, and 70.51 are not to be construed in pari materia.

Section 4. This act shall take effect July 1, 2015.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 383 (2015)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Edwards offered the following:

Amendment

Remove lines 27-34 and insert:

legal title to the real property that is the subject of and directly impacted by the action by a governmental entity ~~at issue~~. The term does not include a governmental entity.

(g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner has ~~had~~ a relevant interest. The term includes only parcels that are the subject of and directly impacted by the action by a governmental entity.

Amendment No. 2

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Edwards offered the following:

Amendment

Remove lines 95-121 and insert:

(1) If governmental entities impose conditions on private property which are unrelated and disproportionate to the harm caused by the use requested by the property owner, such conditions may rise to a level constituting an unconstitutional exaction in contradiction of the State Constitution and United States Constitution unless the relevant governmental entity can demonstrate that the conditions imposed have an essential nexus to a legitimate public purpose and rough proportionality to the harm of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate. Where unconstitutional exactions exist in Florida, a cause of action for damages is created.

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

(a) "Governmental entity" has the same meaning as provided in s. 70.001(3)(c).

(b) "Property owner" has the same meaning as provided in s. 70.001(3)(f).

(c) "Real property" has the same meaning as provided in s. 70.001(3)(g).

(d) "Unconstitutional exaction" means a condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the harm the governmental entity seeks to avoid, minimize, or mitigate.

(3) In addition to other remedies available in law or equity, a property owner may bring an action in a court of competent jurisdiction under this section to recover damages caused by an unconstitutional exaction.