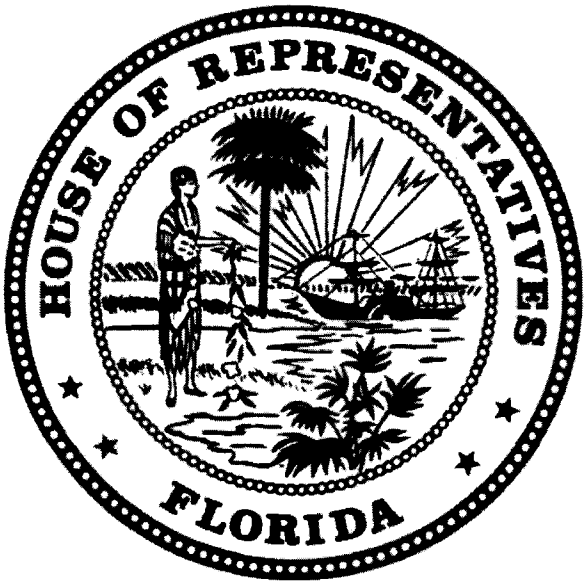

Civil Justice Subcommittee

Tuesday, March 17, 2015
8:00 AM - 11:00 AM
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, March 17, 2015 08:00 am
End Date and Time:	Tuesday, March 17, 2015 11:00 am
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

HB 137 Civil Liability of Farmers by Rader
HB 313 Digital Assets by Fant
HB 889 Health Care Representatives by Wood
HB 931 Interstate Compacts by Hill
HB 1103 Patent Infringement by Stone
HB 1211 Community Associations by Fitzenhagen

Consideration of the following proposed committee substitute(s):

PCS for HB 779 -- Rental Agreements
PCS for HB 943 -- Family Law

NOTICE FINALIZED on 03/13/2015 16:08 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 137 Civil Liability of Farmers
SPONSOR(S): Rader
TIED BILLS: None **IDEN./SIM. BILLS:** SB 158

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

SUMMARY ANALYSIS

Removing produce or crops remaining in the fields after harvest, generally by hand, is commonly referred to as "gleaning."

A farmer who allows gleaning after harvest is exempt from some civil liability arising from any injury or death resulting from the condition of the land, or from the condition of the produce or crop harvested. The exemption from civil liability does not apply if injury or death results from gross negligence, intentional act, or a known dangerous condition not disclosed by the farmer.

The bill expands coverage of the statute by removing the "after harvest" restriction, and by modifying the liability provision to provide that a farmer is not liable for a dangerous condition that is obvious to a person entering the farm.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Landowner Liability in General

A plaintiff who is injured on another person's land may sue the landowner in tort if the landowner breached a duty of care owed to the plaintiff and the plaintiff suffered damages as a result of the landowner's breach.[1] A landowner's duty to persons on his or her land is governed by the status of the injured person.

An "invitee" is a person who was invited to enter the land.[2] Florida law defines "invitation" to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs."[3] The duties owed to most invitees are the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.[4]

Farms and Gleaning

The historical use of the term "gleaning" refers to the practice of allowing persons to pick up crops in the field after the normal harvest. Most of the food available for gleaning is food that was missed by mechanical harvesting implements and thus only available for harvest by hand. Gleaning by volunteers on behalf of local charities is a time-honored tradition in farming communities.

Farm Liability in Statute

Current law as s. 768.137, F.S., provides that any farmer who, without receiving compensation, allows persons to enter his or her land for the purpose of removing produce or crops remaining in the fields *after harvest* is exempt from civil liability arising from any injury or death resulting from the condition of the land, produce, or crop. However, this exemption from civil liability does not apply if injury or death directly results from the gross negligence, intentional act, or from a known dangerous condition not disclosed by the farmer.

The statute does not apply to a farmer who allows a pre-harvest gleaning. The liability standard for such farmer would be that described above under *Landowner Liability in General.*

Effect of Proposed Changes

The bill amends s. 768.137, F.S., to:

- Remove language that limits the scope of the statute to post-harvest, thereby making the statute apply to gratuitous harvesting of crops at any time.
- Limit the provisions making the farmer liable for gross negligence or an intentional tort to only apply where the farmer committed the gross negligence or the intentional tort.

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[1] 74 Am.Jur 2d Torts s. 7 (2013).
[2] *Post v. Lunney,* 261 So.2d 147, 147-48 (Fla. 1972).
[3] Section 768.075(3)(a)1., F.S.
[4] *See, e.g., Dampier v. Morgan Tire & Auto, LLC,* 82 So.3d 204, 205 (Fla. 5th DCA 2012).

- Add that a farmer is not liable for a dangerous condition that would be obvious to a person entering on the land.
- Make grammatical and style improvements.

B. SECTION DIRECTORY:

Section 1 amends s. 768.137, F.S., regarding the limitation for civil liability for certain farmers.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to civil liability of farmers; amending s. 768.137, F.S.; revising an exemption from civil liability for farmers who gratuitously allow a person to enter upon their land for the purpose of removing farm produce or crops; revising applicability of the exemption; providing an effective date.

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

Section 1. Subsections (2) and (3) of section 768.137, Florida Statutes, are amended to read:

768.137 Definition; limitation of civil liability for certain farmers; exception.—

(2) A ~~Any~~ farmer who gratuitously allows a person ~~persons~~ to enter upon the farmer's ~~her or his own~~ land for the purpose of removing ~~any~~ farm produce or crops is ~~remaining in the fields following the harvesting thereof, shall be~~ exempt from civil liability:

(a) Arising out of any injury or the death of such person due to ~~resulting from~~ the nature or condition of the ~~such~~ land; or

(b) Arising out of any injury or death due to the nature, age, or condition of the ~~any such~~ farm produce or crops removed by such person ~~crop~~.

(3) The exemption from civil liability provided for in

this section does ~~shall~~ not apply if injury or death directly results from the gross negligence or~~,~~ intentional act of the farmer~~,~~ or the failure of the farmer to warn of a dangerous condition of which the farmer has actual knowledge unless the dangerous condition would be obvious to a person entering upon the farmer's land ~~from known dangerous conditions not disclosed by the farmer~~.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 313 Digital Assets
SPONSOR(S): Fant
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 102

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

SUMMARY ANALYSIS

The bill creates the Florida Fiduciary Access to Digital Assets Act (Act) to provide personal representatives of a decedent, agents under a power of attorney, guardians, and trustees with the ability to access the digital assets of an account holder as if these fiduciaries were the account holder. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, electronic bank statements, and other electronic communications or records.

The bill expressly states that the fiduciaries are authorized users for purposes of criminal laws prohibiting unauthorized access to electronic accounts. For purposes of privacy laws prohibiting email service providers and similar entities from disclosing an account holder's records without the account holder's consent, the bill provides that the fiduciaries are deemed to have the lawful consent of the account holders.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Many documents and records that once existed in tangible form, such as letters, contracts, and financial and bank statements, are being replaced by intangible digital assets[1] that are not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, computers, online accounts, and other devices.[2] Accordingly, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the online accounts and digital assets of a deceased or incapacitated person.

This switch to electronic records and digital assets raise a number of issues: Upon an account holder's death or incapacity, how does a fiduciary identify and locate that person's digital assets? Who then has control or ownership? How is an account accessed when no one has the decedent's password? Does the original term of service agreement control whether a successor may gain access to an account?

Resolution of these issues require balancing the fiduciary's duty to identify and access the digital assets with the Internet Service Provider's (ISP) duty to protect the original account holder's privacy and not divulge information that could be a violation of state or federal computer security laws. An additional barrier may exist in the terms-of-service agreement that the original account holder agreed to when initiating a contract with the service provider.

Criminal Laws

Federal Law

Federal laws prohibit the unauthorized access of both computer systems and certain types of protected data. The Stored Communications Act[3] establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. These privacy protections are viewed by some as being substantial barriers for family members and fiduciaries who seek to access the contents of a deceased or incapacitated user's online accounts.[4] The service providers see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. Their reasoning is that, if the Stored Communications Act applies, the online account service provider is prohibited by law from disclosing the contents of the communications and files.[5]

The Computer Fraud and Abuse Act[6] is designed to protect computers in which there is a federal interest from certain threats and forms of espionage and from being used to commit fraud.[7] The law

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[1] Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property, and client lists. The assets are generally important because of their sentimental or financial value.

[2] *See* James D. Lamm, Digital Passing: Estate Planning for Passwords and Digital Property, *Video Clip: Family Wants Access to Son's Digital Data After Death* (Sept. 10, 2014), http://www.digitalpassing.com/2014/09/10/video-clip-family-access-sons-digital-data-death/ (last visited March 11, 2015).

[3] 18 U.S.C. s. 2701 *et seq.*

[4] James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, 12 (on file with the Civil Justice Subcommittee).

[5] *Id.*

[6] 18 U.S.C. s. 2510, *et seq.*

[7] Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, 1 (Oct. 15, 2014).

imposes penalties for the unauthorized access of stored data, devices, and computer hardware.[8] The Department of Justice has stated that the Computer Fraud and Abuse Act is broad enough in scope to permit the federal government to prosecute someone if the person violates the access terms of a web site's terms-of-service agreement or usage policies.[9]

State Law

Chapter 815, F.S., the "Florida Computer Crimes Act," and Ch. 934, F.S., "Security of Communications; Surveillance," address computer related crimes and the security of communications and are modeled after the federal Stored Communications Act. Neither provision addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.[10]

The Model Uniform Law

Believing that legislation was needed to ensure that account holders or their guardians retain control of digital property, the Uniform Law Commission developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July, 2014.

Effect of the Bill

The bill creates ch. 740, F.S., consisting of ss. 740.001-740.911, F.S., the "Florida Fiduciary Access to Digital Assets Act," (Act) to provide fiduciaries with the authority to access, control, or copy digital assets and accounts. The Act only applies to four different types of fiduciaries: personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. These fiduciaries are already bound to comply with existing fiduciary duties. The provisions of the Act do not extend to family members or others who seek access to the digital assets unless they are a fiduciary.

The bill is also limited by the definition of "digital assets." The act only applies to an electronic record, which includes electronic communications, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.

Definitions

The bill creates s. 740.101, F.S., to define terms used in the Act. The majority of the terms are found in the Florida Probate Code and the Florida Powers of Attorney Act, while others are adapted from federal statutes or the uniform act. Below are some of the most frequently used new terms in the bill:

- An "account holder" is defined as a person who has entered into a terms-of-service agreement with a custodian as well as a fiduciary for that person. It also includes a deceased person who entered into the agreement during the individual's lifetime. Under this definition, the fiduciary steps into the shoes of the original account holder;
- "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person;
- "Content of an electronic communication" is defined to mean information not readily accessible to the public concerning the substance or meaning of an electronic communication;
- A "custodian" is defined as a person that carries, maintains, processes, receives, or stores a digital asset of an account holder, such as an ISP;

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[8] William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014).
[9] Lamm, *supra* note 4, at 10.
[10] The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes* (2014).

- A "digital asset" is defined as an electronic record but does not include the underlying asset or liability unless the asset or liability is an electronic record;
- "Electronic communication" is defined as a digital asset stored by an electronic communication service or carried or maintained by a remote computing service and includes the catalogue and content of an electronic communication; and
- "Electronic communication service" means a custodian that provides to the public the ability to send or receive an electronic communication, such as a web-based email provider;

Four Types of Fiduciaries Covered (Sections 4-7)

The bill creates ss. 740.201-740.501, F.S., which provide that only a fiduciary who is a personal representative of a decedent, a guardian of a ward, an agent for a principal under a power of attorney, or a trustee may be authorized to access another's digital assets. In essence, the bill provides that the fiduciary steps into the shoes of the person he or she is representing through this grant of authority to manage their digital assets. Each of the four types of fiduciaries are *generally* given the right to access:

- The content of an electronic communication sent or received by the decedent, ward, or principal if the electronic communication service or remote computing service is authorized to disclose the content under the federal law. The "content" is defined in the act as information not readily accessible to the public concerning the substance or meaning of an electronic communication. It is generally the subject line of an e-mail or the body of an e-mail or the body of other types of electronic communications that are protected by the federal law;
- The "catalogue" of electronic communications sent or received by the decedent. The "catalogue" is the non-content records that a service provider holds such as the sender's and recipient's name and address, and the date and time of the e-mail message; and
- Any other digital asset that the decedent had a right or interest in at his or her death.

The authority of a personal representative or trustee to access a decedent's or settlor's digital assets can be restricted by court order, the terms of a trust or will, or by agreement between a service provider and the account holder decedent or settlor to restrict a fiduciary's access to the digital assets. With respect to guardians, a guardian is not authorized to access a ward's digital assets unless authorized by court order.

Section 750.501, F.S., regarding the control of digital assets by a trustee, is structured slightly different than the provisions relating to other types of fiduciaries. The bill distinguishes a trustee who is an original account holder from a trustee who is not an original account holder. Unless otherwise provided by the court or the terms of the trust, a trustee that is the original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications and the content of an electronic communication. Similar to provisions in the bill for the other fiduciaries, a trustee or successor of a trust that is not an original account holder has the right to access the catalogue of electronic communications. The trustee will have access to the content of the settlor's communications *if* the electronic communication service or remote computing services is authorized to disclose them under federal law.

A Fiduciary's Access and Authority Over the Digital Assets (Section 8)

Section 740.601, F.S., created in the bill establishes the fiduciary's access to, and authority over, the digital assets of the account holder. The fiduciary remains subject to the duties and obligations of existing law and any terms-of-service agreement and is liable for any breach that occurs.

A fiduciary that is an account holder or has the right to access a digital asset:

- May take any action regarding the digital asset to the extent of the account holder, subject to any limitations in a terms of a service agreement and copyright laws;
- Is deemed to have the consent of the account holder for the custodian to divulge the content of an electronic communication under applicable privacy laws; and

- Is an authorized user under applicable computer fraud and unauthorized access laws. By defining the fiduciary as an authorized user, this section provides that the fiduciary is legally authorized to access the digital information and is not in violation of the federal or state laws prohibiting unauthorized access.

Provisions in Terms-of-Service Agreements and Access to Tangible Personal Property (Section 8)

Section 740.601(2), F.S., which is created in the bill, addresses terms-of-service agreements. A provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of an account holder is declared to be against the public policy of the state unless the account holder agreed to the provision after July 1, 2015 (the effective date of the bill). The bill effectively provides that account holders consent to the disclosure of their digital assets to a fiduciary unless they affirmatively opt out of disclosing their digital assets. The bill also declares that a choice-of-law provision in a terms-of-service agreement is unenforceable if the provision designates a law that limits a fiduciary's access to a digital asset.

Section 740.601(5), F.S., provides that a fiduciary is authorized to access digital assets stored on equipment that is the tangible property of the decedent, ward, principal, or settlor, such as a computer or cell phone. This provision shields a fiduciary from criminal and civil liability for unauthorized access of such equipment.

Compliance and Immunity (Sections 9 & 10)

Section 740.701, F.S., created in the bill provides the procedures for a fiduciary to request access to, control of, or a copy of an account holder's digital assets, and requires the custodian's compliance with the fiduciary's request within 60 days, if:

- A personal representative submits a certified copy of the letters of administration or other specified document;
- A guardian submits a certified copy of letters of plenary guardianship or a court order giving the guardian authority over the asset;
- An agent submits an original or copy of the power of attorney and a certification of the agent, under penalty of perjury, that the power of attorney is in effect;
- A trustee submits a certified copy of the trust instrument or a certification of trust authorizing the trustee to exercise authority over the asset; or
- A person entitled to receive and collect specified digital assets submits a request accompanied by a certified copy of an order of summary administration.

A custodian who relies on a certification of trust is not liable if he or she acts in reliance on those documents. However, if the custodian demands the trust instrument, he or she is liable for damages if a court determines that the custodian did not act in good faith when demanding the trust instrument. The bill also provides that a custodian is immune from liability if it acts in good faith in compliance with the bill.

Electronic Signatures in Global and National Commerce Act (Section 11)

Section 740.901, F.S., which is created by the bill, establishes the relationship between the Act and the Electronic Signatures in Global and National Commerce Act, which regulates the recognition of electronic signatures for interstate and foreign commerce, noting where this act does and does not modify the federal law.

Applicability of the Act (Section 12)

Section 740.011, F.S., created by the bill, provides that the powers granted by the Act to personal representatives, guardians, trustees, and agents applies regardless of whether the fiduciary's authority arose on, before, or after July 1, 2015 (the effective date of the bill). Additionally, the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Effective Date (Section 13)

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

B. SECTION DIRECTORY:

Section 1 creates ch. 740, F.S., consisting of ss. 740.001-740.911, F.S., to be entitled "Fiduciary Access to Digital Assets."

Section 2 creates s. 740.001, F.S., relating to the short title.

Section 3 creates s. 740.101, F.S., relating to definitions.

Section 4 creates s. 740.201, F.S., relating to the authority of a personal representative over the digital assets of a decedent.

Section 5 creates s. 740.301, F.S., relating to the authority of a guardian over the digital assets of a ward.

Section 6 creates s. 740.401, F.S., relating to the control by an agent over digital assets.

Section 7 creates s. 740.501, F.S., relating to the control by a trustee over digital assets.

Section 8 creates s. 740.601, F.S., relating to fiduciary access and authority.

Section 9 creates s. 740.701, F.S., relating to compliance.

Section 10 creates s. 740.801, F.S., relating to immunity.

Section 11 creates s. 740.901, F.S., relating to the relation to the Electronic Signatures in Global and National Commerce Act.

Section 12 creates s. 740.911, F.S., relating to applicability.

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:

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 doctrine of preemption is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, a service provider, with few exceptions, may not divulge the contents of a communication without the "lawful consent" of the originator or addressee or intended recipient or the subscriber.[11] There is no case law directly on point that addresses whether a state statute can deem that a decedent, settler, principal, or ward lawfully consents to the release of his or her communications to a fiduciary. Additionally, there does not appear to be any case law indicating whether a state statute can define who is an authorized user of an account for purposes of federal laws that prohibit the unauthorized access to certain electronic data. Therefore, it is unclear whether federal law preempts the access to digital assets authorized by the bill. However, fiduciaries are generally understood to stand in the shoes of those they represent and this bill seems consistent with the traditional functions of fiduciaries.

   Notwithstanding the foregoing, the bill, might not conflict with federal law because it provides fiduciaries with access to an account holder's electronic communication *if* authorized by federal law. Thus, the bill could be read to reserve to the courts the duty of defining what access is authorized under federal law.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 12 of the bill provides that the Act applies retroactively to the digital assets of individuals who died or became incapacitated before the bill takes effect. Consequently, the bill assumes that given the choice, these individuals would not have acted to restrict access to their digital assets.

[11] 18 U.S.C. 2702(b)(3).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to digital assets; providing a directive to the Division of Law Revision and Information; creating s. 740.001, F.S.; providing a short title; creating s. 740.101, F.S.; defining terms; creating s. 740.201, F.S.; authorizing a personal representative to have access to specified digital assets of a decedent under certain circumstances; creating s. 740.301, F.S.; authorizing a guardian to have access to specified digital assets of a ward under certain circumstances; creating s. 740.401, F.S.; authorizing an agent to have access to specified digital assets of a principal under certain circumstances; creating s. 740.501, F.S.; authorizing a trustee to have access to specified digital assets held in trust under certain circumstances; creating s. 740.601, F.S.; providing the rights of a fiduciary relating to digital assets; providing that specified provisions in a terms-of-service agreement are unenforceable or void as against the strong public policy of this state under certain circumstances; creating s. 740.701, F.S.; providing requirements for compliance for a custodian, a personal representative, a guardian, an agent, a trustee, or another person that is entitled to receive and collect specified digital assets; providing for damages if a demand for

the trust instrument is not made in good faith by a custodian; providing applicability; creating s. 740.801, F.S.; providing immunity for a custodian and its officers, employees, and agents for any action done in good faith and in compliance with ch. 740, F.S.; creating s. 740.901, F.S.; clarifying the relationship of ch. 740, F.S., to the Electronic Signatures in Global and National Commerce Act; creating s. 740.911, F.S.; providing applicability; providing an effective date.

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

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of sections 740.001-740.911, Florida Statutes, to be entitled "Fiduciary Access to Digital Assets."

Section 2. Section 740.001, Florida Statutes, is created to read:

740.001 Short title.—This chapter may be cited as the "Florida Fiduciary Access to Digital Assets Act."

Section 3. Section 740.101, Florida Statutes, is created to read:

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

(1) "Account holder" means a person that has entered into a terms-of-service agreement with a custodian and also includes

a fiduciary for such person. The term includes a deceased individual who entered into the agreement during the individual's lifetime.

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

(3) "Carry" means to engage in the transmission of electronic communications.

(4) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Content of an electronic communication" means information not readily accessible to the public concerning the substance or meaning of an electronic communication.

(6) "Court" means a circuit court of this state.

(7) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(8) "Digital asset" means an electronic record. The term does not include an underlying asset or liability to which an electronic record refers, unless the asset or liability is itself an electronic record.

(9) "Electronic" means technology having electrical,

digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) "Electronic communication" means a digital asset stored by an electronic communication service or carried or maintained by a remote computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(11) "Electronic communication service" means a custodian that provides to the public the ability to send or receive an electronic communication.

(12) "Fiduciary" means a person that is an original, additional, or successor personal representative, guardian, agent, or trustee.

(13) "Guardian" means a person that has been appointed by the court as guardian of the property of a minor or incapacitated individual. The term includes a person that has been appointed by the court as an emergency temporary guardian of the property.

(14) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(15) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(16) "Personal representative" means the fiduciary

appointed by the court to administer the estate of a deceased individual pursuant to letters of administration or an order appointing a curator or administrator ad litem for the estate.

(17) "Power of attorney" means a record that grants an agent authority to act in the place of a principal pursuant to chapter 709.

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

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

(20) "Remote computing service" means a custodian that provides to the public computer processing services or the storage of digital assets by means of an electronic communications system as defined in 18 U.S.C. s. 2510(14).

(21) "Terms-of-service agreement" means an agreement that controls the relationship between an account holder and a custodian.

(22) "Trustee" means a fiduciary that holds legal title to a digital asset pursuant to an agreement, declaration, or trust instrument that creates a beneficial interest in the settlor or others.

(23) "Ward" means an individual for whom a guardian has been appointed.

(24) "Will" means an instrument admitted to probate, including a codicil, executed by an individual in the manner

prescribed by the Florida Probate Code, which disposes of the individual's property on or after his or her death. The term includes an instrument that merely appoints a personal representative or revokes or revises another will.

Section 4. Section 740.201, Florida Statutes, is created to read:

740.201 Authority of personal representative over digital assets of a decedent.—Subject to s. 740.601(2) and unless otherwise provided by the court or the will of a decedent, a personal representative has the right to access:

(1) The content of an electronic communication sent or received by the decedent if the electronic communication service or remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b);

(2) The catalogue of electronic communications sent or received by the decedent; and

(3) Any other digital asset in which the decedent had a right or interest at his or her death.

Section 5. Section 740.301, Florida Statutes, is created to read:

740.301 Authority of guardian over digital assets of a ward.—The court, after an opportunity for hearing, may grant a guardian the right to access:

(1) The content of an electronic communication sent or received by the ward if the electronic communication service or

remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b);

(2) The catalogue of electronic communications sent or received by the ward; and

(3) Any other digital asset in which the ward has a right or interest.

Section 6. Section 740.401, Florida Statutes, is created to read:

740.401 Control by agent of digital assets.—

(1) To the extent a power of attorney expressly grants authority to an agent over the content of an electronic communication of the principal, the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic communication service or remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b).

(2) Except as provided in subsection (1) and unless otherwise provided by a power of attorney or a court order, an agent has the right to access:

(a) The catalogue of electronic communications sent or received by the principal; and

(b) Any other digital asset in which the principal has a right or interest.

Section 7. Section 740.501, Florida Statutes, is created

to read:

740.501 Control by trustee of digital assets.—Subject to s. 740.601(2) and unless otherwise provided by the court or the terms of a trust, a trustee or a successor of a trustee that is:

(1) An original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received and the content of an electronic communication; or

(2) Not an original account holder has the right to access the following digital assets held in trust:

(a) The catalogue of electronic communications sent or received by the account holder;

(b) The content of an electronic communication sent or received by the account holder if the electronic communication service or remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b); and

(c) Any other digital asset in which the account holder or any successor account holder has a right or interest.

Section 8. Section 740.601, Florida Statutes, is created to read:

740.601 Fiduciary access and authority.—

(1) A fiduciary that is an account holder or has the right under this chapter to access a digital asset of an account holder:

(a) May take any action concerning the digital asset to

the extent of the account holder's authority and the fiduciary's powers under the laws of this state, subject to the terms-of-service agreement and copyright or other applicable law;

(b) Is deemed to have the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary under applicable electronic privacy laws; and

(c) Is an authorized user under applicable computer fraud and unauthorized access laws.

(2) If a provision in a terms-of-service agreement limits a fiduciary's access to a digital asset of the account holder, the provision is void as against the strong public policy of this state unless the account holder agreed to the provision after July 1, 2015, by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement.

(3) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this chapter to the extent the provision designates a law that enforces a limitation on a fiduciary's access to a digital asset which is void under subsection (2).

(4) Except as provided in subsection (2), a fiduciary's access to a digital asset under this chapter does not violate a terms-of-service agreement, notwithstanding a provision of the agreement, which limits third-party access or requires notice of change in the account holder's status.

(5) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access the property and any digital asset stored in it and is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including the laws of this state.

Section 9. Section 740.701, Florida Statutes, is created to read:

740.701 Compliance.—

(1) If a fiduciary that has a right under this chapter to access a digital asset of an account holder complies with subsection (2), the custodian shall comply with the fiduciary's request for a record for:

(a) Access to the digital asset;

(b) Control of the digital asset; and

(c) A copy of the digital asset to the extent authorized by copyright law.

(2) If a request under subsection (1) is made by:

(a) A personal representative who has the right of access under s. 740.201, the request must be accompanied by a certified copy of the letters of administration of the personal representative, an order authorizing a curator or administrator ad litem, or other court order;

(b) A guardian that has the right of access under s. 740.301, the request must be accompanied by a certified copy of

letters of plenary guardianship of the property or a court order that gives the guardian authority over the digital asset;

(c) An agent that has the right of access under s. 740.401, the request must be accompanied by an original or a copy of the power of attorney which authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect;

(d) A trustee that has the right of access under s. 740.501, the request must be accompanied by a certified copy of the trust instrument, or a certification of trust under s. 736.1017, which authorizes the trustee to exercise authority over the digital asset; or

(e) A person that is entitled to receive and collect specified digital assets, the request must be accompanied by a certified copy of an order of summary administration issued pursuant to chapter 735.

(3) A custodian shall comply with a request made under subsection (1) not later than 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(4) A custodian that receives a certification of trust may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(5) A custodian that acts in reliance on a certification of trust without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of facts stated in the certification.

(6) A custodian that enters into a transaction in good faith and in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(7) A custodian that demands the trust instrument in addition to a certification of trust or excerpts under subsection (4) is liable for damages if the court determines that the custodian did not act in good faith in demanding the trust instrument.

(8) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

Section 10. Section 740.801, Florida Statutes, is created to read:

740.801 Immunity.—A custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this chapter.

Section 11. Section 740.901, Florida Statutes, is created to read:

740.901 Relation to Electronic Signatures in Global and National Commerce Act.—This chapter modifies, limits, or

supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

Section 12. Section 740.911, Florida Statutes, is created to read:

740.911 Applicability.—

(1) Subject to subsection (2), this chapter applies to:

(a) An agent acting under a power of attorney executed before, on, or after July 1, 2015;

(b) A personal representative acting for a decedent who died before, on, or after July 1, 2015;

(c) A guardian appointed through a guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2015; and

(d) A trustee acting under a trust created before, on, or after July 1, 2015.

(2) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 313 (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 Fant offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of sections 740.001-740.911, Florida Statutes, to be entitled "Fiduciary Access to Digital Assets."

Section 2. Section 740.001, Florida Statutes, is created to read:

740.001 Short title.—This chapter may be cited as the "Florida Fiduciary Access to Digital Assets Act.

Section 3. Section 740.101, Florida Statutes, is created to read:

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

(1) "Account holder" means a person that has entered into

a terms-of-service agreement with a custodian and also includes a fiduciary for such person. The term includes a deceased individual who entered into the agreement during the individual's lifetime.

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

(3) "Carry" means to engage in the transmission of electronic communications.

(4) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Content of an electronic communication" means information concerning the substance or meaning of an electronic communication which:

(a) Has been sent or received by an account holder;

(b) Is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(c) Is not readily accessible to the public.

(6) "Court" means a circuit court of this state.

(7) "Custodian" means a person that carries, maintains,

processes, receives, or stores a digital asset of an account holder.

(8) "Digital asset" means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

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

(10) "Electronic communication" has the same meaning as the definition in 18 U.S.C. s. 2510(12).

(11) "Electronic communication service" means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(12) "Fiduciary" means a person that is an original, additional, or successor personal representative, guardian, agent, or trustee.

(13) "Guardian" means a person that has been appointed by the court as guardian of the property of a minor or incapacitated individual. The term includes a person that has been appointed by the court as an emergency temporary guardian of the property.

(14) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(15) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or

governmental subdivision, agency, or instrumentality, or other legal entity.

(16) "Personal representative" means the fiduciary appointed by the court to administer the estate of a deceased individual pursuant to letters of administration or an order appointing a curator or administrator ad litem for the estate.

(17) "Power of attorney" means a record that grants an agent authority to act in the place of a principal pursuant to chapter 709.

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

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

(20) "Remote computing service" means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system as defined in 18 U.S.C. s. 2510(14).

(21) "Terms-of-service agreement" means an agreement that controls the relationship between an account holder and a custodian.

(22) "Trustee" means a fiduciary that holds legal title to a digital asset pursuant to an agreement, declaration, or trust instrument that creates a beneficial interest in another.

(23) "Ward" means an individual for whom a guardian has been appointed. The term includes an individual for whom an

application for the appointment of a guardian is pending.

(24) "Will" means an instrument admitted to probate, including a codicil, executed by an individual in the manner prescribed by the Florida Probate Code, which disposes of the individual's property on or after his or her death. The term includes an instrument that merely appoints a personal representative or revokes or revises another will.

Section 4. Section 740.201, Florida Statutes, is created to read:

740.201 Authority of personal representative over digital assets of a decedent.—Subject to s. 740.601(2) and unless otherwise provided by the court or the will of a decedent, the personal representative of the decedent has the right to access:

(1) The content of an electronic communication that the custodian is permitted to disclose under 47 U.S.C. s. 222 or under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b);

(2) The catalogue of electronic communications sent or received by the decedent; and

(3) Any other digital asset in which the decedent had a right or interest at his or her death.

Section 5. Section 740.301, Florida Statutes, is created to read:

740.301 Authority of guardian over digital assets of a ward.— Subject to s. 740.601(2), the court, after an opportunity for hearing, may grant a guardian the right to access:

(1) The content of an electronic communication that the custodian is permitted to disclose under 47 U.S.C. s. 222 or under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b);

(2) The catalogue of electronic communications sent or received by the ward; and

(3) Any other digital asset in which the ward has a right or interest.

Section 6. Section 740.401, Florida Statutes, is created to read:

740.401 Control by agent of digital assets.—

(1) To the extent a power of attorney expressly grants authority to an agent over the content of an electronic communication of the principal and subject to s. 740.601(2), the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under 47 U.S.C. s. 222 or under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b).

(2) Subject to s. 740.601(2) and unless otherwise provided by a power of attorney or a court order, an agent has the right to access:

(a) The catalogue of electronic communications sent or received by the principal; and

(b) Any other digital asset in which the principal has a right or interest.

Section 7. Section 740.501, Florida Statutes, is created to read:

740.501 Control by trustee of digital assets.—Subject to s. 740.601(2) and unless otherwise provided by the court or the terms of a trust, a trustee or a successor of a trustee that is:

(1) An original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received and the content of an electronic communication; or

(2) Not an original account holder has the right to access the following digital assets held in trust:

(a) The catalogue of electronic communications sent or received by the account holder;

(b) The content of an electronic communication that the custodian is permitted to disclose under 47 U.S.C. s. 222 or under the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b); and

(c) Any other digital asset in which the account holder or any successor account holder has a right or interest.

Section 8. Section 740.601, Florida Statutes, is created to read:

740.601 Fiduciary access and authority.—

(1) A fiduciary that is an account holder or has the right under this chapter to access a digital asset of an account holder:

(a) May take any action concerning the digital asset to

the extent of the account holder's authority and the fiduciary's powers under the laws of this state, subject to the terms-of-service agreement and copyright or other applicable law;

(b) Is deemed to have the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary under applicable electronic privacy laws; and

(c) Is an authorized user under applicable computer fraud and unauthorized access laws.

(2) If a provision in a terms-of-service agreement limits a fiduciary's access to a digital asset of the account holder, the provision is void as against the strong public policy of this state unless the account holder agreed to the provision by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement. A direction provided by the account holder to a custodian by an affirmative act separate from the account holder's assent to other provisions of the terms of service agreement supersedes any contrary direction in the account holder's will, trust, or power of attorney.

(3) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this chapter to the extent the provision designates a law that enforces a limitation on a fiduciary's access to a digital asset which is void under subsection (2).

(4) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access the property and any digital asset stored in it and is an authorized user for purposes of any applicable computer fraud and unauthorized access laws, including the laws of this state.

Section 9. Section 740.701, Florida Statutes, is created to read:

740.701 Compliance.—

(1) If a fiduciary that has a right under this chapter to access a digital asset of an account holder complies with subsection (2), the custodian shall comply with the fiduciary's request for a record for:

(a) Access to the digital asset;

(b) Control of the digital asset; and

(c) A copy of the digital asset to the extent authorized by copyright law.

(2) If a request under subsection (1) is made by:

(a) A personal representative who has the right of access under s. 740.201, the request must be accompanied by a certified copy of the letters of administration of the personal representative, an order authorizing a curator or administrator ad litem, or other court order;

(b) A guardian that has the right of access under s. 740.301, the request must be accompanied by a certified copy of

letters of plenary guardianship of the property or a court order that gives the guardian authority over the digital asset;

(c) An agent that has the right of access under s. 740.401, the request must be accompanied by an original or a copy of the power of attorney which authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect;

(d) A trustee that has the right of access under s. 740.501, the request must be accompanied by a certified copy of the trust instrument, or a certification of trust under s. 736.1017, which authorizes the trustee to exercise authority over the digital asset; or

(e) A person that is entitled to receive and collect specified digital assets, the request must be accompanied by a certified copy of an order of summary administration issued pursuant to chapter 735.

(3) A custodian shall comply with a request made under subsection (1) not later than 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(4) A custodian that receives a certification of trust may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(5) A custodian that acts in reliance on a certification of trust without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of facts stated in the certification.

(6) A custodian that enters into a transaction in good faith and in reliance on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(7) A custodian that demands the trust instrument in addition to a certification of trust or excerpts under subsection (4) is liable for damages if the court determines that the custodian did not act in good faith in demanding the trust instrument.

(8) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

Section 10. Section 740.801, Florida Statutes, is created to read:

740.801 Immunity.—A custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this chapter.

Section 11. Section 740.901, Florida Statutes, is created to read:

740.901 Relation to Electronic Signatures in Global and National Commerce Act.—This chapter modifies, limits, or

supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

Section 12. Section 740.911, Florida Statutes, is created to read:

740.911 Exception for anonymous accounts.—

(1) Nothing in this chapter prevents any person from opening an anonymous account.

(2) The custodian of an anonymous account is not required to provide a fiduciary with access to the anonymous account unless the fiduciary establishes by clear and convincing evidence:

(a) That the owner of the anonymous account is deceased;

(b) That the anonymous account belonged to a particular, identifiable, decedent; and

(c) That the fiduciary has legal authority over the estate of the decedent who owned the anonymous account.

Section 13. Section 740.921, Florida Statutes, is created to read:

740.921 Applicability.—

(1) Subject to subsection (2), this chapter applies to:

(a) An agent acting under a power of attorney executed before, on, or after July 1, 2015;

(b) A personal representative acting for a decedent who

died before, on, or after July 1, 2015;

(c) A guardian appointed through a guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2015; and

(d) A trustee acting under a trust created before, on, or after July 1, 2015.

(2) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Section 14. 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:

An act relating to digital assets; providing a directive to the Division of Law Revision and Information; creating s. 740.001, F.S.; providing a short title; creating s. 740.101, F.S.; defining terms; creating s. 740.201, F.S.; authorizing a personal representative to have access to specified digital assets of a decedent under certain circumstances; creating s. 740.301, F.S.; authorizing a guardian to have access to specified digital assets of a ward under certain circumstances; creating s. 740.401, F.S.; authorizing an agent to have access to specified digital assets of a principal under certain circumstances; creating s. 740.501, F.S.; authorizing a trustee to have

access to specified digital assets held in trust under certain circumstances; creating s. 740.601, F.S.; providing the rights of a fiduciary relating to digital assets; providing that specified provisions in a terms-of-service agreement are unenforceable or void as against the strong public policy of this state under certain circumstances; creating s. 740.701, F.S.; providing requirements for compliance for a custodian, a personal representative, a guardian, an agent, a trustee, or another person that is entitled to receive and collect specified digital assets; providing for damages if a demand for the trust instrument is not made in good faith by a custodian; providing applicability; creating s. 740.801, F.S.; providing immunity for a custodian and its officers, employees, and agents for any action done in good faith and in compliance with ch. 740, F.S.; creating s. 740.901, F.S.; clarifying the relationship of ch. 740, F.S., to the Electronic Signatures in Global and National Commerce Act; creating s. 740.911, F.S.; providing applicability to an anonymous account; creating s. 740.921, F.S.; providing applicability; providing an effective date.

PCS for HB 779

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 779 Rental Agreements
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 524

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

SUMMARY ANALYSIS

Tenants are often unaware that they are renting a home in foreclosure, sometimes first discovering the foreclosure when facing a 24 hour notice of eviction. From 2009 through 2014, a federal law required the purchaser at a foreclosure sale to give a bona fide tenant at least 90 days' notice of eviction from a foreclosed home.

This bill creates a mechanism for by which a bona fide tenant must be given at least 30 days' notice of eviction from a foreclosed home.

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

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

HB 779 was referred to the Civil Justice Subcommittee and the Judiciary Committee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Foreclosure is the process by which a lender sues the borrower, selling the collateral in an attempt to satisfy the debt. In real property foreclosure, the lien holder adds parties in possession as defendants in the action, to foreclose their interests. A *lis pendens* is generally filed with the foreclosure action, and recorded in the public records,[1] giving notice that the property is in litigation. The *lis pendens* is a notice to the public that the property is subject to litigation, and anyone who takes an interest after its filing is subject to loss of that interest.[2] Florida courts also post court dockets, providing a means to use an internet search to determine whether property one intends to lease is in foreclosure. Certain internet real estate sites allow one to determine whether a home is in foreclosure.

Good practice would be for a prospective tenant to investigate the public records to be sure that the home he or she rents is not in foreclosure. In practice, prospective tenants rarely have the skills for such investigation and thus they rarely conduct such a search. Accordingly, a foreclosure can progress to the point of foreclosure sale without the tenant's knowledge of the pending action.[3] Once the property is sold in foreclosure, the tenant may be evicted summarily because the tenant's right of occupancy is dependent upon ownership of the property.[4] A tenant after foreclosure may have as little as 24 hours' notice to vacate the property pursuant to writ of possession.[5]

The matter of tenants being forced out of foreclosed homes on short notice is not unique to Florida. In the recent economic downturn, Congress passed the Protecting Tenants in Foreclosure Act of 2009,[6] a law that required the winning bidder at most foreclosure sales to honor an existing bona fide lease or, in the alternative, give the tenant at least 90 days' notice to vacate. The act expired December 31, 2014.

Effect of the Bill

The bill creates s. 83.621, F.S., regarding termination of a rental agreement after foreclosure. If a tenant is occupying residential premises that are the subject of a foreclosure sale, upon issuance of a certificate of title following the sale, the purchaser named in the certificate of title takes title to the residential premises as a landlord, subject to the rights of the tenant created by this bill.

The tenant may remain in possession for up to 30 days following the giving of a notice to vacate. The form of the notice is created in the bill.

This notice is to be delivered by mail, personal delivery, or, if the tenant is absent, by leaving a copy at the residence.[7]

If the tenant does not vacate at the end of the 30 day period, the clerk may issue a writ of possession as a part of the foreclosure action.[8]

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[1] Section 28.222, F.S.
[2] Section 48.23, F.S.
[3] Judicial sales are published in a newspaper of sufficient circulation. *See* s. 45.031, F.S.
[4] Pursuant to s. 702.10, F.S., after foreclosure sale, and the expiration of the time to contest the sale, upon affidavit that the premises have not been vacated, the "clerk shall issue to the sheriff a writ for possession."
[5] Section 702.10, F.S., references s. 83.62, F.S., which provides for 24 hours' notice of eviction.
[6] Title VII of Pub.Law 111-22, enacted May 20, 2009.
[7] Section 83.56(4), F.S.
[8] As opposed to starting an eviction action in county court.

The bill does not apply if:

- The tenant is the mortgagor in the subject foreclosure or the child, spouse, domestic partner, or parent of the mortgagor in the subject foreclosure.
- The tenant's rental agreement is not the result of an arm's-length transaction.
- The tenant's rental agreement allows the tenant to pay rent that is substantially less than the fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state, or local subsidy

B. SECTION DIRECTORY:

Section 1 creates s. 83.621, F.S., regarding termination of rental agreement upon foreclosure.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

Forcing purchasers at a foreclosure sale to be an involuntary landlord, even for a brief time, may further increase the risk assumed when buying a foreclosed property, thereby further deflating the amount persons will be willing to bid for a foreclosed property.

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:

The section number in the title and in the body are inconsistent.

The sample notice to tenant is inaccurate.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to rental agreements; creating s. 83.561, F.S.; providing application; providing for deferred execution of a writ of possession after foreclosure in certain cases; providing that a purchaser taking title to a tenant-occupied residential property following a foreclosure sale takes title to the property as a landlord; specifying conditions under which the tenant may remain in possession of the premises; prescribing the form for a 30-day notice of termination of the rental agreement; establishing requirements for delivery of the notice; providing exceptions; providing an effective date.

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

Section 1. Section 83.621, Florida Statutes, is created to read:

83.621 Termination of rental agreement upon foreclosure.--As applied to residential property:

(1) If a tenant is occupying residential premises that are the subject of a foreclosure sale, upon issuance of a certificate of title following the sale, the purchaser named in the certificate of title takes title to the residential premises as a landlord, subject to the rights of the tenant under paragraph (a).

(a) The tenant may remain in possession of the premises for 30 days following delivery of a written 30-day notice of termination.

(b) The 30-day notice of termination must be in substantially the following form:

You are hereby notified that your rental agreement is terminated effective 30 days following the date of the delivery of this notice or the end of the term specified in your written rental agreement, whichever occurs later, and that I demand possession of the premises on that date. You are still obligated to pay rent during the 30-day period or the remainder of the term of your rental agreement, in the same amount that you have been paying. Your rent must be delivered to ...(landlord's name and address)....

(c) The 30-day notice of termination shall be delivered in the same manner as provided in s. 83.56(4).

(d) At the conclusion of the 30-day notice of termination the purchaser may apply to clerk of the foreclosure court for a writ of possession.

(2) Subsection (1) does not apply if:

(a) The tenant is the mortgagor in the subject foreclosure or the child, spouse, or parent of the mortgagor in the subject foreclosure, unless the property is a multiunit residential structure and other tenants occupy units of the structure.

(b) The tenant's rental agreement is not the result of an arm's-length transaction.

(c) The tenant's rental agreement allows the tenant to pay rent that is substantially less than the fair market rent for the premises, unless the rent is reduced or subsidized due to a federal, state, or local subsidy.

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

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Jones, M. offered the following:

Amendment

Remove lines 17-19 and insert:

Section 1. Section 83.561, Florida Statutes, is created to read:

83.561 Termination of rental agreement upon foreclosure.—

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 Jones, M. offered the following:

Amendment

Remove lines 35-39 and insert:

of this notice and that I demand possession of the premises on that date. You are still obligated to pay rent during the 30-day period in the same amount that you have

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 889 Health Care Representatives
SPONSOR(S): Wood
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1224

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

SUMMARY ANALYSIS

Current law provides several methods for a person to make health care decisions, and in some instances access health information, on behalf of another person. One such method is the designation by an adult person of another adult person to act as a health care surrogate. A health care surrogate is authorized to review confidential medical information and to make health care decisions in the place of the principal. Generally, a determination of incapacity of the principal is required before the health care surrogate may act.

Because a principal may regain capacity and in some instances, especially with the elderly, may vacillate in and out of capacity, a redetermination of incapacity is frequently necessary to provide ongoing authorization for the health care surrogate to act. This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions.

This bill amends the health care surrogate law to allow appointment of a health care surrogate that may act at any time; that is, a health care surrogate who may act while an adult is still competent and able to make his or her own decisions.

This bill also creates a means for appointment of a health care surrogate for the benefit of a minor when the parents, legal custodian, or legal guardian of the minor cannot be timely contacted by a health care provider.

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

The effective date of the bill is October 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

General Background

Part II of Chapter 765, F.S., entitled "Health Care Surrogate," governs the designation of health care surrogates in the State of Florida. A health care surrogate is a competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal's incapacity.[1] Section 765.203, F.S. provides a suggested form for the designation of a health care surrogate. If an adult fails to designate a surrogate or a designated surrogate is unwilling or unable to perform his or her duties, a health care facility may seek the appointment of a proxy[2] to serve as surrogate upon the incapacity of such person.[3] A surrogate appointed by the principal or by proxy, may, subject to any limitations and instructions provided by the principal, take the following actions:[4]

- Make all health care decisions[5] for the principal during the principal's incapacity;
- Consult expeditiously with appropriate health care providers to provide informed consent, including written consent where required, provided that such consent reflects the principal's wishes or the principal's best interests;
- Have access to the appropriate medical records of the principal;
- Apply for public benefits for the principal and have access to information regarding the principal's income, assets, and financial records to the extent required to make such application;
- Authorize the release of information and medical records to appropriate persons to ensure continuity of the principal's health care; and
- Authorize the admission, discharge, or transfer of the principal to or from a health care facility.

The surrogate's authority to act commences upon a determination that the principle is incapacitated.[6] A determination of incapacity is required to be made by an attending physician.[7] If the physician evaluation finds that the principal is incapacitated and the principal has designated a health care surrogate, a health care facility will notify such surrogate in writing that her or his authority under the instrument has commenced.[8]The heath care surrogate's authority continues until a determination that the principal has regained capacity. If a principal goes in and out of capacity, a redetermination of incapacity is necessary each time before a health care surrogate may make health care decisions.[9]

This process can hinder effective and timely assistance and is cumbersome. Further, some competent persons desire the assistance of a health care surrogate with the sometimes complex task of understanding health care treatments and procedures and with making health care decisions, but may not effectively empower such persons to act on their behalf due to the restriction that a health care surrogate act only for incapacitated persons.

---

[1] s. 765.101(16), F.S.
[2] "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual. s. 765.101(15), F.S.
[3] ss. 765.202(4) and 765.401, F.S.
[4] s.765.205, F.S.
[5] "Health care decision" means: informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives; the decision to apply for private, public, government, or veterans' benefits to defray the cost of health care; the right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; and the decision to make an anatomical gift pursuant to part V of ch. 765, F.S..
[6] s. 765.204(3), F.S.
[7] s. 765.204, F.S.
[8] s. 765.204(2), F.S.
[9] s. 765.204(3), F.S.

Additionally, there is no statutory authority for a minor to designate a health care surrogate or for a health care facility to seek a proxy to serve as a health care surrogate for a minor when his or her parents, legal custodian, or legal guardian cannot be timely contacted by the health care provider.

Effect of the Bill

Health Care Surrogate for an Adult

The bill creates s. 765.202(6), F.S., to provide that an individual may elect to appoint a health care surrogate who may act while the individual is still competent to make healthcare decisions. To that end, the bill:

- Adds a legislative finding at s. 765.102(3), F.S., that some adults want a health care surrogate to assist them with making medical decisions.

- Provides that statutory provisions for review of the decision of a health care surrogate at s. 765.105, F.S., do not apply where the individual who appointed the health care surrogate is still competent.

- Amends s. 765.204, F.S., the law regarding a finding of incapacity, to require a health care facility to notify the surrogate upon a finding of incapacity. The notification requirement also requires notice to the attorney in fact if the health care facility knows of a durable power of attorney.

- Amends s. 765.205, F.S., the law regarding the responsibilities of a health care surrogate, to provide that, where a surrogate's authority or an attorney in fact's authority exists while the patient is still competent, the patient's wishes are controlling. A physician and a health care provider must, in this situation, clearly communicate to the patient about every decision made and who made it.

- Current law as s. 765.202(3), F.S., provides that an alternate health care surrogate may act where the primary surrogate is unwilling or unable to act. The bill adds that an alternate may also act where the primary surrogate is not reasonably available.

The changes to law regarding health care surrogates for adults are reflected in an amended statutory form at s. 765.203, F.S., a copy of which is appended to this analysis.

Health Care Surrogate for a Minor

In general, a minor does not have the legal right to consent to medical care or treatment. Instead, for non-emergency treatment, a parent or legal guardian must give consent. As to emergency treatment, where the parents, legal custodian or legal guardian of a minor cannot be timely contacted to give consent for medical treatment of a minor, s. 743.0645(2), F.S., sets forth a list of people who have the power to consent on behalf of the minor. There is no general statutory authority for non-emergency medical treatment of a minor without consent of a parent or legal guardian.

It is common for parents and legal guardians to go on vacation and leave their children with a caregiver, and equally common for parents and legal guardians to allow a minor to travel and stay with relatives or friends for a period of time. Lawyers routinely draft a power of attorney authorizing caregivers to consent to medical treatment of the minor, despite there being no statutory authority for such document.

The bill creates s. 765.2035, F.S., to create statutory authority for a parent or legal guardian to designate a health care surrogate who may consent to medical care for a minor. The designation must be in writing and signed by two witnesses. The designated surrogate may not be a witness.

Like a surrogate for an adult, an alternate surrogate may be appointed to act if the original surrogate is not willing, able, or reasonably available to act.

In addition to regular and emergency treatment, a health care surrogate for a minor is authorized to consent to mental health treatment unless the document specifically provides otherwise. The appointment of a health care surrogate for a minor remains in place until the termination date provided in the designation (if any), the minor reaches the age of majority, or the designation is revoked.

The bill also creates a sample form at s. 765.2038, F.S. The form is attached at the end of this analysis.

The bill amends s. 743.0645, F.S., the statute on other persons who may consent to medical care or treatment of a minor, to conform. The bill also amends that statute to recognize that a power of attorney regarding consent to authorize health care for a minor, executed between July 1, 2001 and September 30, 2015 (the day before the effective date of this bill) will be recognized as authority to consent to treatment. A designation of health care surrogate or a power of attorney is deemed to include authority to consent to surgery and/or anesthesia unless those are specifically excluded.

Other

The bill amends ss. 765.101 and 765.202, F.S., to specify that a right to consent to treatment of an individual (adult or minor) also includes the right to obtain health information regarding that individual. The bill creates s. 765.101(8), F.S., to define the term "health information" to be consistent with the Health Insurance Portability and Accountability Act (known as "HIPAA").

The bill removes references to "attending physician" in favor of the term "treating physician" or simply "physician" in statutes related to advance directives, health care surrogates, pain management, palliative care, capacity, living wills, determination of patient condition, persistent vegetative state, and anatomical gifts. This change in terminology should have no practical effect.

B. SECTION DIRECTORY:

Section 1 amends s. 743.0645, F.S., regarding persons who may consent to medical care or treatment of a minor.

Section 2 amends s. 765.101, F.S., regarding definitions.

Section 3 amends s. 765.102, F.S., regarding legislative findings and intent.

Section 4 amends s. 765.104, F.S., regarding amendment or revocation.

Section 5 amends s. 765.105, F.S., regarding review of surrogate or proxy's decision.

Section 6 amends s. 765.1103, F.S., regarding pain management and palliative care.

Section 7 amends s. 765.1105, F.S., regarding transfer of a patient.

Section 8 amends s. 765.202, F.S., regarding designation of a health care surrogate.

Section 9 amends s. 765.203, F.S., regarding suggested form of designation of a health care surrogate.

Section 10 creates s. 765.2035, F.S., regarding designation of a health care surrogate for a minor.

Section 11 creates s. 765.2038, F.S., regarding the suggested form for designation of health care surrogate for a minor.

Section 12 amends s. 765.204, F.S., regarding capacity of principal and procedure for determining.

Section 13 amends s. 765.205, F.S., regarding responsibility of the surrogate.

Section 14 amends s. 765.302, F.S., regarding the procedure for making a living will and notice to physician.

Section 15 amends s. 765.303, F.S., regarding suggested form of a living will.

Section 16 amends s. 765.304, F.S., regarding procedure for living will.

Section 17 amends s. 765.306, F.S., regarding determination of patient condition.

Section 18 amends s. 765.404, F.S., regarding persistent vegetative state.

Section 19 amends s. 765.516, F.S., regarding donor amendment or revocation of anatomical gift.

Section 20 provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill allows for appointment of a health care surrogate who may make medical decisions while a patient is still competent to make health care decisions. It is possible that the bill does not give clear direction to physicians regarding situations where the patient and the surrogate are in conflict. See lines 718-730.

The bill eliminates the term "attending physician" and creates the defined term "primary physician." The bill uses the terms "physician", "primary physician," and "treating physician" at various points.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

DESIGNATION OF HEALTH CARE SURROGATE

I, _____, designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: _____
Address: _____
Phone: _____

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: _____
Address: _____
Phone: _____

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

_____ (Initial here) Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and
2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

_____ (Initial here) Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.
2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.
3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.
4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

_____ (Initial here) Specific instructions and restrictions:

_____
_____
_____

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [_____], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [_____], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

SIGNATURES: Sign and date the form here:

date:_____ sign your name_____

address _____ print your name_____

city _____ state_____

SIGNATURES OF WITNESSES:

First witness:

print name _____

address_____

city _____ state ____

_____

signature of witness

date _____

Second witness:

print name_____

address_____

city _____ state ____

_____

signature of witness

date _____

DESIGNATION OF HEALTH CARE SURROGATE FOR MINOR

I/We, _____ the □ natural guardian(s) as defined in s. 744.301(1), Florida Statutes; □ legal custodian(s); □ legal guardian(s) [check one] of the following minor(s):

_____

_____

_____

pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: _____
Address: _____
Zip Code: _____ Phone: _____

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: _____
Address: _____
Zip Code: _____ Phone: _____

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: _____
Name: _____

Signed: _____
Date: _____

WITNESSES:
1. _____
2. _____

A bill to be entitled

An act relating to health care representatives; amending s. 743.0645, F.S.; conforming provisions to changes made by the act; amending s. 765.101, F.S.; defining terms for purposes of provisions relating to health care advanced directives; revising definitions to conform to changes made by the act; amending s. 765.102, F.S.; revising legislative intent to include reference to surrogate authority that is not dependent on a determination of incapacity; amending s. 765.104, F.S.; conforming provisions to changes made by the act; amending s. 765.105, F.S.; conforming provisions to changes made by the act; providing an exception for a patient who has designated a surrogate to make health care decisions and receive health information without a determination of incapacity being required; amending ss. 765.1103 and 765.1105, F.S.; conforming provisions to changes made by the act; amending s. 765.202, F.S.; revising provisions relating to the designation of health care surrogates; amending s. 765.203, F.S.; revising the suggested form for designation of a health care surrogate; creating s. 765.2035, F.S.; providing for the designation of health care surrogates for minors; providing for designation of an alternate surrogate; providing for decisionmaking if neither the designated surrogate nor

the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal; authorizing designation of a separate surrogate to consent to mental health treatment for a minor; providing that the health care surrogate authorized to make health care decisions for a minor is also the minor's principal's choice to make decisions regarding mental health treatment for the minor unless provided otherwise; providing that a written designation of a health care surrogate establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate; creating s. 765.2038, F.S.; providing a suggested form for the designation of a health care surrogate for a minor; amending s. 765.204, F.S.; conforming provisions to changes made by the act; providing for notification of incapacity of a principal; amending s. 765.205, F.S.; conforming provisions to changes made by the act; providing an additional requirement when a patient has designated a surrogate to make health care decisions and receive health information, or both, without a determination of incapacity being required; amending ss. 765.302, 765.303, 765.304, 765.306, 765.404, and 765.516, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Paragraph (b) of subsection (1) and paragraph (a) of subsection (2) of section 743.0645, Florida Statutes, are amended to read:

743.0645 Other persons who may consent to medical care or treatment of a minor.—

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

(b) "Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, health care surrogate designation under s. 765.2035 executed after September 30, 2015, power of attorney executed after July 1, 2001, but before October 1, 2015, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(2) Any of the following persons, in order of priority listed, may consent to the medical care or treatment of a minor who is not committed to the Department of Children and Families or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise

provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, 2015, or a person who possesses a power of attorney to provide medical consent for the minor executed before October 1, 2015. A health care surrogate designation under s. 765.2035 executed after September 30, 2015, and a power of attorney executed after July 1, 2001, but before October 1, 2015, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the health care surrogate for a minor or power of attorney.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

Section 2. Section 765.101, Florida Statutes, is amended to read:

765.101 Definitions.—As used in this chapter:

(1) "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made

pursuant to part V of this chapter.

~~(2) "Attending physician" means the primary physician who has responsibility for the treatment and care of the patient.~~

(2)~~(3)~~ "Close personal friend" means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the ~~attending or~~ treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient's health care; and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs.

(3)~~(4)~~ "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.

(4) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

(5) "Health care decision" means:

(a) Informed consent, refusal of consent, or withdrawal of

consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

(6) "Health care facility" means a hospital, nursing home, hospice, home health agency, or health maintenance organization licensed in this state, or any facility subject to part I of chapter 394.

(7) "Health care provider" or "provider" means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession.

(8) "Health information" means any information, whether oral or recorded in any form or medium, as defined in 45 C.F.R. s. 160.103 and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. s. 1320d, as amended, that:

(a) Is created or received by a health care provider, health care facility, health plan, public health authority,

employer, life insurer, school or university, or health care clearinghouse; and

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the provision of health care to the principal.

(9) ~~(8)~~ "Incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

(10) ~~(9)~~ "Informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

(11) ~~(10)~~ "Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

(12)~~(11)~~ "Living will" or "declaration" means:

(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302; or

(b) A witnessed oral statement made by the principal expressing the principal's instructions concerning life-prolonging procedures.

(13) "Minor's principal" means a principal who is a natural guardian as defined in s. 744.301(1); legal custodian; or, subject to chapter 744, legal guardian of the person of a minor.

(14)~~(12)~~ "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(15)~~(13)~~ "Physician" means a person licensed pursuant to chapter 458 or chapter 459.

(16) "Primary physician" means a physician designated by an individual or the individual's surrogate, proxy, or agent under a durable power of attorney as provided in chapter 709, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

(17)~~(14)~~ "Principal" means a competent adult executing an

advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(18) ~~(15)~~ "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual.

(19) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs.

(20) ~~(16)~~ "Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether the authority of the surrogate to make health care decisions or to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as provided in s. 765.204 ~~on behalf of the principal upon the principal's incapacity~~.

(21) ~~(17)~~ "Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

Section 3. Subsections (3) through (6) of section 765.102, Florida Statutes, are renumbered as subsections (4) through (7),

respectively, present subsections (2) and (3) are amended, and a new subsection (3) is added to that section, to read:

765.102 Legislative findings and intent.—

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, ~~medical treatment~~ upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to receive immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.

(4) ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be

respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures~~,~~ or to designate another to make the health care ~~treatment~~ decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health ~~medical~~ care.

Section 4. Subsection (1) of section 765.104, Florida Statutes, is amended to read:

765.104 Amendment or revocation.—

(1) An advance directive ~~or designation of a surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction;

(c) By means of an oral expression of intent to amend or revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

Section 5. Section 765.105, Florida Statutes, is amended

to read:

765.105 Review of surrogate or proxy's decision.—

(1) The patient's family, the health care facility, or the ~~attending~~ physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person believes:

(a) ~~(1)~~ The surrogate or proxy's decision is not in accord with the patient's known desires or ~~the provisions of~~ this chapter;

(b) ~~(2)~~ The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(c) ~~(3)~~ The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(d) ~~(4)~~ The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(e) ~~(5)~~ The surrogate or proxy has abused his or her powers; or

(f) ~~(6)~~ The patient has sufficient capacity to make his or her own health care decisions.

(2) This section does not apply to a patient who is not incapacitated and who has designated a surrogate who has

immediate authority to make health care decisions and receive health information, or both, on behalf of the patient.

Section 6. Subsection (1) of section 765.1103, Florida Statutes, is amended to read:

765.1103 Pain management and palliative care.—

(1) A patient shall be given information concerning pain management and palliative care when he or she discusses with the ~~attending~~ or treating physician, or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the patient is incapacitated, the information shall be given to the patient's health care surrogate or proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed guardian or attorney in fact must have been delegated authority to make health care decisions on behalf of the patient.

Section 7. Section 765.1105, Florida Statutes, is amended to read:

765.1105 Transfer of a patient.—

(1) A health care provider or facility that refuses to comply with a patient's advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider

or facility to commit any act which is contrary to the provider's or facility's moral or ethical beliefs, if the patient:

(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient's surrogate or proxy, unless ~~the provisions of~~ s. 765.105 applies ~~apply~~.

Section 8. Subsections (1), (3), and (4) of section 765.202, Florida Statutes, are amended, subsections (6) and (7) are renumbered as subsections (7) and (8), respectively, and a new subsection (6) is added to that section, to read:

765.202 Designation of a health care surrogate.—

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed

by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able, or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal's failure to designate an alternate surrogate shall not invalidate the designation of a surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available ~~able or willing~~ to make health care decisions on behalf of the principal and in accordance with the principal's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(6) A principal may stipulate in the document that the authority of the surrogate to receive health information or make health care decisions or both is exercisable immediately without the necessity for a determination of incapacity as provided in s. 765.204.

Section 9. Section 765.203, Florida Statutes, is amended to read:

765.203 Suggested form of designation.—A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

I, ...(name)..., designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: ...(name of health care surrogate)...
Address: ...(address)...
Phone: ...(telephone)...

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I designate as my alternate health care surrogate:

Name: ...(name of alternate health care surrogate)...
Address: ...(address)...
Phone: ...(telephone)...

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

...(Initial here)... Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care

clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

...(Initial here)... Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.

4. Decide to make an anatomical gift pursuant to part V of chapter 765, Florida Statutes.

...(Initial here)... Specific instructions and restrictions: .....
.....
.....

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all decisions that he or she has made on my behalf and matters concerning me.

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [....], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [....], MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

SIGNATURES: Sign and date the form here:

...(date)... ...(sign your name)...

...(address)... ...(print your name)...

...(city)... ...(state)...

SIGNATURES OF WITNESSES:

First witness Second witness

...(print name)... ...(print name)...

...(address)... ...(address)...

...(city)... ...(state)... ...(city)... ...(state)...

...(signature of witness)... ...(signature of witness)...

...(date)... ...(date)...

~~Name:....(Last)....(First)....(Middle Initial)....~~

~~In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:~~

~~Name:.....~~

~~Address:.....~~

~~.....~~ ~~Zip Code:.....~~

~~Phone:.....~~

~~If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:~~

~~Name:.....~~

~~Address:.....~~

~~.....~~ ~~Zip Code:.....~~

~~Phone:.....~~

~~I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits~~

~~to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.~~

~~Additional instructions (optional):.....~~

~~.....~~

~~.....~~

~~.....~~

~~I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.~~

~~Name:.....~~

~~Name:.....~~

~~.....~~

~~.....~~

~~Signed:.....~~

~~Date:.....~~

~~Witnesses:~~ ~~1.~~

~~2.~~

Section 10. Section 765.2035, Florida Statutes, is created to read:

765.2035 Designation of a health care surrogate for a minor.—

(1) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document signed by the minor's principal in the presence of two subscribing adult witnesses. If a minor's principal is unable to sign the instrument, the principal may, in the presence of witnesses, direct that another person sign the minor's principal's name as required by this subsection. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate may not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate; however, such designation must be explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The minor's principal's failure to designate an alternate surrogate does not invalidate the designation.

(4) If neither the designated surrogate or the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal and in accordance with the minor's principal's instructions, s. 743.0645(2) shall apply as if no surrogate had been designated.

(5) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a separate surrogate to consent to mental health treatment for the minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate is authorized to make health care decisions for a minor under this chapter is also the minor's principal's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the minor's principal. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

Section 11. Section 765.2038, Florida Statutes, is created to read:

765.2038 Designation of health care surrogate for a minor; suggested form.—A written designation of a health care surrogate for a minor executed pursuant to this chapter may, but need to be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

FOR MINOR

I/We, ...(name/names)..., the [....] natural guardian(s) as defined in s. 744.301(1), Florida Statutes; [....] legal custodian(s); [....] legal guardian(s) [check one] of the following minor(s):

.....;

.....;

.....,

pursuant to s. 765.2035, Florida Statutes, designate the following person to act as my/our surrogate for health care decisions for such minor(s) in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: ...(name)...
Address: ...(address)...
Zip Code: ...(zip code)...
Phone: ...(telephone)...

I/We authorize and request all physicians, hospitals, or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate:

Name: ...(name)...
Name: ...(name)...

Signed: ...(signature)...
Date: ...(date)...

WITNESSES:
1. ...(witness)...
2. ...(witness)...

Section 12. Section 765.204, Florida Statutes, is amended to read:

765.204 Capacity of principal; procedure.—

(1) A principal is presumed to be capable of making health care decisions for herself or himself unless she or he is determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his intellectual disability.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the ~~attending~~ physician shall evaluate the principal's capacity and, if the physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the ~~attending~~ physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physician's

evaluations in the principal's medical record. If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the ~~attending~~ physician determines that the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) Notwithstanding subsections (2) and (3), if the principal has designated a health care surrogate and has stipulated that the authority of the surrogate is to take effect immediately, or has appointed an agent under a durable power of attorney as provided in chapter 709 to make health care decisions for the principal, the health care facility shall notify such surrogate or agent in writing when a determination

of incapacity has been entered into the principal's medical record.

(5)~~(4)~~ A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

(6)~~(5)~~ If ~~In the event~~ the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, ~~the provisions of~~ part III applies ~~shall apply~~.

Section 13. Section 765.205, Florida Statutes, is amended to read:

765.205 Responsibility of the surrogate.—

(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments

currently in effect are to be withdrawn.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) Notwithstanding subsections (1) and (2), if the principal has designated a health care surrogate and has stipulated that the authority of the surrogate is to take effect immediately, or has appointed an agent under a durable power of attorney as provided in chapter 709 to make health care decisions for the principal, the fundamental right of self-determination of every competent adult regarding his or her

health care decisions shall be controlling. Before implementing a health care decision made for a principal who is not incapacitated, the primary physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

(4) ~~(3)~~ If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the principal's health care status to the guardian.

Section 14. Subsection (2) of section 765.302, Florida Statutes, is amended to read:

765.302 Procedure for making a living will; notice to physician.—

(2) It is the responsibility of the principal to provide for notification to her or his ~~attending or~~ treating physician that the living will has been made. In the event the principal is physically or mentally incapacitated at the time the principal is admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. A ~~An attending or~~ treating physician or health care facility which is so notified shall promptly make the living will or a copy thereof a part of the principal's medical records.

Section 15. Subsection (1) of section 765.303, Florida Statutes, is amended to read:

765.303 Suggested form of a living will.—

(1) A living will may, BUT NEED NOT, be in the following form:

Living Will

Declaration made this .... day of ...., ...(year)..., I, ..., willfully and voluntarily make known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am incapacitated and

...(initial)... I have a terminal condition

or ...(initial)... I have an end-stage condition

or ...(initial)... I am in a persistent vegetative state

and if my ~~attending or~~ treating physician and another consulting physician have determined that there is no reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the

consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry out the provisions of this declaration:

Name:.....

Address:.....

..... Zip Code:.....

Phone:.....

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

Additional Instructions (optional):

.....

.....

.....

....(Signed)....

....Witness....

....Address....

....Phone....

....Witness....

....Address....

....Phone....

Section 16. Subsection (1) of section 765.304, Florida

Statutes, is amended to read:

765.304 Procedure for living will.—

(1) If a person has made a living will expressing his or her desires concerning life-prolonging procedures, but has not designated a surrogate to execute his or her wishes concerning life-prolonging procedures or designated a surrogate under part II, the person's ~~attending~~ physician may proceed as directed by the principal in the living will. In the event of a dispute or disagreement concerning the ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the ~~attending~~ physician shall not withhold or withdraw life-prolonging procedures pending review under s. 765.105. If a review of a disputed decision is not sought within 7 days following the ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the ~~attending~~ physician may proceed in accordance with the principal's instructions.

Section 17. Section 765.306, Florida Statutes, is amended to read:

765.306 Determination of patient condition.—In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's ~~attending or~~ treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient's medical record

and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

Section 18. Section 765.404, Florida Statutes, is amended to read:

765.404 Persistent vegetative state.—For persons in a persistent vegetative state, as determined by the person's ~~attending~~ physician in accordance with currently accepted medical standards, who have no advance directive and for whom there is no evidence indicating what the person would have wanted under such conditions, and for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy to make health care decisions for them, life-prolonging procedures may be withheld or withdrawn under the following conditions:

(1) The person has a judicially appointed guardian representing his or her best interest with authority to consent to medical treatment; and

(2) The guardian and the person's ~~attending~~ physician, in consultation with the medical ethics committee of the facility where the patient is located, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the patient. If there is no medical ethics committee at the facility, the facility must have an arrangement with the medical ethics committee of another facility or with a community-based ethics committee approved by

the Florida Bio-ethics Network. The ethics committee shall review the case with the guardian, in consultation with the person's ~~attending~~ physician, to determine whether the condition is permanent and there is no reasonable medical probability for recovery. The individual committee members and the facility associated with an ethics committee shall not be held liable in any civil action related to the performance of any duties required in this subsection.

Section 19. Paragraph (c) of subsection (1) of section 765.516, Florida Statutes, is amended to read:

765.516 Donor amendment or revocation of anatomical gift.—

(1) A donor may amend the terms of or revoke an anatomical gift by:

(c) A statement made during a terminal illness or injury addressed to <u>a treating</u> ~~an attending~~ physician, who must communicate the revocation of the gift to the procurement organization.

Section 20. This act shall take effect October 1, 2015.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Wood offered the following:

Amendment

Remove line 111 and insert:

facility or to the primary ~~attending or~~ treating physician stating that

Remove line 290 and insert:

primary ~~attending~~ physician, or any other interested person who may

Remove line 320 and insert:

primary ~~attending or treating~~ physician, or such physician's designee,

Remove line 638 and insert:

in question, the primary ~~attending~~ physician shall evaluate the

Remove line 661 and insert:

surrogate. In the event the primary ~~attending~~ physician determines that

Remove lines 742-747 and insert:

for notification to her or his primary ~~attending or treating~~ physician that the living will has been made. In the event the principal is physically or mentally incapacitated at the time the principal is admitted to a health care facility, any other person may notify the physician or health care facility of the existence of the living will. A primary ~~An attending or treating~~

Remove line 765 and insert:

and if my primary ~~attending or treating~~ physician and another consulting

Remove lines 808-825 and insert:

II, the person's primary ~~attending~~ physician may proceed as directed by the principal in the living will. In the event of a dispute or disagreement concerning the primary ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the primary ~~attending~~ physician shall not withhold or withdraw life-prolonging procedures pending review under s. 765.105. If a review of a disputed decision is not sought within 7 days following the primary ~~attending~~ physician's decision to withhold or withdraw life-prolonging procedures, the primary ~~attending~~ physician may proceed in accordance with the principal's instructions.

Section 17. Section 765.306, Florida Statutes, is amended to read:

Amendment No. 1

765.306 Determination of patient condition.—In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the patient's primary ~~attending or treating~~ physician and at least one other consulting physician

Remove line 834 and insert:

primary ~~attending~~ physician in accordance with currently accepted

Remove line 845 and insert:

(2) The guardian and the person's primary ~~attending~~ physician, in

Remove line 856 and insert:

person's primary ~~attending~~ physician, to determine whether the condition

Remove line 868 and insert:

addressed to the primary ~~an attending~~ physician, who must

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 889 (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 Wood offered the following:

Amendment

Remove line 549 and insert:

authorized to make health care decisions for a minor under

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 889 (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 Wood offered the following:

Amendment (with title amendment)

Remove lines 718-731 and insert:

(3) If, after the appointment of a surrogate, a court

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

Remove lines 45-49 and insert:

765.205, F.S.; conforming provisions to changes made by the act;

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 931 Interstate Compacts
SPONSOR(S): Hill
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1242

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

SUMMARY ANALYSIS

One method of proposing amendments to the United States Constitution is through a constitutional convention pursuant to Article V, which requires Congress to call a convention for proposing amendments when two-thirds of the state legislatures make application to Congress for a convention. No convention has ever been convened under the current constitution.

The bill provides that the state enters into an interstate compact (Compact). Agreeing to the Compact automatically constitutes application for an Article V Convention, the sole purpose of which would be to propose an amendment a Balance Budget Amendment, whose text is prescribed in the Compact. The state would also agree to observe the Compact's provisions governing the convention's composition and rules. Finally, by agreeing to the Compact, the legislature commits itself to "prospective" ratification of the proposed amendment.

The key element of the Compact is the Balanced Budget Amendment that would be proposed by the convention. Among its major elements, the amendment would:

- Provide for a balanced federal budget at all times, unless any deficit is financed by debt issued in conformity with the amendment's requirements;
- Set a ceiling for federal debt equal to 105% of the outstanding debt at the time the amendment takes effect;
- Require that any increase in the federal debt ceiling proposed by Congress must be submitted to and approved by a simple majority of state legislatures;
- Require the President to ensure that the debt ceiling is not exceeded by proposing the impoundment of specific expenditures sufficient to prevent the breach;
- Specify that the President's failure to designate or enforce such impoundments would be an impeachable misdemeanor; and
- Require that any new or increased tax revenue legislation be approved by two-thirds of the membership of the Senate and House of Representatives.

The Compact establishes an ongoing Compact Commission to promote the convention and coordinate and enforce the Compact. It also sets the size of the convention, specifies that the President of the Senate and Speaker of the House would serve as the state's delegate, and limit each state to one vote. The convention would last one day, and its sole duty would be to introduce, debate, and vote to ratify the specific text of the Balanced Budget Amendment described above.

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

The bill provides that it is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Process for Amending the United States Constitution

Article V of the United States Constitution provides two methods for proposing amendments to the Constitution. The first method authorizes Congress to propose amendments to the states that are approved by two-thirds vote of both houses of Congress.[1] Amendments approved in this manner do not require the President's signature and are transmitted to each state for ratification.[2] Starting with the Bill of Rights in 1789, Congress has used this method to submit 33 amendments to the states.[3] Of those 33 proposals, 27 amendments to the Constitution have been approved by the states.[4]

The second method, which has never been used,[5] requires Congress to call a convention for proposing amendments when two-thirds of the state legislatures make application to Congress for a convention.[6] Thirty-four states would need to make applications to meet the two-thirds requirement to call an Article V Convention. Though the form of a convention is not specified in the Constitution, Congress has historically taken on broad responsibilities in connection with a convention by administering state applications; establishing procedures to summon a convention; setting the amount of time allotted to its deliberations; determining the number and selection process of its delegates; setting internal convention procedures, and providing arrangement for the formal transmission of any proposed amendments to the states.[7]

Florida's Article V Constitutional Conventional Act

In 2014, the legislature passed the Article V Constitutional Convention Act to regulate the eligibility, appointment and restrictions of Florida's delegates if a constitutional convention is called.[8] The bill also created an advisory group to advise the delegates.

Interstate Compacts

The Compact Clause of the United States Constitution states "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state . . . ."[9] It is the only section of the United States Constitution that deals with formal agreements between and among

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[1] U.S. CONST. art. V.
[2] *The Constitutional Amendment Process*, U.S, National Archives and Records Administration, http://www.archives.gov/federal-register/constitution (last visited March 13, 2015).
[3] *Proposed Amendments Not Ratified by the States*, U.S. Government Printing Office, http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-8.pdf (last visited April 29, 2014).
[4] Thomas H. Neale, Cong. Research Serv., RL 7-7883, The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress 1 (2012).
[5] *See* Sara R. Ellis et al., *Article V Constitutional Conventions: A Primer*, 78 TENN. L. REV. 663, 665 (2011)("Despite the submission of approximately 750 applications for an Article V convention, including applications by all fifty states, no constitutional convention has ever been called.").
[6] U.S. CONST. art. V. Florida would "make application" via a resolution. In 2010, SCR 10 passed in both the Florida House of Representatives and the Senate. SCR 10 urged Congress to call an Article V Convention for the purpose of proposing an amendment to the U.S. Constitution to provide for a balanced federal budget and to limit the ability of Congress to dictate states requirements for the expenditure of federal funds.
[7] Thomas H. Neale, *supra* note 4.
[8] Chapter 2014-52, L.O.F.
[9] U.S. CONST. art. I, § 10, cl. 3.

the states. Usually congressional consent to an interstate compact takes the form of a joint resolution or act of Congress specifying its approval of the text of the compact, adding any conditions or provisions it deems necessary, and often embodying the compact document. As with any congressional enactment, it must be signed by the President before it becomes law.[10]

Effect of the Bill

The bill creates s. 11.95, F.S., which provides, through a series of Articles, that the state agrees to enter and be bound by a compact (Compact) with other states for the purpose of calling a constitutional convention pursuant to Article V of the United State Constitution for the purpose of a Balance Budget Amendment.

The text of the constitutional amendment is provided in Article II of the Compact as follows:

"SECTION 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.

"SECTION 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.

"SECTION 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered, or accepted as a quid pro quo for such approval. If such approval is not obtained within 60 calendar days after referral, then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.

"SECTION 4. Whenever the outstanding debt exceeds 98 percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective 30 days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.

"SECTION 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.

"SECTION 6. For purposes of this article, "debt" means any obligation backed by the full faith and credit of the government of the United States; "outstanding debt" means all debt held in any account and by any entity at a given point in time; "authorized debt" means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in time under this article; "total outlays of the government of the United States" means all expenditures of the government of the United States from any source; "total receipts of the government of the United States" means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; "impoundment" means a proposal not to spend all

[10] Thomas Neale, *The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, Congressional Research Service, 14-16 (April 11, 2014).

or part of a sum of money appropriated by Congress; and "general revenue tax" means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.

"SECTION 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement."

Compact Membership and Withdrawal

Article III of the Compact sets membership and withdrawal requirements. It provides that the Compact governs each Member State[11] to the fullest extent permitted by its respective constitution and supersedes and repeals any conflicting law. Additionally, each Member State is contractually bound to other Member states and promises to comply with the terms and conditions of the Compact.

When less than three-fourths of the states are Member States, any Member State may withdraw from this Compact. However, once at least three-fourths of the states are Member States, then no Member State may withdraw from the Compact prior to its termination absent unanimous consent of all Member States.

Compact Commission and Compact Administrators

Article IV of the Compact establishes the Compact Commission and the Compact Administrator. The Compact Commission will appoint and oversee a Compact Administrator, promote the Compact, coordinate the performance of obligations under the Compact, and defend and enforcement the Compact in legal proceedings, among other things.

The Compact Administrator will notify the states of the date, time, and location of the convention; organize the convention, maintain a list of all Member States and their appointed delegates; and maintain all official records relating to the Compact. The Compact Administrator will also notify Member States of key events.

Resolution Applying for a Convention

Article V of the Compact provides that when three-fourths of the states join the Compact, the Legislature of each Member State will apply to Congress to call a convention for the limited purpose of ratifying the Balanced Budget Amendment.

Appointment of Delegates, Limitations, and Instructions

Article VI of the Compact regulates the appointment and authority of delegates who will attend a convention pursuant to the Compact. The President of the Senate, or his or her designee, and the Speaker of the House of Representatives, or his or her designee, will represent Florida as its sole and exclusive delegates. A delegate may be replaced or recalled by the Legislature at any time for good cause, such as criminal misconduct or the violation of the Compact. Each delegate must take an oath to "act strictly in accordance with the terms and conditions of the Compact for a Balanced Budget, the Constitution of the state I represent, and the Constitution of the United States."

A delegate's authority is limited to introducing, debating, voting upon, proposing, and enforcing the convention rules specified in the Compact, and to introducing, debating, voting on, and rejecting or proposing for ratification the Balanced Budget Amendment. Any actions taken by any delegate beyond this limited authority are void ab initio[12]. Additionally, a delegate may not introduce, debate, vote upon, reject, or propose for ratification any constitutional amendment at the convention other than the constitutional amendment the Balanced Budget Amendment.

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[11] A "Member State" is defined as "a State that has enacted, adopted, and agreed to be bound by this Compact."
[12] "Void ab initio" means void from the beginning.

If any Member State or delegate violates any provision of the Compact, then every delegate of that Member State immediately forfeits his or her appointment, and must immediately cease participation at the convention, vacate the convention, and return to his or her respective state's capitol.[13]

Convention Rules

Article VII of the Compact details the convention agenda and rules. The agenda of the Convention will be exclusively limited to introducing, debating, voting on, and rejecting or proposing for ratification the Balanced Budget Amendment. The convention will not consider any matter outside of this agenda. The convention has a limited time-frame in which it must act. It must permanently adjourn either 24 hours after commencing consideration of the Balanced Budget Amendment or the completion of the business on its agenda, whichever occurs first.

Regardless of whether a state is a member to the compact, each state may have no more than three delegates at the convention. However, each state will only have one vote.

The convention will be chaired by the delegate representing the first state to have become a Member State. Any vote, including the rejection or proposal of any constitutional amendment, requires a quorum to be present and a majority affirmative vote of those states constituting the quorum. In adopting parliamentary procedure, the convention must exclusively adopt or adapt provisions from Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure.

Unless otherwise specified by Congress in its call, the convention will be held in Dallas, Texas, on the sixth Wednesday after the latter of the date on which three-fourths of the states become Member States or the enactment date of the Congressional resolution calling the convention.[14] In the event that the chair declares an emergency due to disorder or an imminent threat to public health and safety, and a majority of the states present do not object, convention proceedings may be temporarily suspended and the Commission will relocate or reschedule the convention.

Prohibition on Ultra Vires[15] Convention

Article VIII of the Compact prohibits Member States from participating in any convention organized pursuant to the Compact other than one called pursuant to and in accordance with the rules provided in the Compact. Additionally, Member states are prohibited from ratifying any proposed amendment to the Constitution of the United States, which originates from the convention, other than the Balanced Budget Amendment.

Resolution Prospectively Ratifying the Balanced Budget Amendment

Article IX of the Compact provides that upon becoming a Member State, the Legislature prospectively adopts and ratifies the Balanced Budget Amendment. However, this Article does not take effect until Congress refers the Balanced Budget Amendment to the states for ratification.

Construction, Enforcement, and Termination of the Compact

Article IX of the Compact regulates the construction of the Compact as well as providing for its legal enforcement and termination. To the extent that the effectiveness of the Compact requires the

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[13] Given the very brief nature of the convention provided by the Compact, it appears that expulsion of a state's delegates would effectively bar a state from having any delegates at the convention. *See* Article VII, Convention Rules below.
[14] The time and date of the convention is provided in Article X of the Compact.
[15] "Ultra vires" means "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." Black's Law Dictionary (10th ed. 2014).

alteration of legislative rules to be effective, legislation agreeing to be bound by the Compact is deemed to repeal, supersede, or amend all such rules to allow for the effectiveness of the Compact to the fullest extent permitted by the constitution of the Member State.

The Compact provides that the chief law enforcement officer of each Member State may defend the Compact from any legal challenge, as well as seek civil mandatory and prohibitory injunctive relief to enforce the Compact. The exclusive venue for all actions arising under the Compact will be in the United States District Court for the Northern District of Texas or the courts of the State of Texas within the jurisdictional boundaries of the district court. Each Member State is required to submit to the jurisdiction of those courts with respect to all actions arising under the Compact. However, the Compact Commission may waive this provision.

The severability clause of the Compact provides that any provision of the Compact except Article VIII related to ultra vires conventions may be severable. If a court finds that the Compact is entirely contrary to the state constitution of a Member State or otherwise entirely invalid, that Member State is withdrawn from the Compact, and the Compact with remain in full force and effect as to any remaining Member State. Moreover, if a court finds the Compact to be wholly or substantially in violation of Article I, Section 10, of the United State Constitution, then it will be construed and enforced solely as reciprocal legislation enacted by the affected Member States.

The termination clause provides that the Compact will terminate when it is fully performed and the Constitution of the United States is amended by the Balanced Budget Amendment. However, in the event such amendment does not occur within 7 years after the date the first state passed legislation agreeing to be bound to the Compact, the Compact terminates 90 days after that 7-year date.

The bill provides that it takes effect upon becoming law.

B. SECTION DIRECTORY:

Section 1 of the bill creates s. 11.95 relating to the compact for a balanced budget.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

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:

It is a general constitutional principle that "one legislature may not bind the legislative authority of its successors."[16] It is unclear if, and to the extent, the bill may bind future legislatures and whether such conduct is permissible.

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

[16] *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996); *see* Eric J. Posner and Adrian Vermeule, *Legislative Entrenchment*, 111 Yale L.J. 1665 (2002)

A bill to be entitled

An act relating to interstate compacts; creating s. 11.95, Florida Statutes; adopting and entering the state into an interstate Compact for a Balanced Budget; exempting the compact from the Article V Constitutional Convention Act; providing the policy, purpose, and intent of the compact; defining terms; providing for proposal by the compact's member states of an amendment to the United States Constitution requiring the Federal Government to maintain a balanced budget with certain exceptions; requiring member states to strictly comply with the terms of the compact; describing circumstances under which the compact becomes contractually binding on a member state; establishing a Compact Commission and specifying the commission's membership and duties; providing for appointment of a Compact Administrator and specifying the administrator's duties; providing for funding of the Compact Commission and Compact Administrator; providing for the member states to apply to the United States Congress for a convention under Article V of the United States Constitution to propose the balanced budget amendment; requiring cooperation among the commission, the member states, and the Compact Administrator; providing for the appointment, terms, duties, and authority of

convention delegates; requiring an oath to be taken by delegates; specifying rules to govern procedures at the convention; specifying actions that are considered ultra vires; providing that the balanced budget amendment is not considered ratified until ratified by a specified number of states; providing for construction and enforcement of the compact; providing an effective date for the compact; authorizing severability of the compact under certain circumstances; providing for termination of the compact under certain conditions; providing an effective date.

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

Section 1. Section 11.95, Florida Statutes, is created to read:

11.95 Compact for a balanced budget.—Notwithstanding the Article V Constitutional Convention Act, ss. 11.93-11.9352, the State of Florida enacts, adopts, and agrees to be bound by the following compact:

ARTICLE I

DECLARATION OF POLICY, PURPOSE, AND INTENT

WHEREAS, every State enacting, adopting, and agreeing to be bound by this Compact intends to ensure that their respective Legislature's use of the power to originate a Balanced Budget

Amendment under Article V of the Constitution of the United States will be exercised conveniently and with reasonable certainty as to the consequences thereof.

NOW, THEREFORE, in consideration of their expressed mutual promises and obligations, be it enacted by every State enacting, adopting, and agreeing to be bound by this Compact, and resolved by each of their respective Legislatures, as the case may be, to exercise herewith all of their respective powers as set forth herein, notwithstanding any law to the contrary.

ARTICLE II

DEFINITIONS

As used in this Compact, the term:

Section 1. "Compact" means this "Compact for a Balanced Budget."

Section 2. "Convention" means the convention for proposing amendments organized by this Compact under Article V of the Constitution of the United States and, where contextually appropriate to ensure the terms of this Compact are not evaded, any other similar gathering or body, which might be organized as a consequence of Congress receiving the application set out in this Compact and claim authority to propose or effectuate any amendment, alteration, or revision to the Constitution of the United States. This term does not encompass a convention for proposing amendments under Article V of the Constitution of the United States that is organized independently of this Compact based on the separate and distinct application of any State.

Section 3. "State" means one of the several States of the United States. Where contextually appropriate, the term "State" shall be construed to include all of its branches, departments, agencies, political subdivisions, and officers and representatives acting in their official capacity.

Section 4. "Member State" means a State that has enacted, adopted, and agreed to be bound to this Compact. For any State to qualify as a Member State with respect to any other State under this Compact, each such State must have enacted, adopted, and agreed to be bound by substantively identical compact legislation.

Section 5. "Compact Notice Recipients" means the Archivist of the United States, the President of the United States, the President of the United States Senate, the Office of the Secretary of the United States Senate, the Speaker of the United States House of Representatives, the Office of the Clerk of the United States House of Representatives, the chief executive officer of each State, and the presiding officer(s) of each house of the Legislatures of the several States.

Section 6. Notice. All notices required by this Compact shall be by United States Certified Mail, return receipt requested, or an equivalent or superior form of notice, such as personal delivery documented by evidence of actual receipt.

Section 7. "Balanced Budget Amendment" means the following:

"ARTICLE ____

"SECTION 1. Total outlays of the government of the United States shall not exceed total receipts of the government of the United States at any point in time unless the excess of outlays over receipts is financed exclusively by debt issued in strict conformity with this article.

"SECTION 2. Outstanding debt shall not exceed authorized debt, which initially shall be an amount equal to 105 percent of the outstanding debt on the effective date of this article. Authorized debt shall not be increased above its aforesaid initial amount unless such increase is first approved by the legislatures of the several states as provided in Section 3.

"SECTION 3. From time to time, Congress may increase authorized debt to an amount in excess of its initial amount set by Section 2 only if it first publicly refers to the legislatures of the several states an unconditional, single subject measure proposing the amount of such increase, in such form as provided by law, and the measure is thereafter publicly and unconditionally approved by a simple majority of the legislatures of the several states, in such form as provided respectively by state law; provided that no inducement requiring an expenditure or tax levy shall be demanded, offered, or accepted as a quid pro quo for such approval. If such approval is not obtained within 60 calendar days after referral, then the measure shall be deemed disapproved and the authorized debt shall thereby remain unchanged.

"SECTION 4. Whenever the outstanding debt exceeds 98

percent of the debt limit set by Section 2, the President shall enforce said limit by publicly designating specific expenditures for impoundment in an amount sufficient to ensure outstanding debt shall not exceed the authorized debt. Said impoundment shall become effective 30 days thereafter, unless Congress first designates an alternate impoundment of the same or greater amount by concurrent resolution, which shall become immediately effective. The failure of the President to designate or enforce the required impoundment is an impeachable misdemeanor. Any purported issuance or incurrence of any debt in excess of the debt limit set by Section 2 is void.

"SECTION 5. No bill that provides for a new or increased general revenue tax shall become law unless approved by a two-thirds roll call vote of the whole number of each House of Congress. However, this requirement shall not apply to any bill that provides for a new end user sales tax which would completely replace every existing income tax levied by the government of the United States; or for the reduction or elimination of an exemption, deduction, or credit allowed under an existing general revenue tax.

"SECTION 6. For purposes of this article, "debt" means any obligation backed by the full faith and credit of the government of the United States; "outstanding debt" means all debt held in any account and by any entity at a given point in time; "authorized debt" means the maximum total amount of debt that may be lawfully issued and outstanding at any single point in

time under this article; "total outlays of the government of the United States" means all expenditures of the government of the United States from any source; "total receipts of the government of the United States" means all tax receipts and other income of the government of the United States, excluding proceeds from its issuance or incurrence of debt or any type of liability; "impoundment" means a proposal not to spend all or part of a sum of money appropriated by Congress; and "general revenue tax" means any income tax, sales tax, or value-added tax levied by the government of the United States excluding imposts and duties.

"SECTION 7. This article is immediately operative upon ratification, self-enforcing, and Congress may enact conforming legislation to facilitate enforcement."

ARTICLE III

COMPACT MEMBERSHIP AND WITHDRAWAL

Section 1. This Compact governs each Member State to the fullest extent permitted by its respective constitution, superseding and repealing any conflicting or contrary law.

Section 2. By becoming a Member State, each such State offers, promises, and agrees to perform and comply strictly in accordance with the terms and conditions of this Compact, and has made such offer, promise, and agreement in anticipation and consideration of, and in substantial reliance upon, such mutual and reciprocal performance and compliance by each other current and future Member State, if any. Accordingly, in addition to

having the force of law in each Member State upon its respective effective date, this Compact and each of its Articles shall also be construed as contractually binding each Member State when:

(a) At least one other State has likewise become a Member State by enacting substantively identical legislation adopting and agreeing to be bound by this Compact; and

(b) Notice of such State's Member State status is or has been seasonably received by the Compact Administrator, if any, or otherwise by the chief executive officer of each other Member State.

Section 3. For purposes of determining Member State status under this Compact, as long as all other provisions of the Compact remain identical and operative on the same terms, legislation enacting, adopting, and agreeing to be bound by this Compact shall be deemed and regarded as "substantively identical" with respect to such other legislation enacted by another State, notwithstanding:

(a) Any difference in Section 2 of Article IV with specific regard to the respectively enacting State's own method of appointing its member to the Commission;

(b) Any difference in Section 5 of Article IV with specific regard to the respectively enacting State's own obligation to fund the Commission;

(c) Any difference in Sections 1 and 2 of Article VI with specific regard to the number and identity of each delegate respectively appointed on behalf of the enacting State, provided

that no more than three delegates may attend and participate in the Convention on behalf of any State; or

(d) Any difference in Section 7 of Article X with specific regard to the respectively enacting State as to whether Section 1 of Article V of this Compact shall survive termination of the Compact, and thereafter become a continuing resolution of the Legislature of such State applying to Congress for the calling of a Convention of the States under Article V of the Constitution of the United States, under such terms and limitations as may be specified by such State.

Section 4. When fewer than three-fourths of the States are Member States, any Member State may withdraw from this Compact by enacting appropriate legislation, as determined by state law, and giving notice of such withdrawal to the Compact Administrator, if any, or otherwise to the chief executive officer of each other Member State. A withdrawal shall not affect the validity or applicability of the Compact with respect to remaining Member States, provided that there remain at least two such States. However, once at least three-fourths of the States are Member States, then no Member State may withdraw from the Compact prior to its termination absent unanimous consent of all Member States.

ARTICLE IV

COMPACT COMMISSION AND COMPACT ADMINISTRATOR

Section 1. Nature of the Compact Commission.—The Compact Commission ("Commission") is hereby established. It has the

power and duty:

(a) To appoint and oversee a Compact Administrator;

(b) To encourage States to join the Compact and Congress to call the Convention in accordance with this Compact;

(c) To coordinate the performance of obligations under the Compact;

(d) To oversee the Convention's logistical operations as appropriate to ensure this Compact governs its proceedings;

(e) To oversee the defense and enforcement of the Compact in appropriate legal venues;

(f) To request funds and to disburse those funds to support the operations of the Commission, Compact Administrator, and Convention; and

(g) To cooperate with any entity that shares a common interest with the Commission and engages in policy research, public interest litigation, or lobbying in support of the purposes of the Compact.

The Commission shall only have such implied powers as are essential to carrying out these express powers and duties. It shall take no action that contravenes or is inconsistent with this Compact or any law of any State that is not superseded by this Compact. It may adopt and publish corresponding bylaws and policies.

Section 2. Commission Membership.—The Commission initially consists of three unpaid members. Each Member State may appoint

one member to the Commission through an appointment process to be determined by its respective chief executive officer until all positions on the Commission are filled. Positions shall be assigned to appointees in the order in which their respective appointing States became Member States. The bylaws of the Commission may expand its membership to include representatives of additional Member States and to allow for modest salaries and reimbursement of expenses if adequate funding exists.

Section 3. Commission Action.—Each Commission member is entitled to one vote. The Commission shall not act unless a majority of its appointed membership is present, and no action shall be binding unless approved by a majority of the Commission's appointed membership. The Commission shall meet at least once a year, and may meet more frequently.

Section 4. First Order of Business.—The Commission shall at the earliest possible time elect from among its membership a Chair, determine a primary place of doing business, and appoint a Compact Administrator.

Section 5. Funding.—The Commission and the Compact Administrator's activities shall be funded exclusively by each Member State, as determined by its respective state law, or by voluntary donations.

Section 6. Compact Administrator.—The Compact Administrator has the power and duty:

(a) To timely notify the States of the date, time, and location of the Convention;

(b) To organize and direct the logistical operations of the Convention;

(c) To maintain an accurate list of all Member States and their appointed delegates, including contact information; and

(d) To formulate, transmit, and maintain all official notices, records, and communications relating to this Compact.

The Compact Administrator shall only have such implied powers as are essential to carrying out these express powers and duties and shall take no action that contravenes or is inconsistent with this Compact or any law of any State that is not superseded by this Compact. The Compact Administrator serves at the pleasure of the Commission and must keep the Commission seasonably apprised of the performance or nonperformance of the terms and conditions of this Compact. Any notice sent by a Member State to the Compact Administrator concerning this Compact shall be adequate notice to each other Member State provided that a copy of said notice is seasonably delivered by the Compact Administrator to each other Member State's respective chief executive officer.

Section 7. Notice of Key Events.—Upon the occurrence of each of the following described events, or otherwise as soon as possible, the Compact Administrator shall immediately send the following notices to all Compact Notice Recipients, together with certified conforming copies of the chaptered version of this Compact as maintained in the statutes of each Member State:

(a) Whenever any State becomes a Member State, notice of that fact shall be given;

(b) Once at least three-fourths of the States are Member States, notice of that fact shall be given together with a statement declaring that the Legislatures of at least two-thirds of the several States have applied for a Convention for proposing amendments under Article V of the Constitution of the United States, petitioning Congress to call the Convention contemplated by this Compact, and further requesting cooperation in organizing the same in accordance with this Compact;

(c) Once Congress has called the Convention contemplated by this Compact, and whenever the date, time, and location of the Convention has been determined, notice of that fact shall be given together with the date, time, and location of the Convention and other essential logistical matters;

(d) Upon approval of the Balanced Budget Amendment by the Convention, notice of that fact shall be given together with the transmission of certified copies of such approved proposed amendment and a statement requesting Congress to refer the same for ratification by three-fourths of the Legislatures of the several States under Article V of the Constitution of the United States; however, in no event shall any proposed amendment other than the Balanced Budget Amendment be transmitted; and

(e) When any Article of this Compact prospectively ratifying the Balanced Budget Amendment becomes effective in any Member State, notice of the same shall be given together with a

statement declaring such ratification and further requesting cooperation in ensuring that the official record confirms and reflects the effective corresponding amendment to the Constitution of the United States.

However, whenever any Member State enacts appropriate legislation, as determined by the laws of the respective state, withdrawing from this Compact, the Compact Administrator shall immediately send certified conforming copies of the chaptered version of such withdrawal legislation as maintained in the statutes of each such withdrawing Member State, solely to each chief executive officer of each remaining Member State, giving notice of such withdrawal.

Section 8. Cooperation.—The Commission, Member States, and Compact Administrator shall cooperate with each other and give each other mutual assistance in enforcing this Compact and shall give the chief law enforcement officer of each other Member State any information or documents that are reasonably necessary to facilitate the enforcement of this Compact.

Section 9. Effective Date of Article.—This Article does not take effect until there are at least two Member States.

ARTICLE V

RESOLUTION APPLYING FOR CONVENTION

Section 1. Be it resolved, as provided for in Article V of the Constitution of the United States, the Legislature of each Member State herewith applies to Congress for the calling of a

convention for proposing amendments limited to the subject matter of proposing for ratification the Balanced Budget Amendment.

Section 2. Congress is further petitioned to refer the Balanced Budget Amendment to the States for ratification by three-fourths of their respective Legislatures.

Section 3. This Article does not take effect until at least three-fourths of the several States are Member States.

ARTICLE VI

DELEGATE APPOINTMENT, LIMITATIONS, AND INSTRUCTIONS

Section 1. Number of Delegates.—Each Member State shall be entitled to delegates as the sole and exclusive representatives at the Convention as set forth in this Article.

Section 2. Identity of Delegates.—The then serving President of the Senate, or his or her designee, and the then serving Speaker of the House of Representatives, or his or her designee, are appointed to represent Florida as its sole and exclusive delegates.

Section 3. Replacement or Recall of Delegates.—A delegate appointed hereunder may be replaced or recalled by the Legislature of his or her respective State at any time for good cause, such as criminal misconduct or the violation of this Compact. If replaced or recalled, any delegate previously appointed hereunder must immediately vacate the Convention and return to his or her respective State's capitol.

Section 4. Oath.—The power and authority of a delegate

under this Article may only be exercised after the Convention is first called by Congress in accordance with this Compact and such appointment is duly accepted by such appointee publicly taking the following oath or affirmation: "I do solemnly swear (or affirm) that I accept this appointment and will act strictly in accordance with the terms and conditions of the Compact for a Balanced Budget, the Constitution of the State I represent, and the Constitution of the United States. I understand that violating this oath (or affirmation) forfeits my appointment and may subject me to other penalties as provided by law."

Section 5. Term.—The term of a delegate then serving as the President of the Senate or the Speaker of the House of Representatives, or their designees, commences upon acceptance of appointment and terminates upon the permanent adjournment of the Convention, unless shortened by recall, replacement, or forfeiture under this Article. Upon expiration of such term, any person formerly serving as a delegate must immediately withdraw from and cease participation at the Convention, if any is proceeding.

Section 6. Delegate Authority.—The power and authority of any delegate appointed hereunder is strictly limited:

(a) To introducing, debating, voting upon, proposing, and enforcing the Convention Rules specified in this Compact, as needed to ensure those rules govern the Convention; and

(b) To introducing, debating, voting upon, and rejecting or proposing for ratification the Balanced Budget Amendment.

All actions taken by any delegate in violation of this section are void ab initio.

Section 7. Delegate Authority.—No delegate of any Member State may introduce, debate, vote upon, reject, or propose for ratification any constitutional amendment at the Convention unless:

(a) The Convention Rules specified in this Compact govern the Convention and its actions; and

(b) The constitutional amendment is the Balanced Budget Amendment.

Section 8. Delegate Authority.—The power and authority of any delegate at the Convention does not include any power or authority associated with any other public office held by the delegate. Any person appointed to serve as a delegate shall take a temporary leave of absence, or otherwise shall be deemed temporarily disabled, from any other public office held by the delegate while attending the Convention, and may not exercise any power or authority associated with any other public office held by the delegate, while attending the Convention. All actions taken by any delegate in violation of this section are void ab initio.

Section 9. Order of Business.—Before introducing, debating, voting upon, rejecting, or proposing for ratification any constitutional amendment at the Convention, each delegate of every Member State must first ensure the Convention Rules in

this Compact govern the Convention and its actions. Every delegate and each Member State must immediately vacate the Convention and notify the Compact Administrator by the most effective and expeditious means if the Convention Rules in this Compact are not adopted to govern the Convention and its actions.

Section 10. Forfeiture of Appointment.—If any Member State or delegate violates any provision of this Compact, then every delegate of that Member State immediately forfeits his or her appointment, and shall immediately cease participation at the Convention, vacate the Convention, and return to his or her respective State's capitol.

Section 11. Expenses.—A delegate appointed hereunder is entitled to reimbursement of reasonable expenses for attending the Convention from his or her respective Member State. No delegate may accept any other form of remuneration or compensation for service under this Compact.

ARTICLE VII

CONVENTION RULES

Section 1. Nature of the Convention.—The Convention shall be organized, construed, and conducted as a body exclusively representing and constituted by the several States.

Section 2. Agenda of the Convention.—The agenda of the Convention shall be entirely focused upon and exclusively limited to introducing, debating, voting upon, and rejecting or proposing for ratification the Balanced Budget Amendment under

the Convention Rules specified in this Article and in accordance with the Compact. It shall not be in order for the Convention to consider any matter that is outside the scope of this agenda.

Section 3. Delegate Identity and Procedure.—States shall be represented at the Convention through duly appointed delegates. The number, identity, and authority of delegates assigned to each State shall be determined by this Compact in the case of Member States or, in the case of States that are not Member States, by their respective state laws. However, to prevent disruption of proceedings, no more than three delegates may attend and participate in the Convention on behalf of any State. A certified chaptered conforming copy of this Compact, together with government-issued photographic proof of identification, shall suffice as credentials for delegates of Member States. Any commission for delegates of States that are not Member States shall be based on its respective state laws, but it shall furnish credentials that are at least as reliable as those required of Member States.

Section 4. Voting.—Each State represented at the Convention shall have one vote, exercised by the vote of that State's delegate in the case of States represented by one delegate, or, in the case of any State that is represented by more than one delegate, by the majority vote of that State's respective delegates.

Section 5. Quorum.—A majority of the several States of the United States, each present through its respective delegate in

the case of any State that is represented by one delegate, or through a majority of its respective delegates, in the case of any State that is represented by more than one delegate, shall constitute a quorum for the transaction of any business on behalf of the Convention.

Section 6. Action by the Convention.—The Convention shall only act as a committee of the whole, chaired by the delegate representing the first State to have become a Member State, if that State is represented by one delegate, or otherwise by the delegate chosen by the majority vote of that State's respective delegates. The transaction of any business on behalf of the Convention, including the designation of a Secretary, the adoption of parliamentary procedures, and the rejection or proposal of any constitutional amendment, requires a quorum to be present and a majority affirmative vote of those States constituting the quorum.

Section 7. Emergency Suspension and Relocation of the Convention.—In the event that the Chair of the Convention declares an emergency due to disorder or an imminent threat to public health and safety prior to the completion of the business on the Agenda, and a majority of the States present at the Convention do not object to such declaration, further Convention proceedings shall be temporarily suspended and the Commission shall subsequently relocate or reschedule the Convention to resume proceedings in an orderly fashion in accordance with the terms and conditions of this Compact with prior notice given to

the Compact Notice Recipients.

Section 8. Parliamentary Procedure.—In adopting, applying, and formulating parliamentary procedure, the Convention shall exclusively adopt, apply, or appropriately adapt provisions of the most recent editions of Robert's Rules of Order and the American Institute of Parliamentarians Standard Code of Parliamentary Procedure. In adopting, applying, or adapting parliamentary procedure, the Convention shall exclusively consider analogous precedent arising within the jurisdiction of the United States. Parliamentary procedures adopted, applied, or adapted pursuant to this section shall not obstruct, override, or otherwise conflict with this Compact.

Section 9. Transmittal.—Upon approval of the Balanced Budget Amendment by the Convention to propose for ratification, the Chair of the Convention shall immediately transmit certified copies of such approved proposed amendment to the Compact Administrator and all Compact Notice Recipients, notifying them respectively of such approval and requesting Congress to refer the same for ratification by the States under Article V of the Constitution of the United States. However, in no event shall any proposed amendment other than the Balanced Budget Amendment be transmitted as aforesaid.

Section 10. Transparency.—Records of the Convention, including the identities of all attendees and detailed minutes of all proceedings, shall be kept by the Chair of the Convention or Secretary designated by the Convention. All proceedings and

records of the Convention shall be open to the public upon request subject to reasonable regulations adopted by the Convention that are closely tailored to preventing disruption of proceedings under this Article.

Section 11. Adjournment of the Convention.—The Convention shall permanently adjourn upon the earlier of twenty-four (24) hours after commencing proceedings under this Article or the completion of the business on its Agenda.

ARTICLE VIII

PROHIBITION ON ULTRA VIRES CONVENTION

Section 1. Member States shall not participate in the Convention unless:

(a) Congress first calls the Convention in accordance with this Compact; and

(b) The Convention Rules of this Compact are adopted by the Convention as its first order of business.

Section 2. Any proposal or action of the Convention is void ab initio and issued by a body that is conducting itself in an unlawful and ultra vires fashion if that proposal or action:

(a) Violates or was approved in violation of the Convention Rules or the delegate instructions and limitations on delegate authority specified in this Compact;

(b) Purports to propose or effectuate a mode of ratification that is not specified in Article V of the Constitution of the United States; or

(c) Purports to propose or effectuate the formation of a

new government.

All Member States are prohibited from advancing or assisting in the advancement of any such proposal or action.

Section 3. Member States shall not ratify or otherwise approve any proposed amendment, alteration, or revision to the Constitution of the United States, which originates from the Convention, other than the Balanced Budget Amendment.

ARTICLE IX

RESOLUTION PROSPECTIVELY RATIFYING THE BALANCED BUDGET AMENDMENT

Section 1. Each Member State, by and through its respective Legislature, hereby adopts and ratifies the Balanced Budget Amendment.

Section 2. This Article does not take effect until Congress effectively refers the Balanced Budget Amendment to the States for ratification by three-fourths of the Legislatures of the several States under Article V of the Constitution of the United States.

ARTICLE X

CONSTRUCTION, ENFORCEMENT, VENUE, AND SEVERABILITY

Section 1. Construction of Compact.—To the extent that the effectiveness of this Compact or any of its Articles or provisions requires the alteration of local legislative rules, drafting policies, or procedures to be effective, the enactment of legislation enacting, adopting, and agreeing to be bound by this Compact shall be deemed to waive, repeal, supersede, or

otherwise amend and conform all such rules, policies, or procedures to allow for the effectiveness of this Compact to the fullest extent permitted by the constitution of any affected Member State.

Section 2. Date and Location of the Convention.—Unless otherwise specified by Congress in its call, the Convention shall be held in Dallas, Texas, and commence proceedings at 9 a.m. Central Standard Time on the sixth Wednesday after the latter of the effective date of Article V of this Compact or the enactment date of the Congressional resolution calling the Convention.

Section 3. Defense of the Compact.—In addition to all other powers and duties conferred by state law which are consistent with the terms and conditions of this Compact, the chief law enforcement officer of each Member State is empowered to defend the Compact from any legal challenge, as well as to seek civil mandatory and prohibitory injunctive relief to enforce this Compact, and shall take such action whenever the Compact is challenged or violated.

Section 4 Venue.—The exclusive venue for all actions in any way arising under this Compact shall be in the United States District Court for the Northern District of Texas or the courts of the State of Texas within the jurisdictional boundaries of the foregoing district court. Each Member State shall submit to the jurisdiction of said courts with respect to such actions. However, upon written request by the chief law enforcement

officer of any Member State, the Commission may elect to waive this provision for the purpose of ensuring an action proceeds in the venue that allows for the most convenient and effective enforcement or defense of this Compact. Any such waiver shall be limited to the particular action to which it is applied and not construed or relied upon as a general waiver of this provision. The waiver decisions of the Commission under this provision shall be final and binding on each Member State.

Section 5. Effective Date.—The effective date of this Compact and any of its Articles is the latter of:

(a) The date of any event rendering the same effective according to its respective terms and conditions; or

(b) The earliest date otherwise permitted by law.

Section 6. Severability and Invalidity.—Article VIII of this Compact is hereby deemed nonseverable prior to termination of the Compact. However, if any other phrase, clause, sentence, or provision of this Compact, or the applicability of any other phrase, clause, sentence, or provision of this Compact to any government, agency, person, or circumstance, is declared in a final judgment to be contrary to the Constitution of the United States, contrary to the state constitution of any Member State, or is otherwise held invalid by a court of competent jurisdiction, such phrase, clause, sentence, or provision shall be severed and held for naught, and the validity of the remainder of this Compact and the applicability of the remainder of this Compact to any government, agency, person, or

circumstance shall not be affected. Furthermore, if this Compact is declared in a final judgment by a court of competent jurisdiction to be entirely contrary to the state constitution of any Member State or otherwise entirely invalid as to any Member State, such Member State shall be deemed to have withdrawn from the Compact, and the Compact shall remain in full force and effect as to any remaining Member State. Finally, if this Compact is declared in a final judgment by a court of competent jurisdiction to be wholly or substantially in violation of Article I, Section 10, of the Constitution of the United States, then it shall be construed and enforced solely as reciprocal legislation enacted by the affected Member State(s).

Section 7. Termination.—This Compact shall terminate and be held for naught when the Compact is fully performed and the Constitution of the United States is amended by the Balanced Budget Amendment. However, notwithstanding anything to the contrary set forth in this Compact, in the event such amendment does not occur within 7 years after the first State passes legislation enacting, adopting, and agreeing to be bound to this Compact, the Compact shall terminate as follows:

(a) The Commission shall dissolve and wind up its operations within 90 days thereafter, with the Compact Administrator giving notice of such dissolution and the operative effect of this section to the Compact Notice Recipients; and

(b) Upon the completed dissolution of the Commission, this

Compact shall be deemed terminated, repealed, void ab initio, and held for naught.

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

PCS for HB 943

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 943 Family Law
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1248

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

SUMMARY ANALYSIS

Alimony provides financial support to a financially dependent former spouse. The primary elements to determine entitlement to alimony are need and the ability to pay, but statutes and case law impose many more criteria. There are currently five different types of alimony: temporary alimony, bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony. An award of alimony may be modified or terminated early in certain circumstances.

The bill makes a number of substantial changes to current law on alimony. The bill:

- Eliminates the categorization of alimony as bridge-the-gap, rehabilitative, durational or permanent.
- Eliminates the categorization of marriages as short, moderate, or long term based on their length.
- Provides guidelines to determine an award of temporary alimony.
- Provides a formula and presumptive guidelines to determine an award of full alimony, one effect of which is to eliminate future awards of permanent alimony.
- Redefines the term "income" for purposes of calculating alimony.
- Limits combined awards of alimony and child support to 55 percent of the payor's net income.
- Revises procedures to initiate participation in the alimony depository.
- Repeals cohabitation requirement for a finding of a supportive relationship in a modification action.
- Specifies when evidence of the financial resources of a successor spouse is admissible in a modification action.
- Requires written findings justifying factors used to determine an alimony award or modification.
- Creates a presumption that the parties may have a lower standard of living after divorce.
- Provides that alimony may be modified or terminated upon certain changes in actual income or the obligee reaching retirement age.
- Requires courts to advance certain domestic relations actions on the court calendar upon party motion.

This bill does not appear to have a fiscal impact on local governments, but may have an indeterminate fiscal impact on state government.

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

HB 943, as filed, was referred to the Civil Justice Subcommittee and the Judiciary Committee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

ALIMONY

In general, alimony provides support to a financially dependent former spouse.[1] Alimony may be awarded to either party in a dissolution of marriage case,[2] and may be awarded in certain other cases. The judgment awarding alimony may be based upon the court's findings of fact, or by an underlying agreement of the parties that is approved by the court.[3] Alimony is determined by considering both the need of the recipient and the ability to pay of the other party.[4] Alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay.[5]

While there is some statutory guidance regarding alimony, much of the law on alimony is common law (that is, established through case precedent). The leading case on alimony is *Canakaris v. Canakaris*,[6] a 1980 case that set forth many general concepts of alimony but also confirmed that ultimately the setting of alimony is a matter within the broad discretion of a trial court. Writing in favor of broad discretion, the Supreme Court said:

> Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme.[7]

However, the court noted the problem with such broad discretion:

> The discretionary power that is exercised by a trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.[8]

In the 35 years since *Canakaris*, little has changed in alimony law. While some statutory guidance has been added and case law has somewhat narrowed judicial discretion, a trial court

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[1] Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).
[2] Section 61.08(2), F.S.
[3] Section 61.14(1)(a), F.S.
[4] *See* s. 61.08(2), F.S.; *Payne v. Payne*, 88 So.3d 1016 (Fla. 2d DCA 2012).
[5] Section 61.08(2), F.S.
[6] *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).
[7] *Id.* at 1202.
[8] *Id.* at 1203.

still has broad discretion in setting the amount and term of alimony. Expressing his frustration with the concept of broad discretion, one appellate judge wrote in 2002:

> I write, however, to express my view that broad discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule.[9]

TYPES OF ALIMONY

Florida law recognizes five forms of alimony: temporary, bridge-the-gap, rehabilitative, durational, and permanent periodic alimony.

Temporary Alimony

Alimony pendente lite is temporary alimony awarded after a marital party files for dissolution of marriage. The right to temporary alimony ends when the divorce becomes final, which is after the appeal process has run.[10] Florida law provides that a party may request alimony pendente lite through petition or motion, and if well-founded, the court must order a reasonable amount.[11]

Bridge-the-Gap Alimony

Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony is not modifiable in amount or duration.[12]

Rehabilitative Alimony

Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.[13] In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which must be included as a part of any order awarding rehabilitative alimony.[14] An award of rehabilitative alimony may be modified or terminated in accordance with s. 61.14, F.S., based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.[15]

Durational Alimony

Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14, F.S. However, the length of an award of durational alimony may not be modified except under exceptional circumstances and may not exceed the length of the marriage.[16]

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[9] *Bacon v. Bacon*, 819 So.2d 950, 954 (Fla. 4th DCA 2002)(Farmer, J., concurring).
[10] 24A AM. JR. 2D *Divorce and Separation* §615.
[11] Section 61.071, F.S.
[12] Section 61.08(5), F.S.
[13] Section 61.08(6)(a), F.S.
[14] Section 61.08(6)(b), F.S.
[15] Section 61.08(6)(c), F.S.
[16] Section 61.08(7), F.S.

Permanent Alimony

Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration, following a marriage of moderate duration if such an award is appropriate upon consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14, F.S.[17]

For purposes of determining the appropriateness of a particular award of alimony, there is a rebuttable presumption that:

- A short-term marriage is a marriage having a duration of less than seven years;
- A moderate-term marriage is a marriage having a duration of greater than seven years but less than seventeen years; and
- A long-term marriage is a marriage having a duration of seventeen years or greater.[18]

Effect of the Bill - Types of Alimony

The bill eliminates:

- Permanent alimony.
- The categorization of alimony as bridge-the-gap, rehabilitative, durational, or permanent in form.
- The categorization of marriage as short-term, moderate-term, or long-term based on the length of the marriage.

The bill creates one category of alimony, similar to what is currently called "durational alimony", that may be awarded in amount and duration based on presumptive guidelines as more fully explained in the "Determination of Alimony Award" section of this analysis. The concept of using such alimony for bridging the gap or rehabilitative purposes is retained in the presumptive guidelines that judges may use to determine the alimony award.

The bill does not change the categorization or form of temporary alimony.

DETERMINATION OF ALIMONY AWARD

Current Guidelines

Unlike child support obligations which are established by a fairly strict formula based on income, the type, amount and duration of alimony awards are largely within the discretion of the court. If alimony is to be judicially determined in "just proportions where appropriate," then this judicial discretion can understandably lead to widely disparate results.[19]

Currently, before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.[20] Thereafter, the court must make a specific factual determination regarding

[17] Section 61.08(8), F.S.
[18] Section 61.08(4), F.S.
[19] Victoria M. Ho and Jennifer J. Cohen, *An update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part I*, The Florida Bar Journal, (October 2003).
[20] *Canakaris v. Canakaris*, 382 So.2d 1197, 1202 (Fla. 1980)

whether there remains a need and ability to pay. Alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance the court must consider all relevant factors, including:[21]

- The standard of living established during the marriage.
- The duration of the marriage.
- The age and the physical and emotional condition of each party.
- The financial resources of each party, including the non-marital and the marital assets and liabilities distributed to each.
- The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to acquire sufficient education or training to enable such party to find appropriate employment.
- The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- The responsibilities each party will have with regard to any minor children they have in common.
- The tax treatment and consequences of any alimony award, including the designation of alimony as nontaxable and nondeductible.
- All sources of income available to either party, including income available through investments.
- Any other factor necessary to do equity and justice between the parties.

The court may also consider the adultery of either spouse and the circumstances surrounding that adultery in determining an award of alimony.[22] However, adultery is not a bar to entitlement to alimony[23] and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.[24]

Among the factors enumerated in current law, the income of the parties is one of the most important to courts in establishing the need of one party and the ability of the other to pay, but is perhaps the most difficult to accurately measure. Unlike the definition of income for purposes of the child support guidelines, income as applicable to alimony actions is defined very broadly as " any form of payment to an individual, regardless of source, including, but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker's compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government."[25] Case law has expanded the definition of income to include in-kind payments[26] and regular gifts.[27] In general, a source of income must be "available" in order to be considered in an alimony claim.[28] A spouse cannot voluntarily make the income unavailable in order to reduce his or her annual income.[29] Income may also be imputed to a voluntarily unemployed or underemployed spouse, whether the

[21] Section 61.08(2), F.S.
[22] Section 61.08(1), F.S.
[23] *See Coltea v. Coltea*, 856 So.2d 1047 (Fla. 4th DCA).
[24] *See Noah v. Noah*, 491 So.2d 1124 (Fla. 1986) (holding that the trial court erred in distributing virtually all assets to the wife on the basis of her husband's adultery where there was no evidence that the adultery depleted the family resources or that the emotional devastation visited on the wife translated into her having a greater financial need).
[25] Section 61.046(7), F.S.
[26] *Fitzgerald v. Fitzgerald*, 912 So.2d 363 (Fla.2d DCA 2005).
[27] *Weiser v. Weiser*, 782 So.2d 986 (Fla. 4th DCA 2000).
[28] *Zold v. Zold*, 880 So.2d 779 (Fla. 5th DCA 2004).
[29] *Geoghegan v. Geoghegan*, 969 So.2d 482 (Fla. 5th DCA 2007)(court should have considered including income earned by husband that was annually contributed by him to his 401K plan where contributions were voluntary)

spouse is the payor or payee.[30] In either case, evidence about specific job opportunities must be presented.[31]

The court must include findings of fact relative to the factors enumerated supporting an award or denial of alimony.[32] It is reversible error if a judgment fails to include findings as to all enumerated factors.[33] After determining the amount of alimony, the court may order periodic payments, payments in lump sum, or a combination of the two. Periodic payment of alimony means a payment of a certain amount of alimony at regular intervals (for example payment of the alimony on a monthly, semi-monthly, bi-weekly, or weekly basis). For lump sum alimony to be awarded, there must be a showing of need and ability to pay as well as unusual circumstances which require non-modifiable support and justification that does not substantially endanger the payor's economic status.[34]

An alimony award may be protected by the court by requiring the payor to purchase life insurance or post a bond, or to otherwise secure the alimony award with other assets that may be suitable for that purpose.[35]

Effect of the Bill - Presumptive Guidelines

The bill creates one category of alimony, similar to what is currently called "durational alimony," that may be awarded in amount and duration based on presumptive guidelines. The guidelines may not be used to calculate temporary alimony.

Initial Determination of Presumptive Alimony Range

The court must make initial written findings regarding the amount of each party's monthly gross income, which includes actual or potential income and such income from nonmarital or marital property distributed to each party, as well as the years of marriage as determined from the date of marriage through the date of the filing of the action for dissolution of marriage.

Gross income is defined virtually identical to gross income for purposes of determining child support under s. 61.30(2)(a), F.S. with the inclusion of several additional sources of income currently recognized in case law, such as continuing monetary gifts[36] and severance pay.[37] "Gross income" does not include child support, public assistance benefits, certain social security benefits, or earnings or gains on retirement accounts if unable to take a distribution from such account.

If a party is voluntarily unemployed or underemployed, alimony is calculated based upon that party's potential income unless the court makes specific written findings regarding circumstances that make it inequitable to impute income. Potential income means income which could be earned by a party using his or her best efforts from:

- Employment - The income a party could reasonable expect to earn by working at a locally available full time job commensurate with education, training, or experience; or
- Investments of assets or use of property - The income a party could reasonably expect to earn from the investment of his or her assets or the use of his or her property in a financially prudent manner.

[30] *Kovar v. Kovar*, 648 So.2d 177 (Fla. 4th DCA 1994); *Rojas v. Rojas*, 656 So.2d 563 (Fla. 3d DCA 1995).
[31] *Brooks v. Brooks*, 602 So.2d 630 (Fla. 2d DCA 1992).
[32] Section 61.08, F.S.
[33] *Pavese v. Pavese*, 932 So.2d 1269 (Fla 2d DCA 2006); *Baig v. Baig*, 917 So.2d 379 (Fla. 2d DCA 2005).
[34] *Rosario v. Rosario*, 945 So. 2d 629, 632 (Fla. 4th DCA 2006).
[35] Section 61.08(3), F.S.
[36] *Ordini v. Ordini*, 701 So. 2d 663 (Fla. 4th DCA 1997) and *Cooper v. Kahn*, 696 So. 2d 1186 (Fla. 3d DCA 1997).
[37] *Stebbins. v. Stebbins*, 754 So.2d 903 (Fla. 1st DCA 2000).

A party is underemployed if he or she is not working full time in a position which is appropriate, based upon his or her education and experience, and available in the geographical area of his or her residence. A party will not be considered underemployed if he or she is enrolled in an educational program that can be reasonably expected to result in a degree or certification if it will lead to higher income and is a good faith educational choice.

After making such initial findings, the court must calculate and make written findings regarding the presumptive alimony amount and duration range pursuant to the following formula:

Presumptive Alimony Formula		
	Low End	**High End**
Amount	**(0.0125 x YOMA) x GI** If a negative number results, the presumptive amount is $0.	**(0.020 x YOMA) x GI** If a negative number results, the presumptive amount is $0.
Duration	**0.25 x YOMD**	**0.75 x YOMD**

- YOMA = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive amount of alimony. For marriages of 20 years or more, 20 years is used in calculating the low end and high end. If the court establishes the duration of the alimony at 50% percent or less than the actual years of marriage, then the court must use the actual years of marriage, up to a maximum of 25 years, to calculate the high end.
- YOMD = Years of marriage (measured from date of marriage through the date of filing the action for dissolution) for purposes of determining the presumptive duration of alimony.
- GI = Monthly gross income of the potential payor minus the monthly gross income of the party seeking alimony. If a party is voluntarily unemployed or underemployed, GI is calculated using the party's potential income.

Determining Alimony Award Within Presumptive Range

A court must award alimony within the presumptive range based on the length of the marriage and a list of enumerated factors.

There is a rebuttable presumption for marriages 2 years or less that no alimony may be awarded regardless of the range determined pursuant to the presumptive guidelines. The court may award alimony for such marriages in accordance with the standards for awarding alimony for marriages in excess of 2 years if the court makes written findings that:

- There is clear and convincing need for alimony;
- There is ability to pay alimony; and
- The failure to award alimony would be inequitable.

For all other marriages, and a marriage of 2 years or less meeting the above criteria, if there is no agreement between the parties, alimony is presumptively awarded within the calculated presumptive range. In determining the amount and duration of the alimony award within the range, the court retains broad discretion, but must consider all of the following factors:

- The financial resources (including actual and potential income) and ability of each spouse to meet his or her reasonable needs independently;
- The standard of living of the parties during the marriage with consideration that neither party may be able to maintain that standard of living as there will be two households after the divorce;
- Whether there was an equitable distribution of marital property;
- Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, and the details of such additional training or education plans;
- Reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties;
- Whether either party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage;
- Whether either party has caused the unreasonable depletion or dissipation of marital assets;
- The amount of temporary alimony and the amount of time it was paid to the recipient spouse;
- The age, health, and physical and mental condition of the parties, including health care needs and unreimbursed health care expenses;
- Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party;
- The tax consequence of the alimony award;
- Any other factor necessary to do equity and justice between the parties.

After consideration of the presumptive alimony amount and duration range and the listed factors, the court may establish an alimony award. The order establishing the award must clearly set forth both the amount and duration of the award. The court must also make a written finding that the payor has the financial ability to pay the award.

A court may still order a payor to secure the award of alimony, but only upon a showing of special circumstances. The court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party for the security. The permissible methods of security include the purchase or maintenance of a decreasing term life insurance policy or a bond, or any other assets that may be suitable. The obligation of a payor to secure the award of alimony may be modified if the underlying alimony award is modified and must be reduced in an amount commensurate with any reduction in the alimony award.

Deviations from the Presumptive Alimony Range

The court may establish an award of alimony that is outside either or both of the presumptive alimony amount and alimony duration ranges only if the court has considered all of the enumerated factors and makes specific written findings concerning the factors that justify the finding that the application of the presumptive alimony amount and alimony duration ranges is inappropriate or inequitable.

Determining Award of Temporary Alimony

Current law does not specify guidelines for the court to consider in awarding temporary alimony. This bill requires the court to first determine whether there is a need for temporary alimony and the ability to pay alimony, which restates and codifies the current standard for determining awards of other types of alimony. If both conditions are met, the court must consider the factors used to determine an award of alimony within the presumptive alimony guidelines and make specific written findings of fact regarding the factors that justify an award of temporary alimony. However, a court may not use the presumptive alimony formula created in the bill to calculate temporary alimony.

MODIFICATION AND TERMINATION OF ALIMONY

Section 61.14, F.S. provides that either party may request modification of an award of alimony, whether such award was agreed to by the parties in a marital settlement agreement or ordered by the court, if the circumstances or the financial ability of either party changes. The change in circumstances must be alleged to have occurred subsequent to last judgment or order awarding alimony.[38] The court has jurisdiction to modify an award of alimony as equity requires.[39] A modification order may be retroactive to the date of the filing of the action, or the filing of the petition for modification.[40] Though s. 61.14, F.S., provides for a modification of alimony upon a change in circumstances, whether the award can be modified and on what basis depends on the type and the purpose of the alimony award.

Basis for Modification or Termination of Alimony		
Type of Alimony	Basis for Modification or Termination	Automatic Termination
Temporary	Upon good cause shown	Entry of final judgment of dissolution of marriage.
Bridge-the-gap	Not modifiable in amount or duration	After 2 Years Remarriage of Recipient Death of Payor or Recipient
Rehabilitative	Substantial change in circumstances Non-compliance with the rehabilitative plan Completion of the rehabilitative plan	Death of Payor or Recipient
Durational	Substantial change in circumstances (Amount) Exceptional Circumstances (Length)	Remarriage of Recipient Death of Payor or Recipient
Permanent	Substantial change in circumstances	Remarriage of Recipient Death of Payor or Recipient

Substantial Change in Circumstances

Where a substantial change in circumstances forms the basis to modify an award of alimony, the moving party must show a substantial change in circumstances, that the change was not contemplated at the time of the final judgment of dissolution, and that the change is sufficient, material, involuntary and permanent in nature."[41]

Supportive Relationship

One form of change of circumstances warranting modification of an alimony award is the existence of a supportive relationship. A court may reduce or terminate an award of alimony based on its specific written findings that, since the granting of a divorce and the award of alimony, the spouse receiving alimony, or the obligee, has entered into a supportive relationship with a person with whom he or she resides. Section 61.14(1), F.S., enumerates factors a court must consider when determining whether a supportive relationship exists between the obligee and the individual with whom such former spouse

[38] *Johnson v. Johnson*, 537 So.2d 637 (Fla. 2d DCA 1998).
[39] Section 61.14(1)(a), F.S.
[40] *Id.*
[41] *Townsend v. Townsend*, 585 So.2d 468 (Fla. 2d DCA 1991); Courts have found a substantial change in circumstance where: an obligor's health deteriorated due to two heart attacks, he was unable to continue gainful employment, and received social security disability income as his full income (*Scott v. Scott*, 109 So.3d 804 (Fla. 5th DCA 2012)). An obligor demonstrated a showing of a substantial change in circumstance through a detrimental impact on his business in manufacturing cathode ray television tubes due to advancing technology that made his product obsolete. The court also noted that the obligor was forced to remove money from family trust accounts to meet his alimony obligation. (*Shawfrank v. Shawfrank*, 97 So. 3d 934, 937 (Fla. 1st DCA 2012)). The court found a substantial change in circumstance where financial affidavits showed that obligee's income jumped from $1,710 to $4,867 a month, making her income higher than the obligor's income of $3,418 a month. (*Koski v. Koski*, 98 So. 3d 93, 94 (Fla. 4th DCA 2012)).

resides (i.e. the extent to which the obligee and the person hold themselves out as a married couple). The spouse paying spousal support, or the obligor, has the burden to prove that a supportive relationship exists.

The bill authorizes a court to terminate or modify an award of alimony based upon a supportive relationship that currently exists or has existed within the year before the filing of the petition for modification. Additional factors that a court may consider to determine the relationship of the obligee to another person include:

- Whether the obligor's failure to comply with court ordered financial obligations to the obligee was a significant factor in the establishment of the relationship;
- The need and extent to which an obligee provides or receives caretaking assistance from a person related by consanguinity with whom the obligee resides.

The bill also eliminates the requirement that the obligee cohabitate with the person with whom they are in a supportive relationship, although cohabitation is a factor the court may still consider. The obligor does not have to prove cohabitation. If a reduction or termination of alimony is granted based on a supportive relationship the reduction or termination is retroactive to the date of filing of the petition for reduction or termination.

Retirement of the Obligor

Current law provides that retirement of the obligor can be considered as part of the total circumstances in order to determine if a sufficient change in circumstances exists to warrant a modification of alimony.[42] In *Pimm v. Pimm*,[43] the Florida Supreme Court set out the following criteria for modification in cases of retirement and voluntary retirement before age 65 (the full retirement age for social security benefits at the time):

- Consideration of payor's age, health, and motivation for retirement as well as the type of work the payor performs and the age at which others engage in that line of work normally retire.
- Whether the retirement placed the receiving spouse in peril of poverty.
- The assets of the parties.

There are no statutory standards relating to modification or termination of alimony based on retirement, and it is strictly up to the trial court's discretion within the guidance provided by the Supreme Court.

The bill codifies the *Pimm case and* provides for modification or termination of an alimony award based on actual retirement. A substantial change in circumstances is deemed to exist if the obligor has reached the full retirement age for social security benefits and has retired or the obligor has reached the customary retirement age for his or her occupation and retired. The obligor may file an action within 1 year of his or her anticipated retirement and the court must determine the customary retirement date for the obligor's profession. However, such determination is not adjudicative of the petition for modification.

If an obligor voluntarily retires before meeting either condition, the court must determine if the retirement is reasonable based on the factors set out in *Pimm*. If the voluntary retirement is reasonable it constitutes a substantial change in circumstances. There is a rebuttal presumption that an obligor's existing alimony obligation shall be modified or terminated upon a finding of substantial change in circumstances. The bill provides factors that may overcome the presumption when applied to the current circumstances of the obligor and obligee, including:

[42] *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992).
[43] *Id.*

- Age, health, assets and liabilities, earned and imputed income, and ability to maintain full or part time employment.
- Any other factor deemed relevant by the court.

The court may temporarily reduce or suspend the obligor's payment of alimony while a petition for modification based on retirement is pending.

Remarriage of the Obligor

The financial status of a successor spouse is ordinarily irrelevant in a modification proceeding, as it is improper for a court to consider the income of the obligor's current spouse in an action to modify the obligor's alimony obligation. An exception exists if it is determined that the obligor has deliberately limited his or her income for the purpose of reducing the alimony obligation and is living off the income of a successor spouse.[44]

The bill provides that the remarriage of an alimony obligor does not constitute a substantial change in circumstance or a basis for modification of alimony. Financial information of a successor spouse of the party paying or receiving alimony is inadmissible in a modification action unless a party claims his or her income has decreased since the marriage. The bill specifies the extent to which the information is discoverable and admissible in such actions.

Imputed Income

The bill provides that a party is entitled to pursue an immediate modification of alimony under the following circumstances which shall constitute a substantial change in circumstances:

- If the actual income earned by a party exceeds, by at least 10 percent, the amount imputed to that party at the time an alimony award was determined. The increase in an obligor's income alone does not constitute a basis for modification unless at the time the award was established the obligor was considered unemployed or underemployed and the court did not impute income to that party at his or her maximum potential income.

- If the obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order of alimony.

Attorney Fees and Costs

Attorney's fees are available in proceedings to modify an award of alimony. Section 61.16(1), F.S. provides, in relevant part: "The court may from time to time, *after considering the financial resources of both parties*, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals." The purpose of s. 61.16, F.S., is to make certain that both parties will have similar ability to secure competent legal counsel. "It is not necessary that one spouse be completely unable to pay attorney's fees in order for the trial court to require the other spouse to pay these fees."[45] The court views the relative disparity of financial circumstances between the spouses when awarding fees. Accordingly a party may prevail in a modification action but, if in possession of greater financial resources relative to his or her spouse, still be required to pay the fees of his or her spouse based upon public policy considerations that each party have similar ability to secure competent legal counsel.

The bill provides an exception to the consideration of the financial resources of the both parties when awarding attorney fees and costs in a modification action. A party who unreasonably pursues or

[44] *Harmon v. Harmon* 523 So.2d 187 (Fla. 2d DCA 1988), *Hayden v. Hayden*, 662 So.2d 714 (Fla. 4th DCA 1995).
[45] *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980).

defends an action for modification of alimony will be required to pay the reasonable attorney fees and costs of the prevailing party and is disqualified from payment of his or her own fees or costs under s. 61.16, F.S.

INCOME TAX TREATMENT OF ALIMONY PAYMENTS

Gross income for federal income tax purposes, includes amounts received as alimony or separate maintenance payments.[46] The payment to or for the benefit of a spouse or former spouse under a divorce or separation instrument[47] will qualify and be deemed and treated by the Internal Revenue Service (IRS) as "alimony" for income tax purposes, and thus will be tax deductible from the payor's gross income and taxable income to the payee, if:[48]

- The payment is made in cash;
- The divorce or separation instrument does not designate the payment as a payment that is not includable in gross income under the Internal Revenue Code and not allowable as a deduction under the Internal Revenue Code;
- The spouses are not members of the same household at the time the payment is made; and
- There is no requirement to make any payment (in cash or property) after the death of the payee.

Florida courts may override the default IRS rule by providing in the judgment of dissolution or support that alimony payments are excluded from the gross income of the payee and not deductible by the payor.[49] However, the usual treatment of alimony has been to make the alimony taxable to the recipient and deductible by the payor.[50]The spouses may also validly override the default taxability rules of the IRS by designating that payments otherwise qualifying as alimony or separate maintenance payments under the Internal Revenue Code be nondeductible by the payor and excludable from gross income by the payee in a marital settlement agreement or related agreement.[51]

Effect of the Bill

The bill codifies and restates current law.

OTHER EFFECTS OF THE BILL

Nominal Alimony

Under current law, nominal alimony may be awarded when the court finds the requisite entitlement to alimony, but due to insufficient resources available at the time of the final hearing, the court cannot award sufficient alimony to meet the needs of the payee. Nominal alimony is not a form of alimony, but rather is an award of a de minimis amount to serve as a "placeholder" for one of the five types of alimony currently recognized by the state. The award of nominal alimony reserves jurisdiction for the court to later modify the amount of alimony upon petition of the payee, should the financial conditions of the payor spouse improve.[52]

The bill reserves the right of a court to award nominal alimony in the amount of $1 per year if:

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[46] 26 U.S.C. § 71(a).
[47] A divorce or separation instrument means a decree of divorce or separate maintenance or a written instrument incident to such a decree, or a written separation agreement, or a decree requiring a spouse to make payments for the support or maintenance of the other spouse. 26 U.S.C. § 71(b)(2).
[48] 26 U.S.C. § 71(b)(1).
[49] *Rykiel v. Rykiel*, 838 So.2d 508, 511-12 (Fla. 2003)
[50] *See generally Garcia v. Garcia*, 696 So.2d 1279 (Fla. 2d DCA 1997); *Rihl v. Rihl*, 727 So.2d 272 (Fla. 3d DCA 1999).
[51] 26 CFR. § 1.71-1T, Q8 & A8.
[52] *Ellis v. Ellis*, 699 So.2d 280 (Fla. 5th DCA 1997)(award of $1.00 in permanent alimony to wife to leave open the possibility of increasing the alimony should the value of the husband's pension increase, since husband could then pay increased alimony from his social security disability income currently being used for his own support).

- At the time of trial, a party who traditionally provided the primary source of financial support to the family temporarily lacked the ability to pay support but was reasonably anticipated to have the ability to pay support in the future; or
- An alimony recipient is presently able to work but has a medical condition that with a reasonable degree of certainty may inhibit or prevent his or her ability to work during the duration of the alimony period.

The duration of the nominal alimony must be established in accordance with the presumptive guidelines. Before the expiration of the durational period, nominal alimony may be modified to a full alimony award using the presumptive alimony guidelines.

Advancing Trial

Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so.[53] The Florida Rules of Judicial Administration provide that the presumptively reasonable time period for the completion of domestic relation cases in the trial and appellate courts of this state is 90 days (from filing to disposition) for uncontested actions and 180 days (from filing to disposition) for contested actions.[54] Nevertheless, the length of a dissolution and support action depends on the circumstances of a particular situation, and may exceed these time periods in some cases. Judges have the duty to identify priority cases as assigned by statute, rule of procedure, case law, or otherwise and implementing such docket control policies as may be necessary.[55] In all civil cases assigned a priority status, any party may file a notice of priority status explaining the nature of the case, the source of the priority status, any deadlines imposed by law on any aspect of the case, and any unusual factors that may bear on meeting the imposed deadlines.[56]

Section 61.192, F.S. is created by the bill to authorize either party in an action brought pursuant to ch. 61, F.S. to move the court to advance the trial of the action on the docket if more than 2 years have passed since the initial petition was served. The statute directs that the court is thereafter required to give the case priority on the court's calendar.

Payment of Alimony Awards

Section 61.08(10), F.S. requires that any order entered after January 1, 1985 that awards alimony, must direct the payment of alimony be made through a depository operated by the clerk of court unless the parties have no minor child or the parties request that the court not direct payment through the depository. If the parties request that the court not enter an order directing payment through the depository, the order of support must provide, or will be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository.[57] Either party may subsequently file with the depository an affidavit alleging default or arrearages in payment and stating that the party wishes to initiate participation in the depository program.[58] The party must provide copies of the affidavit to the court and the other party or parties.[59] Fifteen days after receipt of the affidavit, the depository must notify all parties that future payments must be directed to the depository.[60] The depository collects a fee equal to 4 percent of the alimony payment, except that no fee may exceed $5.25.[61]

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[53] Florida Rule of Judicial Administration 2.085.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Section 61.08(10)(d), F.S.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Section 61.181(2)(b), F.S.

The bill revises the procedures parties must use to initiate subsequent participation in the depository program. Instead of filing an affidavit with the depository alleging a default or arrearage, a party must file a verified motion with the court. The moving party must provide the non-moving party with a copy of the motion. A court is required to conduct an evidentiary hearing within 15 days after the filing of the motion to establish the default and arrearages, if any. The court must issue an order directing the clerk of the circuit court to establish or amend a Family Law Case History account, and direct that future payments be processed by the depository.

Child Support

The bill provides that in no event may a combined award of alimony and child support constitute more than 55 percent of the payor's net income, calculated without any consideration of alimony or child support obligations, and amends s. 61.30, F.S., the child support guidelines to require a court to adjust the award of child support to ensure that the 55 percent cap is not exceeded.

APPLICABILITY TO PENDING OR FUTURE PETITIONS FOR MODIFICATION OF ALIMONY

The revisions made by the bill, with the exception of revisions related to the calculation of the duration of an alimony award, apply to all petitions for modification of alimony pending on October 1, 2015, and to all petitions for modification of alimony filed on or after October 1, 2015. The changes in current law do not constitute a substantial change in circumstances for purposes of modifying an alimony award and may not serve as the sole basis to seek modification of an alimony award made before October 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 61.071, F.S., relating to alimony pendent lite; suit money.

Section 2 amends s. 61.08, F.S., relating to alimony.

Section 3 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, or alimony agreements or orders.

Section 4 amends s. 61.30, F.S., relating to child support guidelines; retroactive child support.

Section 5 creates s. 61.192, F.S., relating to advancing trial.

Section 6 provides for applicability and construction of the effect of the bill.

Section 7 provides an effective date of October 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   The bill appears to have an impact on the State Courts System which is indeterminate at this time.

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 is likely to impact future alimony awards.

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:

Provisions of the bill requiring the court to advance actions under ch. 61, F.S. on the calendar and to hear a motion regarding payment of alimony through the clerk depository within a specified period may violate the court's exclusive rule-making authority. The Florida Supreme Court is responsible for adopting rules of practice and procedure in all state courts. The Legislature cannot modify or rewrite court-formulated rules of practice and procedure.[62] The court has invalidated statutes that the court claims violate its exclusive rulemaking authority.[63]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Current law provides for an award of alimony unconnected with an action for dissolution. The court has the ability in these actions to enter an alimony award "as it deems just and proper."[64] As the bill repeals the discretionary guidelines given to judges to determine an award of alimony and replaces it with presumptive guidelines based on income and the years of marriage, which is calculated depending upon the date of the filing of the action of dissolution, it is unclear whether alimony awards unconnected with dissolution are also subject to the presumptive guidelines or if judges retain full discretion to determine the award.

The bill does not specify the basis of modification for an award of alimony under the presumptive guidelines.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

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[62] Art. V, Sec. 2(a), Fla. Const.

[63] *See Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (holding that time limits for the writ of habeas corpus is a matter of practice and procedure, thereby invalidating part of the Death Penalty Reform Act); see also *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So.2d 730 (Fla. 1991) (striking law regarding counterclaims in foreclosure proceedings).

[64] Section 61.09 F.S.

A bill to be entitled

An act relating to family law; amending s. 61.071, F.S.; specifying that a court may not use certain presumptive alimony guidelines in calculating alimony pendente lite; amending s. 61.08, F.S.; providing definitions; requiring a court to make specified findings before ruling on a request for alimony; providing for determination of presumptive alimony range and duration range; providing presumptions concerning alimony awards depending on the duration of marriages; providing for imputation of income in certain circumstances; providing for awards of nominal alimony in certain circumstances; providing for taxability and deductibility of alimony awards; specifying that a combined award of alimony and child support may not constitute more than a specified percentage of a payor's net income; providing for termination and payment of awards; amending s. 61.14, F.S.; providing that a party may pursue an immediate modification of alimony in certain circumstances; revising factors to be considered in determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship; providing for burden of proof for claims concerning the existence of supportive relationships; providing for the effective date of a reduction or

termination of an alimony award; providing that the remarriage of an alimony obligor is not a substantial change in circumstance; providing that the financial information of a spouse of a party paying or receiving alimony is inadmissible and undiscoverable; providing an exception; providing for modification or termination of an award based on a party's retirement; providing a presumption upon a finding of a substantial change in circumstance; specifying factors to be considered in determining whether to modify or terminate an award based on a substantial change in circumstance; providing for a temporary suspension of an obligor's payment of alimony while his or her petition for modification or termination is pending; providing for an effective date of a modification or termination of an award; providing for an award of attorney fees and costs for unreasonably pursuing or defending a modification of an award; amending s. 61.30, F.S.; providing that whenever a combined alimony and child support award constitutes more than a specified percentage of a payor's net income, the child support award be adjusted to reduce the combined total; creating s. 61.192, F.S.; providing for motions to advance the trial of certain actions if a specified period has passed since the initial service on the respondent; providing applicability; providing an

effective date.

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

Section 1. Section 61.071, Florida Statutes, is amended to read:

61.071 Alimony pendente lite; suit money.—In every proceeding for dissolution of the marriage, a party may claim alimony and suit money in the petition or by motion, and if the petition is well founded, the court shall allow a reasonable sum therefor. If a party in any proceeding for dissolution of marriage claims alimony or suit money in his or her answer or by motion, and the answer or motion is well founded, the court shall allow a reasonable sum therefor. After determining there is a need for alimony and that there is an ability pay alimony, the court shall consider the alimony factors in s. 61.08(4)(b)1.-14. and make specific written findings of fact regarding the relevant factors that justify an award of alimony under this section. The court may not use the presumptive alimony guidelines in s. 61.08 to calculate alimony under this section.

Section 2. Section 61.08, Florida Statutes, is amended to read:

61.08 Alimony.—

(Substantial rewording of section. See s. 61.08, F.S., for present text.)

(1) DEFINITIONS.—As used in this section, unless the context otherwise requires, the term:

(a)1. "Gross income" means recurring income from any source and includes, but is not limited to:

a. Income from salaries.

b. Wages, including tips declared by the individual for purposes of reporting to the Internal Revenue Service or tips imputed to bring the employee's gross earnings to the minimum wage for the number of hours worked, whichever is greater.

c. Commissions.

d. Payments received as an independent contractor for labor or services, which payments must be considered income from self-employment.

e. Bonuses.

f. Dividends.

g. Severance pay.

h. Pension payments and retirement benefits actually received.

i. Royalties.

j. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.

k. Interest.

l. Trust income and distributions which are regularly received, relied upon, or readily available to the beneficiary.

m. Annuity payments.

n. Capital gains.

o. Any money drawn by a self-employed individual for personal use that is deducted as a business expense, which moneys must be considered income from self-employment.

p. Social security benefits, including social security benefits actually received by a party as a result of the disability of that party.

q. Workers' compensation benefits.

r. Unemployment insurance benefits.

s. Disability insurance benefits.

t. Funds payable from any health, accident, disability, or casualty insurance to the extent that such insurance replaces wages or provides income in lieu of wages.

u. Continuing monetary gifts.

v. Income from general partnerships, limited partnerships, closely held corporations, or limited liability companies; except that if a party is a passive investor, has a minority interest in the company, and does not have any managerial duties or input, the income to be recognized may be limited to actual cash distributions received.

w. Expense reimbursements or in-kind payments or benefits received by a party in the course of employment, self-employment, or operation of a business which reduces personal living expenses.

x. Overtime pay.

y. Income from royalties, trusts, or estates.

z. Spousal support received from a previous marriage.

aa. Gains derived from dealings in property, unless the gain is nonrecurring.

2. "Gross income" does not include:

a. Child support payments received.

b. Benefits received from public assistance programs.

c. Social security benefits received by a parent on behalf of a minor child as a result of the death or disability of a parent or stepparent.

d. Earnings or gains on retirement accounts, including individual retirement accounts; except that such earnings or gains shall be included as income if a party takes a distribution from the account. If a party is able to take a distribution from the account without being subject to a federal tax penalty for early distribution and the party chooses not to take such a distribution, the court may consider the distribution that could have been taken in determining the party's gross income.

3.a. For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, the term "gross income" equals gross receipts minus ordinary and necessary expenses, as defined in sub-subparagraph b., which are required to produce such income.

b. "Ordinary and necessary expenses," as used in sub-subparagraph a., does not include amounts allowable by the Internal Revenue Service for the accelerated component of

depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for purposes of calculating alimony.

(b) "Potential income" means income which could be earned by a party using his or her best efforts and includes potential income from employment and potential income from the investment of assets or use of property. Potential income from employment is the income which a party could reasonably expect to earn by working at a locally available, full-time job commensurate with his or her education, training, and experience. Potential income from the investment of assets or use of property is the income which a party could reasonably expect to earn from the investment of his or her assets or the use of his or her property in a financially prudent manner.

(c)1. "Underemployed" means a party is not working full-time in a position which is appropriate, based upon his or her educational training and experience, and available in the geographical area of his or her residence.

2. A party is not considered "underemployed" if he or she is enrolled in an educational program that can be reasonably expected to result in a degree or certification within a reasonable period, so long as the educational program is:

a. Expected to result in higher income within the foreseeable future.

b. A good faith educational choice based upon the previous

education, training, skills, and experience of the party and the availability of immediate employment based upon the educational program being pursued.

(d) "Years of marriage" means the number of whole years, beginning from the date of the parties' marriage until the date of the filing of the action for dissolution of marriage.

(2) INITIAL FINDINGS.—When a party has requested alimony in a dissolution of marriage proceeding, before granting or denying an award of alimony, the court shall make initial written findings as to:

(a) The amount of each party's monthly gross income, including, but not limited to, the actual or potential income, and also including actual or potential income from nonmarital or marital property distributed to each party.

(b) The years of marriage as determined from the date of marriage through the date of the filing of the action for dissolution of marriage.

(3) ALIMONY GUIDELINES.—After making the initial findings described in subsection (2), the court shall calculate the presumptive alimony amount range and the presumptive alimony duration range. The court shall make written findings as to the presumptive alimony amount range and presumptive alimony duration range.

(a) Presumptive alimony amount range.—The low end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.0125 x the years of marriage) x the difference between the monthly gross incomes of the parties

The high end of the presumptive alimony amount range shall be calculated by using the following formula:

(0.020 x the years of marriage) x the difference between the monthly gross incomes of the parties

For purposes of calculating the presumptive alimony amount range, 20 years of marriage shall be used in calculating the low end and high end for marriages of 20 years or more. In calculating the difference between the parties' monthly gross income, the income of the party seeking alimony shall be subtracted from the income of the other party. If the application of the formulas to establish a guideline range results in a negative number, the presumptive alimony amount shall be $0. If a court establishes the duration of the alimony award at 50 percent or less of the length of the marriage, the court shall use the actual years of the marriage, up to a maximum of 25 years, to calculate the high end of the presumptive alimony amount range.

(b) Presumptive alimony duration range.—The low end of the presumptive alimony duration range shall be calculated by using the following formula:

0.25 x the years of marriage

The high end of the presumptive alimony duration range shall be calculated by using the following formula:

0.75 x the years of marriage

(4) ALIMONY AWARD.—

(a) Marriages of 2 years or less.—For marriages of 2 years or less, there is a rebuttable presumption that no alimony shall be awarded. The court may award alimony for a marriage with a duration of 2 years or less only if the court makes written findings that there is clear and convincing need for alimony, there is an ability to pay alimony, and that the failure to award alimony would be inequitable. The court shall then establish the alimony award in accordance with paragraph (b).

(b) Marriages of more than 2 years.—Absent an agreement of the parties, alimony shall presumptively be awarded in an amount within the alimony amount range calculated in paragraph (3)(a). Absent an agreement of the parties, alimony shall presumptively be awarded for a duration within the alimony duration range calculated in paragraph (3)(b). In determining the amount and duration of the alimony award, the court shall consider all of the following factors upon which evidence was presented:

1. The financial resources of the recipient spouse,

including the actual or potential income from nonmarital or marital property or any other source and the ability of the recipient spouse to meet his or her reasonable needs independently.

2. The financial resources of the payor spouse, including the actual or potential income from nonmarital or marital property or any other source and the ability of the payor spouse to meet his or her reasonable needs while paying alimony.

3. The standard of living of the parties during the marriage with consideration that there will be two households to maintain after the dissolution of the marriage and that neither party may be able to maintain the same standard of living after the dissolution of the marriage.

4. The equitable distribution of marital property, including whether an unequal distribution of marital property was made to reduce or alleviate the need for alimony.

5. Both parties' income, employment, and employability, obtainable through reasonable diligence and additional training or education, if necessary, and any necessary reduction in employment due to the needs of an unemancipated child of the marriage or the circumstances of the parties.

6. Whether a party could become better able to support himself or herself and reduce the need for ongoing alimony by pursuing additional educational or vocational training along with all of the details of such educational or vocational plan, including, but not limited to, the length of time required and

the anticipated costs of such educational or vocational plan.

7. Whether one party has historically earned higher or lower income than the income reflected at the time of trial and the duration and consistency of income from overtime or secondary employment.

8. Whether either party has foregone or postponed economic, educational, or employment opportunities during the course of the marriage.

9. Whether either party has caused the unreasonable depletion or dissipation of marital assets.

10. The amount of temporary alimony and the number of months that temporary alimony was paid to the recipient spouse.

11. The age, health, and physical and mental condition of the parties, including consideration of significant health care needs or uninsured or unreimbursed health care expenses.

12. Significant economic or noneconomic contributions to the marriage or to the economic, educational, or occupational advancement of a party, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party, payment by one spouse of the other spouse's separate debts, or enhancement of the other spouse's personal or real property.

13. The tax consequence of the alimony award.

14. Any other factor necessary to do equity and justice between the parties.

(c) Deviation from guidelines.—The court may establish an

award of alimony that is outside the presumptive alimony amount or alimony duration ranges only if the court considers all of the factors in paragraph (b) and makes specific written findings concerning the relevant factors that justify that the application of the presumptive alimony amount or alimony duration ranges, as applicable, is inappropriate or inequitable.

(d) Order establishing alimony award.—After consideration of the presumptive alimony amount and duration ranges in accordance with paragraphs (3)(a) and (b), and the factors upon which evidence was presented in accordance with paragraph (b), the court may establish an alimony award. An order establishing an alimony award must clearly set forth both the amount and the duration of the award. The court shall also make a written finding that the payor has the financial ability to pay the award.

(5) IMPUTATION OF INCOME.—If a party is voluntarily unemployed or underemployed, alimony shall be calculated based on a determination of potential income unless the court makes specific written findings regarding the circumstances that make it inequitable to impute income.

(6) NOMINAL ALIMONY.—Notwithstanding subsections (1), (3), and (4), the court may make an award of nominal alimony in the amount of $1 per year if, at the time of trial, a party who has traditionally provided the primary source of financial support to the family temporarily lacks the ability to pay support but is reasonably anticipated to have the ability to pay support in

the future. The court may also award nominal alimony for an alimony recipient that is presently able to work but for whom a medical condition with a reasonable degree of medical certainty may inhibit or prevent his or her ability to work during the duration of the alimony period. The duration of the nominal alimony shall be established within the presumptive durational range based upon the length of the marriage subject to the alimony factors in paragraph (4)(b). Before the expiration of the durational period, nominal alimony may be modified in accordance with s. 61.14 as to amount to a full alimony award using the alimony guidelines and factors in accordance with s. 61.08.

(7) TAXABILITY AND DEDUCTIBILITY OF ALIMONY.—

(a) Unless otherwise stated in the judgment or order for alimony or in an agreement incorporated thereby, alimony shall be deductible from income by the payor under s. 215 of the Internal Revenue Code and includable in the income of the payee under s. 71 of the Internal Revenue Code.

(b) When making a judgment or order for alimony, the court may, in its discretion after weighing the equities and tax efficiencies, order alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(c) The parties may, in a marital settlement agreement, separation agreement, or related agreement, specifically agree in writing that alimony be nondeductible from income by the payor and nonincludable in the income of the payee.

(8) MAXIMUM COMBINED AWARD.—In no event shall a combined award of alimony and child support constitute more than 55 percent of the payor's net income, calculated without any consideration of alimony or child support obligations.

(9) SECURITY OF AWARD.—To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a decreasing term life insurance policy or a bond, or to otherwise secure such alimony award with any other assets that may be suitable for that purpose, in an amount adequate to secure the alimony award. Any such security may be awarded only upon a showing of special circumstances. If the court finds special circumstances and awards such security, the court must make specific evidentiary findings regarding the availability, cost, and financial impact on the obligated party. Any security may be modifiable in the event that the underlying alimony award is modified and shall be reduced in an amount commensurate with any reduction in the alimony award.

(10) TERMINATION OF AWARD.—An alimony award shall terminate upon the death of either party or the remarriage of the obligee.

(11)(a) PAYMENT OF AWARD.—With respect to an order requiring the payment of alimony entered on or after January 1, 1985, unless paragraph (c) or paragraph (d) applies, the court shall direct in the order that the payments of alimony be made through the appropriate depository as provided in s. 61.181.

(b) With respect to an order requiring the payment of alimony entered before January 1, 1985, upon the subsequent appearance, on or after that date, of one or both parties before the court having jurisdiction for the purpose of modifying or enforcing the order or in any other proceeding related to the order, or upon the application of either party, unless paragraph (c) or paragraph (d) applies, the court shall modify the terms of the order as necessary to direct that payments of alimony be made through the appropriate depository as provided in s. 61.181.

(c) If there is no minor child, alimony payments need not be directed through the depository.

(d)1. If there is a minor child of the parties and both parties so request, the court may order that alimony payments need not be directed through the depository. In this case, the order of support shall provide, or be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository. The court shall provide a copy of the order to the depository.

2. If subparagraph 1. applies, either party may subsequently file with the clerk of the court a verified motion alleging a default or arrearages in payment stating that the party wishes to initiate participation in the depository program. The moving party shall copy the other party with the motion. No later than fifteen days after filing the motion, the court shall conduct an evidentiary hearing establishing the

default and arrearages, if any, and issue an order directing the clerk of the circuit court to establish, or amend an existing, Family Law Case History account, and further advising the parties that future payments shall thereafter be directed through the depository.

3. In IV-D cases, the Title IV-D agency shall have the same rights as the obligee in requesting that payments be made through the depository.

Section 3. Subsection (1) of section 61.14, Florida Statutes, is amended to read:

61.14 Enforcement and modification of support, maintenance, or alimony agreements or orders.—

(1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party changes or the child who is a beneficiary of an agreement or court order as described herein reaches majority after the execution of the agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for an order decreasing or increasing the amount of

support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order. A party is entitled to pursue an immediate modification of alimony if the actual income earned by the other party exceeds, by at least 10 percent, the amount imputed to that party at the time the existing alimony award was determined and such circumstance shall constitute a substantial change in circumstances sufficient to support a modification of alimony. However, an increase in an alimony obligor's income alone does not constitute a basis for a modification to increase alimony unless at the time the alimony award was established it was determined that the obligor was underemployed or unemployed and the court did not impute income to that party at his or her maximum potential income. If an alimony obligor becomes involuntarily underemployed or unemployed for a period of 6 months following the entry of the last order requiring the payment of alimony, the obligor is entitled to pursue an immediate modification of his or her existing alimony obligations and such circumstance shall constitute a substantial change in circumstance sufficient to support a modification of alimony. A finding that medical insurance is reasonably available or the child support guidelines schedule in s. 61.30 may constitute changed circumstances. Except as otherwise

provided in s. 61.30(11)(c), the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties or the child.

(b)1. The court may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination between the obligee and another ~~a~~ person ~~with whom the obligee resides~~. ~~On the issue of whether alimony should be reduced or terminated under this paragraph, the burden is on the obligor to prove by a preponderance of the evidence that a supportive relationship exists.~~

2. In determining whether an existing award of alimony should be reduced or terminated because of an alleged supportive relationship between an obligee and a person who is not related by consanguinity or affinity and ~~with whom the obligee resides~~, the court shall elicit the nature and extent of the relationship in question. The court shall give consideration, without limitation, to circumstances, including, but not limited to, the following, in determining the relationship of an obligee to another person:

a. The extent to which the obligee and the other person have held themselves out as a married couple by engaging in conduct such as using the same last name, using a common mailing address, referring to each other in terms such as "my spouse" ~~"my husband" or "my wife,"~~ or otherwise conducting themselves in a manner that evidences a permanent supportive relationship.

b. The period of time that the obligee has resided with the other person in a permanent place of abode.

c. The extent to which the obligee and the other person have pooled their assets or income or otherwise exhibited financial interdependence.

d. The extent to which the obligee or the other person has supported the other, in whole or in part.

e. The extent to which the obligee or the other person has performed valuable services for the other.

f. The extent to which the obligee or the other person has performed valuable services for the other's company or employer.

g. Whether the obligee and the other person have worked together to create or enhance anything of value.

h. Whether the obligee and the other person have jointly contributed to the purchase of any real or personal property.

i. Evidence in support of a claim that the obligee and the other person have an express agreement regarding property sharing or support.

j. Evidence in support of a claim that the obligee and the other person have an implied agreement regarding property

sharing or support.

k. Whether the obligee and the other person have provided support to the children of one another, regardless of any legal duty to do so.

l. Whether the obligor's failure, in whole or in part, to comply with all court-ordered financial obligations to the obligee constituted a significant factor in the establishment of the supportive relationship.

m. The need and extent to which an obligee provides caretaking assistance to a person related by consanguinity with whom the obligee resides, or receives caretaking assistance from that person.

3. In any proceeding to modify an alimony award based upon a supportive relationship, the obligor has the burden of proof to establish, by a preponderance of the evidence, that a supportive relationship exists or has existed within the previous year before the date of the filing of the petition for modification or termination. The obligor is not required to prove cohabitation of the obligee and the third party.

4. Notwithstanding paragraph (f), if a reduction or termination is granted under this paragraph, the reduction or termination is retroactive to the date of filing of the petition for reduction or termination.

5.~~3.~~ This paragraph does not abrogate the requirement that every marriage in this state be solemnized under a license, does not recognize a common law marriage as valid, and does not

recognize a de facto marriage. This paragraph recognizes only that relationships do exist that provide economic support equivalent to a marriage and that alimony terminable on remarriage may be reduced or terminated upon the establishment of equivalent equitable circumstances as described in this paragraph. The existence of a conjugal relationship, though it may be relevant to the nature and extent of the relationship, is not necessary for the application of the provisions of this paragraph.

(c)1. For purposes of this section, the remarriage of an alimony obligor does not constitute a substantial change in circumstance or a basis for a modification of alimony.

2. The financial information, including, but not limited to, information related to assets and income, of a subsequent spouse of a party paying or receiving alimony is inadmissible and may not be considered as a part of any modification action unless a party is claiming that his or her income has decreased since the marriage. If a party makes such a claim, the financial information of the subsequent spouse is discoverable and admissible only to the extent necessary to establish whether the party claiming that his or her income has decreased is diverting income or assets to the subsequent spouse that might otherwise be available for the payment of alimony. However, this subparagraph may not be used to prevent the discovery of or admissibility in evidence of the income or assets of a party when those assets are held jointly with a subsequent spouse.

This subparagraph is not intended to prohibit the discovery or admissibility of a joint tax return filed by a party and his or her subsequent spouse in connection with a modification of alimony.

(d)1. An obligor may file a petition for modification or termination of an alimony award based upon his or her actual retirement.

a. A substantial change in circumstance is deemed to exist if:

(I) The obligor has reached the age for eligibility to receive full retirement benefits under s. 216 of the Social Security Act, 42 U.S.C. s. 416 and has retired; or

(II) The obligor has reached the customary retirement age for his or her occupation and has retired from that occupation. An obligor may file an action within 1 year of his or her anticipated retirement date and the court shall determine the customary retirement date for the obligor's profession. However, a determination of the customary retirement age is not an adjudication of a petition for a modification of an alimony award.

b. If an obligor voluntarily retires before reaching any of the ages described in sub-subparagraph a., the court shall determine whether the obligor's retirement is reasonable upon consideration of the obligor's age, health, and motivation for retirement and the financial impact on the obligee. A finding of reasonableness by the court shall constitute a substantial

change in circumstance.

2. Upon a finding of a substantial change in circumstance, there is a rebuttable presumption that an obligor's existing alimony obligation shall be modified or terminated. The court shall modify or terminate the alimony obligation, or make a determination regarding whether the rebuttable presumption has been overcome, based upon the following factors applied to the current circumstances of the obligor and obligee:

a. The age of the parties.

b. The health of the parties.

c. The assets and liabilities of the parties.

d. The earned or imputed income of the parties as provided in s. 61.08(1)(a) and (5).

e. The ability of the parties to maintain part-time or full-time employment.

f. Any other factor deemed relevant by the court.

3. The court may temporarily reduce or suspend the obligor's payment of alimony while his or her petition for modification or termination under this paragraph is pending.

(e) A party who unreasonably pursues or defends an action for modification of alimony shall be required to pay the reasonable attorney fees and costs of the prevailing party. Further, a party obligated to pay prevailing party attorney fees and costs in connection with unreasonably pursuing or defending an action for modification is not entitled to an award of attorney fees and cost in accordance with s. 61.16.

(f) There is a rebuttable presumption that a modification or termination of an alimony award is retroactive to the date of the filing of the petition, unless the obligee demonstrates that the result is inequitable.

(g) ~~(e)~~ For each support order reviewed by the department as required by s. 409.2564(11), if the amount of the child support award under the order differs by at least 10 percent but not less than $25 from the amount that would be awarded under s. 61.30, the department shall seek to have the order modified and any modification shall be made without a requirement for proof or showing of a change in circumstances.

(h) ~~(d)~~ The department may ~~shall have authority to~~ adopt rules to implement this section.

Section 4. Paragraph (d) is added to subsection (11) of section 61.30, Florida Statutes, to read:

61.30 Child support guidelines; retroactive child support.—

(11)

(d) Whenever a combined alimony and child support award constitutes more than 55 percent of the payor's net income, calculated without any consideration of alimony or child support obligations, the court shall adjust the award of child support to ensure that the 55 percent cap is not exceeded.

Section 5. Section 61.192, Florida Statutes, is created to read:

61.192 Advancing trial.—In an action brought pursuant to

this chapter, if more than 2 years have passed since the initial petition was served on the respondent, either party may move the court to advance the trial of their action on the docket. This motion may be made at any time after 2 years have passed since the petition was served, and once made the court must give the case priority on the court's calendar.

Section 6. The amendments made by this act to chapter 61, Florida Statutes, with the exception of amendments relating to the calculation of the duration of an alimony award, apply to all alimony modification petitions pending as of the effective date of this act and to all alimony modification petitions filed on or after the effective date of this act. The changes to the law made by this act do not constitute a substantial change in circumstances and may not serve as the sole basis to seek a modification of an alimony award made before the effective date of this act.

Section 7. This act shall take effect October 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1103 Patent Infringement
SPONSOR(S): Stone
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1084

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

SUMMARY ANALYSIS

The bill creates the "Patent Troll Prevention Act" (Act) regarding bad faith patent infringement claims. In determining whether an assertion of patent infringement violates the Act, a court may consider a number of factors, including whether:

- The demand letter contained basic information regarding the patent, the patent owner, and the specific infringing conduct;
- The demand letter requested payment of a license fee or a response within an unreasonable period of time or requested an unreasonable license fee;
- The assertion of patent infringement is deceptive or unenforceable, and the person knew, or should have known, that the claim or assertion was unenforceable; and
- The person has previously sued to enforce the claim and a court found the claim to be meritless.

A defendant subject to a patent infringement claim that violates the Act may seek a court order requiring the plaintiff to a post a bond equal to the lesser of $250,000 or the defendant's estimated litigation expenses.

The bill creates a private right of action for a person who has received a bad faith assertion of patent infringement, and it provides that a bad faith assertion of patent infringement is an unfair and deceptive trade practice that is subject to a civil action by the Department of Legal Affairs.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Patent Law

A patent is the grant of a property right in an invention to its inventor, issued by the United States Patent and Trademark Office generally for a term of 20 years.[1] A patent confers the right to exclude others from making, using, or selling the invention in the United States or importing the invention into the United States.[2]

Article I, s. 8, cl 8, of the Unite States Constitution gives Congress the power to enact laws relating to patents.[3] Based on this grant of power, Congress enacted a number of patent statutes, most significantly, the Patent Act of 1952.[4] Congress, in turn, has vested the federal courts with exclusive jurisdiction to determine patent validity and infringement.[5]

Enforcement of Patents

A patent holder may enforce its rights by filing infringement suits in federal court.[6] The patent holder bears the burden of establishing infringement by each alleged infringer.[7] Patent litigation is generally very expensive: the average suit in which $1 million to $25 million is at stake costs $1.6 million through discovery and $2.8 million through trial.[8]

Although Congress has not expressly preempted state law in all areas of patent law, federal courts have generally held that most patent litigation is implicitly preempted by Congress.[9] Accordingly, the Federal Circuit, which has exclusive appellate jurisdiction over patent cases, has held that state law claims against abusive patent infringement practices are mostly preempted by the federal Patent Act.[10] To avoid preemption, an accused infringer must prove not only the elements of its state-law claim, it must also prove, (1) that the infringement allegations were "objectively baseless," meaning that no reasonable litigant could have expected to succeed, and (2) that the patent holder made its infringement allegations with knowledge of their inaccuracy or with reckless disregard for their accuracy.[11]

Patent Trolls

"Patent assertion entities," commonly referred to as "patent trolls," describes a business that focuses on purchasing and asserting patents against companies that already use the patented technology in

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[1] United States Patent and Trademark Office, *General Information Concerning Patents* (Oct. 2014) http://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2 (last visited March 10, 2015).
[2] 35 U.S.C. §154 (2012).
[3] "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, §8, cl. 8, U.S. Const.
[4] P.L. 82-593, 66 Stat. 792 (codified at 35 U.S.C.).
[5] 28 U.S.C. §1338(a) ("No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents . . . .").
[6] *See id*; 35 U.S.C. §271 (2012).
[7] 35 U.S.C. §101 (2012).
[8] Brian Yeh, *An Overview of the "Patent Trolls" Debate*, Congressional Research Service (April 16, 2013).
[9] *See Globetrotter Software, Inc. v. Elan Computer Grp., Inc.*, 362 F.3d 1367, 1374 (Fed. Cir. 2004).
[10] *Id.* at 1377.
[11] *Id.*; *Dominant Semiconductors Sdn. Bhd. v. OSRAM GmbH,* 524 F.3d 1254 (Fed. Cir. 2008).

their business operations (after infringement and lock-in have occurred), rather than developing and transferring technology to licensees.[12] Patent trolls frequently operate by sending notices of alleged patent infringement to large numbers of businesses to threaten litigation if the business does not pay a licensing fee.[13] Often defendants, especially smaller companies and startups, will choose to settle to avoid expending time and resources on costly litigation. Patent trolls simply transfer a legal right not to be sued for the transfer of money.[14]

State Attempts to Limit Bad Faith Patent Infringement Claims

Eighteen states have passed statutes outlawing certain acts of patent enforcement;[15] the majority of statutes are modeled after a Vermont statute, which prohibits "bad faith" assertions of patent infringement.[16] Other states have outlawed assertions that "contain false, misleading, or deceptive information"[17] or have defined specific acts as illegal, such as threatening litigation and not filing suit or making infringement assertions that "lack a reasonable basis in fact or law."[18] Most of the new statutes create a private right of action for the targets of unlawful infringement assertions, and all of the statutes provide for enforcement by state officials, such as the state attorney general.[19] However, whether such state law attempts to curb bad faith patent claims are preempted by federal law is unknown.[20]

Effect of the Bill

The bill creates Part VII of ch. 501, F.S., consisting of ss. 501.991-501.997, F.S., the "Patent Troll Prevention Act," to prohibit bad faith patent infringement claims.

Newly-created s. 501.991, F.S., provides a statement of legislative intent that acknowledges the state is preempted from passing laws that conflict with federal patent law. However, the Legislature recognizes the need to protect businesses and consumers from bad faith patent infringement claims and litigation that lead to expensive litigation, are a significant burden to companies, and hamper the state's economic development efforts.

Prohibition on Bad Faith Assertions of Patent Infringement

The bill creates s. 501.993, F.S., to prohibit a person from making a bad faith assertion of patent infringement.

In determining that a person has made a bad faith assertion of patent infringement, a court may consider a number of factors, including whether:

- The demand letter contains the patent number, the name and address of the patent owner, and the facts concerning the specific infringing conduct, and if not, did the person provide such information after being requested to do so;

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[12] Thomas A. Hemphill, *The Paradox of Patent Assertion Entities*, American Enterprise Institute (Aug. 12, 2013) http://www.aei.org/publication/the-paradox-of-patent-assertion-entities/ (last visited March 10, 2015).
[13] *See* Paul R. Gugliuzza, *Patent Trolls and Preemption*, Boston University School of Law Public Law & Legal Theory Paper No. 15-03, 1-4 (Jan. 20, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2539280 (last visited March 10, 2015).
[14] Hemphill, *supra* Note 12.
[15] Gugliuzza, *supra* Note 13 at 4-5; Patent Progress's Guide to State Patent Legislation (March 9, 2015) http://www.patentprogress.org/patent-progress-legislation-guides/patent-progresss-guide-state-patent-legislation/ (last visited March 11, 2015).
[16] VT. STAT. ANN., tit. 9, § 4197(a) (2014).
[17] WIS. STAT. § 100.197(2)(b) (2014).
[18] *E.g.*, 815 ILL. COMP. STAT. 505/2RRR(b)(1), (3) (2014).
[19] *E.g.*, VT. STAT. ANN., tit. 9, § 4199(a); WIS. STAT. § 100.197(3)(b); TENN. CODE ANN. § 29-40-103 to -104; 815 ILL. COMP. STAT. 505/7, 505/10a.
[20] *See* Gugliuzza, *supra* Note 13.

- The person failed to conduct an analysis to determine whether the target's conduct was covered by the claim of the patent;
- The demand letter requested payment of a license fee or a response within an unreasonable period of time or requested an license fee for an amount that is not based on a reasonable estimate of the value of the license;
- The assertion of patent infringement is unenforceable, and the person knew, or should have known, that the claim or assertion was unenforceable;
- The claim or assertion of patent infringement is deceptive; and
- The person has previously filed or threatened to file suit based on the same or a similar claim of patent infringement and the threats or lawsuits lacked the required identifying and contact information, or the person sued to enforce the claim and a court found the claim to be meritless.

Alternatively, a court may consider a number of factors as evidence that a person has not made a bad faith assertion of patent infringement, including whether:

- The demand letter contained the required identifying and contract information, or if not, whether it was provided upon request;
- The person engaged in a good faith effort to establish that the target has infringed the patent and negotiated an appropriate remedy;
- The person made a substantial investment in the use of the patent or in a product or sale of a product covered by the patent;
- The person is the inventor of the patented product, is the original assignee, or is an institution of higher education or an organization affiliated with an institution of higher education.
- The person has demonstrated good faith business practices in previous efforts to enforce, including successfully enforcing through litigation, the patent or substantially similar patent.

Bond Requirement

Section 501.994, F.S., created by the bill provides that the target of a lawsuit involving a bad faith assertion of patent infringement may move that the court issue a protective order. If the court finds that the target has established a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement, the court must require that the plaintiff post a bond in an amount equal to the lesser of $250,000 or a good faith estimate of the target's expense of litigation. The court must hold a hearing at either party's request. A court may waive the bond requirement for good cause shown or if it finds the plaintiff has available assets equal to the amount of the proposed bond.

Private Right of Action for Bad Faith Assertions of Patent Infringement

Newly created s. 501.995, F.S., provides that a person who has received a bad faith assertion of patent infringement may bring a civil action. A court may award the following remedies to a prevailing plaintiff in such an action: equitable relief, damages, costs and fees, including attorney fees, and punitive damages in an amount equal to $50,000 or three times the total damages, costs, and fees, whichever is greater.

Enforcement Pursuant to the Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.[21] The law can be enforced either by enforcing authorities, generally a state attorney or the Department of Legal Affairs (DLA)[22], or by a private suit filed by an individual.[23]

[21] Section 501.204, F.S.
[22] Section 501.203(2), F.S.
[23] Section 501.211, F.S.

Section 501.996, F.S., created by the bill, provides that a bad faith assertion of patent infringement is an unfair and deceptive trade practice that is subject to a civil action by the Department of Legal Affairs.

Exemption for Certain Demand Letters Pursuant to Federal Pharmaceutical Laws

Section 501.997, F.S., created by the bill exempts from the Act any demand letter or assertion of patent infringement that includes a claim for relief arising under federal law related to pharmaceutical and biologic licensing and patents.

The bill provides that it will take effect upon becoming law.

B. SECTION DIRECTORY:

Section 1 creates Part VII of ch. 501, F.S., consisting of ss. 501.991-501.997, F.S., entitled the "Patent Troll Prevention Act."

Section 2 creates s. 501.991, F.S., relating to legislative intent.

Section 3 creates s. 501.992, F.S., relating to definitions.

Section 4 creates s. 501.993, F.S., relating to bad faith assertions of patent infringement.

Section 5 creates s. 501.994, F.S., relating to bonds.

Section 6 creates s. 501.995, F.S., relating to private rights of action.

Section 7 creates s. 501.996, F.S., relating to enforcement.

Section 8 creates s. 501.997, F.S., relating to exemptions.

Section 9 provides that the bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

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:

As explained above, Congress has not expressly preempted state law in all areas of patent law; however, federal courts have generally held that most patent litigation has been implicitly preempted by Congress.[24] Accordingly, state law claims against abusive patent infringement practices are mostly preempted by the federal Patent Act.[25] To avoid preemption, an accused infringer must prove not only the elements of its state-law claim, it must also prove, (1) that the infringement allegations were "objectively baseless," meaning that no reasonable litigant could have expected to succeed, and (2) that the patent holder made its infringement allegations with knowledge of their inaccuracy or with reckless disregard for their accuracy.[26] To the extent that the bill does not require proof of these two elements to prevail on a claim of bad faith assertion of patent infringement, the bill may be partially preempted by federal law.

Additionally, the Florida Supreme Court has generally held that statutes that require all plaintiffs to post a bond before proceeding with their claim violate art. 1, s. 21 of the Florida Constitution, related to access to the courts.[27] The bond provision in the Act does not apply to all plaintiffs; rather, it only applies if a defendant establishes a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement.

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 use of the phrase "good faith business practices" at line 144 of the bill is vague and does not provide guidance to a court as to what types of business practices related to the enforcement of a patent are considered "good faith" practices.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[24] *See Globetrotter*, 362 F.3d at 1374.
[25] *Id.* at 1377.
[26] *Id.*; *Dominant Semiconductors*, 524 F.3d 1254.
[27] *Psychiatric Assoc. v. Siegel*, 610 So. 2d 419 (Fla. 1992).

A bill to be entitled

An act relating to patent infringement; creating part VII of ch. 501, F.S., entitled the "Patent Troll Prevention Act"; creating s. 501.991, F.S.; providing legislative intent; creating s. 501.992, F.S.; defining terms; creating s. 501.993, F.S.; prohibiting bad faith assertions of patent infringement from being made; providing factors that a court may consider when determining whether an allegation was or was not made in bad faith; creating s. 501.994, F.S.; authorizing a court to require a patent infringement plaintiff to post a bond under certain circumstances; limiting the bond amount; authorizing the court to waive the bond requirement in certain circumstances; creating s. 501.995, F.S.; authorizing private rights of action for violations of this part; authorizing the court to award certain relief to prevailing plaintiffs; creating s. 501.996, F.S.; requiring a bad faith assertion of patent infringement to be treated as an unfair or deceptive trade practice; creating s. 501.997, F.S.; providing an exemption; providing an effective date.

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

Section 1. Part VII of chapter 501, Florida Statutes,

consisting of ss. 501.991-501.997, Florida Statutes, is created and is entitled the "Patent Troll Prevention Act."

Section 2. Section 501.991, Florida Statutes, is created to read:

501.991 Legislative intent.—

(1) The Legislature recognizes that it is preempted from passing any law that conflicts with federal patent law. However, the Legislature recognizes that the state is dedicated to building an entrepreneurial and business-friendly economy where businesses and consumers alike are protected from abuse and fraud. This includes protection from abusive and bad faith demands and litigation.

(2) Patents encourage research, development, and innovation. Patent holders have a legitimate right to enforce their patents. The Legislature does not wish to interfere with good faith patent litigation or the good faith enforcement of patents. However, the Legislature recognizes a growing issue: the frivolous filing of bad faith patent claims that have led to technical, complex, and especially expensive litigation.

(3) The expense of patent litigation, which may cost millions of dollars, can be a significant burden on companies and small businesses. Not only do bad faith patent infringement claims impose undue burdens on individual businesses, they undermine the state's effort to attract and nurture technological innovations. Funds spent to help avoid the threat of bad faith litigation are no longer available for serving

communities through investing in producing new products, helping businesses expand, or hiring new workers. The Legislature wishes to help its businesses avoid these costs by encouraging good faith assertions of patent infringement and the expeditious and efficient resolution of patent claims.

Section 3. Section 501.992, Florida Statutes, is created to read:

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

(1) "Demand letter" means a letter, e-mail, or other communication asserting or claiming that a person has engaged in patent infringement.

(2) "Institution of higher education" means an educational institution as defined in 20 U.S.C. s. 1001(a).

(3) "Target" means a person, including the person's customers, distributors, or agents, residing in, incorporated in, or organized under the laws of this state which:

(a) Has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(b) Has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(c) Whose customers have received a demand letter asserting that the person's product, service, or technology has infringed upon a patent.

Section 4. Section 501.993, Florida Statutes, is created to read:

501.993 Bad faith assertions of patent infringement.—A

person may not make a bad faith assertion of patent infringement.

(1) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(a) The demand letter does not contain the following information:

1. The patent number;

2. The name and address of the patent owner and assignee, if any; and

3. Factual allegations concerning the specific areas in which the target's products, services, or technology infringe or are covered by the claims in the patent.

(b) Before sending the demand letter, the person failed to conduct an analysis comparing the claims in the patent to the target's products, services, or technology, or the analysis did not identify specific areas in which the target's products, services, and technology were covered by the claims of the patent.

(c) The demand letter lacked the information listed under paragraph (a), the target requested the information, and the person failed to provide the information within a reasonable period of time.

(d) The demand letter requested payment of a license fee or response within an unreasonable period of time.

(e) The person offered to license the patent for an amount

that is not based on a reasonable estimate of the value of the license.

(f) The claim or assertion of patent infringement is unenforceable, and the person knew, or should have known, that the claim or assertion was unenforceable.

(g) The claim or assertion of patent infringement is deceptive.

(h) The person, including its subsidiaries or affiliates, has previously filed or threatened to file one or more lawsuits based on the same or a similar claim of patent infringement and:

1. The threats or lawsuits lacked the information listed under paragraph (a); or

2. The person sued to enforce the claim of patent infringement and a court found the claim to be meritless.

(i) Any other factor the court finds relevant.

(2) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(a) The demand letter contained the information listed under paragraph (1)(a).

(b) The demand letter did not contain the information listed under paragraph (1)(a), the target requested the information, and the person provided the information within a reasonable period of time.

(c) The person engaged in a good faith effort to establish that the target has infringed the patent and negotiated an

appropriate remedy.

(d) The person made a substantial investment in the use of the patented invention or discovery or in a product or sale of a product or item covered by the patent.

(e) The person is:

1. The inventor or joint inventor of the patented invention or discovery, or in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventors, is the original assignee; or

2. An institution of higher education or a technology transfer organization owned by or affiliated with an institution of higher education.

(f) The person has:

1. Demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or

2. Successfully enforced the patent, or a substantially similar patent, through litigation.

(g) Any other factor the court finds relevant.

Section 5. Section 501.994, Florida Statutes, is created to read:

501.994 Bond.—If a person initiates a proceeding against a target in a court of competent jurisdiction, the target may move that the proceeding involves a bad faith assertion of patent infringement in violation of this part and request that the court issue a protective order. After the motion, and if the

court finds that the target has established a reasonable likelihood that the plaintiff has made a bad faith assertion of patent infringement, the court must require the plaintiff to post a bond in an amount equal to the lesser of $250,000 or a good faith estimate of the target's expense of litigation, including an estimate of reasonable attorney fees, conditioned on payment of any amount finally determined to be due to the target. The court shall hold a hearing at either party's request. A court may waive the bond requirement for good cause shown or if it finds the plaintiff has available assets equal to the amount of the proposed bond.

Section 6. Section 501.995, Florida Statutes, is created to read:

501.995 Private right of action.—A person aggrieved by a violation of this part may bring an action in a court of competent jurisdiction. A court may award the following remedies to a prevailing plaintiff in an action brought pursuant to this section:

(1) Equitable relief;

(2) Damages;

(3) Costs and fees, including reasonable attorney fees; and

(4) Punitive damages in an amount equal to $50,000 or three times the total damages, costs, and fees, whichever is greater.

Section 7. Section 501.996, Florida Statutes, is created

to read:

501.996 Enforcement.—A violation of this part is an unfair or deceptive trade practice in any action brought by the department pursuant to s. 501.207.

Section 8. Section 501.997, Florida Statutes, is created to read:

501.997 Exemption.—A demand letter or assertion of patent infringement that includes a claim for relief arising under 35 U.S.C. s. 271(e)(2) or 42 U.S.C. s. 262 is not subject to this part.

Section 9. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1103 (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 Stone offered the following:

Amendment

Remove lines 135-142 and insert:

(e) The person is the inventor or joint inventor of the patented invention or discovery, or in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventors, is the original assignee.

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 Stone offered the following:

Amendment (with title amendment)

Remove lines 185-192 and insert:

or deceptive trade practice in any action brought by an enforcing authority pursuant to s. 501.207. For the purposes of this section "enforcing authority" has the same meaning as provided in s. 501.203.

Section 8. Section 501.997, Florida Statutes, is created to read:

501.997 Exemptions.—This part shall not apply to institutions of higher education, to a technology transfer organization owned by or affiliated with an institution of higher education, or to a demand letter or an assertion of patent infringement that includes a claim for relief arising under 35 U.S.C. s. 271(e)(2) or 42 U.S.C. s. 262.

Amendment No. 2

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

Remove line 21 and insert:

501.997, F.S.; providing exemptions; providing an

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1211 Community Associations
SPONSOR(S): Fitzenhagen
TIED BILLS: None **IDEN./SIM. BILLS:** SB 870

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

SUMMARY ANALYSIS

The laws governing condominium, cooperative and homeowners associations all require an annual meeting of the members at which some or all of the directors of the association may be elected. Current law does not recognize electronic voting.

The bill creates a mechanism for electronic voting in condominium, cooperative and homeowners association elections.

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:

The laws governing condominium, cooperative and homeowners associations all require an annual meeting of the members at which some or all of the directors of the association may be elected.

A condominium association is required to have an annual meeting at which directors are elected.[1] Votes must be cast by "written ballot or voting machine."[2] Proxies may not be used in the election.[3] Florida Administrative Code governing condominium associations also provides detailed regulations for voting and election procedures, such as requiring that paper ballots be mailed in double envelopes.[4] Similar statutory and administrative requirements apply to cooperative associations.[5]

A homeowners association is likewise required to hold board of director elections at its annual meeting or as provided in its governing documents.[6] Elections are conducted in accordance with the procedures set forth in the governing documents of the association.[7] Additionally, proxies may be used in the election unless otherwise provided in the governing documents.[8]

This bill provides that an association may elect to conduct such elections by electronic voting according to the following terms:

Each member voting electronically must consent, in writing, to electronic voting.

The association must provide each member with a method to:

- Authenticate the member's identity to the electronic voting system.
- Secure the member's vote from, among other things, malicious software and the ability of others to remotely monitor or control the electronic voting platform.
- Communicate with the electronic voting system.
- Review an electronic ballot before its transmission to the electronic voting system.
- Transmit an electronic ballot to the electronic voting system that ensures the secrecy and integrity of each ballot.
- Verify the authenticity of receipts sent from the electronic voting system.
- Confirm, at least 14 days before the voting deadline, that the member's electronic voting platform can successfully communicate with the electronic voting system.
- Vote by mail or to deliver a ballot in person in the event of a disruption of the electronic voting system,

In addition, an electronic voting system must be:

- Accessible to members with disabilities.
- Secure from, among other things, malicious software and the ability of others to remotely monitor or control the system.
- Able to authenticate the member's identity.

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[1] Section 718.112(2)(d)1., F.S.; *see generally* Peter M. Dunbar, *The Condominium Concept: A Practical Guide for Officers, Owners, Realtors, Attorneys, and Directors of Florida Condominiums*, 40-57 (14th. ed.)
[2] Section 718.112(2)(d)4., F
[3] *Id.*
[4] 61B-23.0021, F.A.C.
[5] Section 719.106(1)(d), F.S.; 61B-75.005, F.A.C.
[6] Section 720.306(2), F.S.
[7] Section 720.306(9)(a), F.S.
[8] Section 720.306(8), F.S.

- Able to communicate with each member's electronic voting platform.
- Able to authenticate the validity of each electronic ballot to ensure that the ballot is not altered in transit.
- Able to transmit a receipt from the electronic voting system to each member who casts an electronic ballot.
- Able to permanently separate any authentication or identifying information from the electronic ballot, rendering it impossible to tie a ballot to a specific member.
- Able to allow the member to confirm that his or her ballot has been received and counted.
- Able to store and keep electronic ballots accessible to election officials for recount, inspection, and review purposes.

The bill also defines the term "electronic transmission." See "DRAFTING ISSUES OR OTHER COMMENTS:" herein.

B. SECTION DIRECTORY:

Section 1 creates s. 718.128, F.S., regarding electronic voting for condominium associations.

Section 2 creates s. 719.129, F.S., regarding electronic voting for cooperative associations.

Section 3 creates s. 720.317, F.S., regarding electronic voting for homeowners associations.

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 appears to require rulemaking by the Department of Business and Professional Regulation, which may require a minimal nonrecurring expenditure in FY 2015-16 payable from the Division of Florida Condominiums, timeshares, and Mobile Homes Trust Fund.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill appears to create a need for rulemaking by the Department of Business and Professional Regulation to modify election rules for condominiums and cooperatives. The department appears to have adequate rulemaking authority at ss. 718.501(1)(f) and 719.501(1)(f), F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill defines the term "electronic transmission." However, the defined term is not used in the substance of the bill.

The bill does not state whether members voting electronically count for purposes of obtaining a quorum.

The bill appears to be limited to "elections." It is unclear whether this is limited to election of the directors of an association, or extends to other matters that can be, or must be, put up to a vote.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to community associations; creating ss. 718.128, 719.129, and 720.317, F.S.; authorizing condominium, cooperative, and homeowners' associations to conduct elections by electronic voting under certain conditions; providing a definition; providing an effective date.

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

Section 1. Section 718.128, Florida Statutes, is created to read:

718.128 Electronic voting.—The association may conduct elections by electronic voting if a member consents, in writing, to voting electronically and the following requirements are met:

(1) The association provides each member with:

(a) A method to authenticate the member's identity to the electronic voting system.

(b) A method to secure the member's vote from, among other things, malicious software and the ability of others to remotely monitor or control the electronic voting platform.

(c) A method to communicate with the electronic voting system.

(d) A method to review an electronic ballot before its transmission to the electronic voting system.

(e) A method to transmit an electronic ballot to the

electronic voting system that ensures the secrecy and integrity of each ballot.

(f) A method to allow members to verify the authenticity of receipts sent from the electronic voting system.

(g) A method to confirm, at least 14 days before the voting deadline, that the member's electronic voting platform can successfully communicate with the electronic voting system.

(h) In the event of a disruption of the electronic voting system, the ability to vote by mail or to deliver a ballot in person.

(2) The association uses an electronic voting system that is:

(a) Accessible to members with disabilities.

(b) Secure from, among other things, malicious software and the ability of others to remotely monitor or control the system.

(c) Able to authenticate the member's identity.

(d) Able to communicate with each member's electronic voting platform.

(e) Able to authenticate the validity of each electronic ballot to ensure that the ballot is not altered in transit.

(f) Able to transmit a receipt from the electronic voting system to each member who casts an electronic ballot.

(g) Able to permanently separate any authentication or identifying information from the electronic ballot, rendering it impossible to tie a ballot to a specific member.

(h) Able to allow the member to confirm that his or her ballot has been received and counted.

(i) Able to store and keep electronic ballots accessible to election officials for recount, inspection, and review purposes.

(3) For purposes of this section, the term "electronic transmission" means any form of communication, not directly involving the physical transmission or transfer of paper, which creates a record that may be retained, retrieved, and reviewed by a recipient and which may be directly reproduced in a comprehensible and legible paper form by such recipient through an automated process. Examples of electronic transmission include, but are not limited to, telegrams, facsimile transmissions of images, and text that is sent via electronic mail between computers.

Section 2. Section 719.129, Florida Statutes, is created to read:

719.129 Electronic voting.—The association may conduct elections by electronic voting if a member consents, in writing, to voting electronically and the following requirements are met:

(1) The association provides each member with:

(a) A method to authenticate the member's identity to the electronic voting system.

(b) A method to secure the member's vote from, among other things, malicious software and the ability of others to remotely monitor or control the electronic voting platform.

(c) A method to communicate with the electronic voting system.

(d) A method to review an electronic ballot before its transmission to the electronic voting system.

(e) A method to transmit an electronic ballot to the electronic voting system that ensures the secrecy and integrity of each ballot.

(f) A method to allow members to verify the authenticity of receipts sent from the electronic voting system.

(g) A method to confirm, at least 14 days before the voting deadline, that the member's electronic voting platform can successfully communicate with the electronic voting system.

(h) In the event of a disruption of the electronic voting system, the ability to vote by mail or to deliver a ballot in person.

(2) The association uses an electronic voting system that is:

(a) Accessible to members with disabilities.

(b) Secure from, among other things, malicious software and the ability of others to remotely monitor or control the system.

(c) Able to authenticate the member's identity.

(d) Able to communicate with each member's electronic voting platform.

(e) Able to authenticate the validity of each electronic ballot to ensure that the ballot is not altered in transit.

(f) Able to transmit a receipt from the electronic voting system to each member who casts an electronic ballot.

(g) Able to permanently separate any authentication or identifying information from the electronic ballot, rendering it impossible to tie a ballot to a specific member.

(h) Able to allow the member to confirm that his or her ballot has been received and counted.

(i) Able to store and keep electronic ballots accessible to election officials for recount, inspection, and review purposes.

(3) For purposes of this section, the term "electronic transmission" means any form of communication, not directly involving the physical transmission or transfer of paper, which creates a record that may be retained, retrieved, and reviewed by a recipient and which may be directly reproduced in a comprehensible and legible paper form by such recipient through an automated process. Examples of electronic transmission include, but are not limited to, telegrams, facsimile transmissions of images, and text that is sent via electronic mail between computers.

Section 3. Section 720.317, Florida Statutes, is created to read:

720.317 Electronic voting.—The association may conduct elections by electronic voting if a member consents, in writing, to voting electronically and the following requirements are met:

(1) The association provides each member with:

(a) A method to authenticate the member's identity to the electronic voting system.

(b) A method to secure the member's vote from, among other things, malicious software and the ability of others to remotely monitor or control the electronic voting platform.

(c) A method to communicate with the electronic voting system.

(d) A method to review an electronic ballot before its transmission to the electronic voting system.

(e) A method to transmit an electronic ballot to the electronic voting system that ensures the secrecy and integrity of each ballot.

(f) A method to allow members to verify the authenticity of receipts sent from the electronic voting system.

(g) A method to confirm, at least 14 days before the voting deadline, that the member's electronic voting platform can successfully communicate with the electronic voting system.

(h) In the event of a disruption of the electronic voting system, the ability to vote by mail or to deliver a ballot in person.

(2) The association uses an electronic voting system that is:

(a) Accessible to members with disabilities.

(b) Secure from, among other things, malicious software and the ability of others to remotely monitor or control the system.

(c) Able to authenticate the member's identity.

(d) Able to communicate with each member's electronic voting platform.

(e) Able to authenticate the validity of each electronic ballot to ensure that the ballot is not altered in transit.

(f) Able to transmit a receipt from the electronic voting system to each member who casts an electronic ballot.

(g) Able to permanently separate any authentication or identifying information from the electronic ballot, rendering it impossible to tie a ballot to a specific member.

(h) Able to allow the member to confirm that his or her ballot has been received and counted.

(i) Able to store and keep electronic ballots accessible to election officials for recount, inspection, and review purposes.

(3) For purposes of this section, the term "electronic transmission" means any form of communication, not directly involving the physical transmission or transfer of paper, which creates a record that may be retained, retrieved, and reviewed by a recipient and which may be directly reproduced in a comprehensible and legible paper form by such recipient through an automated process. Examples of electronic transmission include, but are not limited to, telegrams, facsimile transmissions of images, and text that is sent via electronic mail between computers.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1211 (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 Fitzenhagen offered the following:

Amendment (with title amendment)

Remove lines 58-67 and insert:

(3) A member voting electronically pursuant to this section shall be counted as being in attendance at the meeting for purposes of determining a quorum.

(4) The bylaws of an association must provide for and allow voting pursuant to this section before this section shall apply. This section may apply to some or all matters for which a vote of the membership is required.

Remove lines 115-124 and insert:

(3) A member voting electronically pursuant to this section shall be counted as being in attendance at the meeting for purposes of determining a quorum.

(4) The bylaws of an association must provide for and allow voting pursuant to this section before this section shall apply. This section may apply to some or all matters for which a vote of the membership is required.

Remove lines 172-181 and insert:

(3) A member voting electronically pursuant to this section shall be counted as being in attendance at the meeting for purposes of determining a quorum.

(4) The bylaws of an association must provide for and allow voting pursuant to this section before this section shall apply. This section may apply to some or all matters for which a vote of the membership is required.

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

Remove line 6 and insert:

certain conditions; providing that a member voting electronically is counted towards quorum; requiring that the bylaws allow electronic voting of some or all matters; providing