



Civil Justice Subcommittee

**Wednesday, March 4, 2015
12:30 PM - 3:30 PM
Sumner Hall (404 HOB)**

MEETING PACKET

**Steve Crisafulli
Speaker**

**Kathleen Passidomo
Chair**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, March 04, 2015 12:30 pm
End Date and Time: Wednesday, March 04, 2015 03:30 pm
Location: Sumner Hall (404 HOB)
Duration: 3.00 hrs

Consideration of the following bill(s):

HB 365 Designated Areas for Skateboarding, Inline Skating, Paintball, or Freestyle or Mountain & Off-Road Bicycling by Gonzalez
CS/HB 437 Guardians for Dependent Children who are Developmentally Disabled or Incapacitated by Children, Families & Seniors Subcommittee, Adkins
HB 583 Single-Sex Public Facilities by Artilles
HB 625 Florida Civil Rights Act by Cortes, B.
HB 775 Appointment of a Guardian Ad Litem by Powell

Consideration of the following proposed committee bill(s):

PCB CJS 15-01 -- Offenses Concerning Racketeering and Illegal Debts
PCB CJS 15-02 -- Public Records

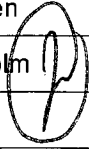

Consideration of the following proposed committee substitute(s):

PCS for HB 611 -- Residential Properties

NOTICE FINALIZED on 03/02/2015 16:21 by Ingram.Michele

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 365 Designated Areas for Skateboarding, Inline Skating, Paintball, or Freestyle or Mountain & Off-Road Bicycling
SPONSOR(S): Gonzalez
TIED BILLS: None **IDEN./SIM. BILLS:** SB 408

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Government Affairs Subcommittee	12 Y, 1 N	Darden	Miller
2) Civil Justice Subcommittee		Malcolm 	Bond 
3) Local & Federal Affairs Committee			

SUMMARY ANALYSIS

Government entities may designate specific areas for skateboarding, inline skating, paintball, freestyle bicycling, or mountain and off-road bicycling. In those areas, the government entity is required to post a rule stating which activities are authorized in the area and that children under 17 years of age may not engage in the activity without written consent from the child's parents or legal guardians. A government entity's failure to obtain written consent may potentially create liability for injuries.

The bill repeals the requirement that a government entity obtain written consent from a parent or guardian before a child under the age of 17 can engage in skateboarding, inline skating, or freestyle bicycling in designated areas. The bill also amends the written consent requirement for paintball and mountain and off-road bicycling to require the approval of only one parent or guardian.

This bill does not have a fiscal impact on state or local government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Under current law, governmental entities¹ can designate specific areas of property they own or control for skateboarding, inline skating, paintball, freestyle bicycling, or mountain and off-road bicycling.² Many of the largest cities in the state operate skateboarding and inline skating parks.³ In those areas, the government entity is required to post a rule stating which activities are authorized in the area and stating that children under 17 years of age may not engage in the activity without written consent from the child's parents or legal guardians.⁴

Some government entities have expressed concern about the mechanics of obtaining written consent. Risk managers and attorneys representing local governments have questioned who would secure the consent from the parent and what procedures can be used to verify the information.⁵ Governmental entities have also expressed concern over the level of liability protection provided by the assumption of risk defense, since s. 316.0085, F.S., provides that parties engaging in the activity assume the inherent risk, regardless of age, but the written consent requirement suggests the waiver is not applicable when concerning minors.⁶

A government entity or public employee may be held liable if there was:

- A failure to guard against or warn of a dangerous condition of which a participant does not and cannot reasonably be expected to have notice;⁷
- An act of gross negligence that is the proximate cause of the injury,⁸ or
- Failure of the governmental entity to obtain written consent from parents or legal guardians before allowing a child under 17 years of age to engage in the allowed activity in the designated area, unless the child's participation is in violation of posted rules.⁹

Public employees or government entities are not otherwise liable for personal injuries or property damage resulting from engaging in the permitted activity.¹⁰ The statute does not limit the liability for independent concessionaries and other parties, even if the party is in a contractual relationship with the governmental entity for use of the public property.¹¹

¹ "Governmental entity" includes the United States, the State of Florida, any county or municipality, or any department, agency, or other instrumentality thereof, school board, special authority, or other entity exercising governmental authority. Section 316.0085(2), F.S.

² Section 316.0085(3), F.S.

³ See Joseph G. Jarret, *Skating on Thin Concrete: The Florida Legislature's Response to Skateboarders and Skaters*, FLORIDA BAR JOURNAL, November 2002, at 74. The cities of Gainesville, Jacksonville, Orlando, St. Petersburg, Tallahassee, and Tampa, among others, have constructed skate parks.

⁴ Section 316.0085(3), F.S.

⁵ Jarret, *supra* note 3 at 74.

⁶ *Id.*

⁷ Section 316.0085(5)(a), F.S.

⁸ *Id.* at (5)(b).

⁹ *Id.* at (5)(c). For mountain or off-road bicycling, the parent or legal guardian must demonstrate written consent was given before the child entered the designated area. *Id.*

¹⁰ *Id.* at (4).

¹¹ *Id.* at (6).

Participants and observers in designated areas assume the "inherent risk"¹² of the activities, regardless of age, and are therefore legally responsible for all damages, injuries, or deaths which result.¹³ Participants engaged in skateboarding, inline skating, paintball, or freestyle or mountain and off-road bicycling, whether in designated areas or not, are responsible for:

- Using equipment within the limits of his or her ability;¹⁴
- Using equipment as intended;¹⁵
- Maintaining control of him or herself and the equipment used;¹⁶ and
- Refraining from acting in a manner that could cause or contribute to the death or injury of any person.¹⁷

Government entities are not required to eliminate or limit the inherent risk in the activity.¹⁸ An insurance policy carried by a government entity which covers any activity described in the statute does not constitute a waiver of the protections provided by the statute.¹⁹

EFFECT OF PROPOSED CHANGES

The bill repeals the requirement for a government entity providing a designated area for skateboarding, inline skating, or freestyle bicycling to obtain written consent from a parent or legal guardian before permitting a child under 17 years of age to engage in the allowed activity. The bill retains the written consent requirement before a child engages in paintball or mountain and off-road bicycling in a designated area.

The bill amends the written consent requirement to require only the permission of one parent or legal guardian. The bill also removes language in current law that provides that a governmental entity may not be shielded from liability if it fails to obtain written consent from a parent or legal guardian before a child under the age of 17 engages in skateboarding, inline skating, or freestyle bicycling in a designated area.

B. SECTION DIRECTORY:

Section 1: Amends s. 316.0085, F.S., relating to skateboarding; inline skating; freestyle or mountain and off-roading bicycling; paintball; definitions; liability.

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.

¹² *Id.* at (2)(b), F.S. ("Inherent risk" means those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating, paintball and freestyle or mountain and off-board bicycling.")

¹³ *Id.* at (7)(a).

¹⁴ *Id.* at (7)(b)(1).

¹⁵ *Id.*

¹⁶ *Id.* at (7)(b)(2).

¹⁷ *Id.* at (7)(b)(3).

¹⁸ *Id.*

¹⁹ *Id.* at (8).

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:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

1 A bill to be entitled
 2 An act relating to designated areas for skateboarding,
 3 inline skating, paintball, or freestyle or mountain
 4 and off-roading bicycling; amending s. 316.0085, F.S.;
 5 deleting the requirement that a governmental entity
 6 that provides a designated area for skateboarding,
 7 inline skating, or freestyle bicycling obtain the
 8 written consent of the parent or legal guardian of a
 9 child under a certain age before allowing the child to
 10 participate in these activities in such area;
 11 requiring the governmental entity to post a rule
 12 indicating that consent forms are required for
 13 children under a certain age before participation in
 14 paintball or mountain and off-road bicycling;
 15 providing an effective date.

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

18
 19 Section 1. Subsection (3) and paragraph (c) of subsection
 20 (5) of section 316.0085, Florida Statutes, are amended to read:
 21 316.0085 Skateboarding; inline skating; freestyle or
 22 mountain and off-road bicycling; paintball; definitions;
 23 liability.-

24 (3) (a) This section does not grant authority or permission
 25 for a person to engage in skateboarding, inline skating,
 26 paintball, or freestyle or mountain and off-road bicycling on

27 | property owned or controlled by a governmental entity unless
 28 | such governmental entity has specifically designated such area
 29 | for skateboarding, inline skating, paintball, or freestyle or
 30 | mountain and off-road bicycling. Each governmental entity shall
 31 | post a rule in each specifically designated area that identifies
 32 | all authorized activities.

33 | **(b) Each governmental entity shall post a rule in each**
 34 | **specifically designated area for paintball or mountain and off-**
 35 | **road bicycling which** ~~and~~ indicates that a child under 17 years
 36 | of age may not engage in such ~~any of those~~ activities until the
 37 | governmental entity has obtained written consent, in a form
 38 | acceptable to the governmental entity, from the child's parent
 39 | or legal guardian ~~parents or legal guardians~~.

40 | (5) This section does not limit liability that would
 41 | otherwise exist for any of the following:

42 | (c) The failure of a governmental entity that provides a
 43 | designated area for ~~skateboarding, inline skating, paintball, or~~
 44 | ~~freestyle~~ or mountain and off-road bicycling to obtain the
 45 | written consent, in a form acceptable to the governmental
 46 | entity, from the parents or legal guardians of any child under
 47 | 17 years of age before allowing ~~authorizing~~ such child to
 48 | participate in ~~skateboarding, inline skating, paintball, or~~
 49 | ~~freestyle~~ or mountain and off-road bicycling in such designated
 50 | area, unless that child's participation is in violation of
 51 | posted rules governing the authorized use of the designated
 52 | area, except that a parent or legal guardian must demonstrate

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53 | that written consent to engage in mountain or off-road bicycling
54 | in a designated area was provided to the governmental entity
55 | before entering the designated area.

56

57 | Nothing in this subsection creates a duty of care or basis of
58 | liability for death, personal injury, or damage to personal
59 | property. Nothing in this section shall be deemed to be a waiver
60 | of sovereign immunity under any circumstances.

61

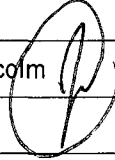

Section 2. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 437 Guardians for Dependent Children who are Developmentally Disabled or Incapacitated

SPONSOR(S): Children, Families & Seniors Subcommittee; Adkins and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 496

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Tuszynski	Brazzell
2) Civil Justice Subcommittee		Malcolm 	Bond 
3) Health Care Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill creates a framework for identifying and appointing guardian advocates, limited guardians, and plenary guardians for developmentally disabled children who may require decision-making assistance beyond their 18th birthday. It also authorizes probate courts to exercise jurisdiction over dependent children nearing their 18th birthday to appoint guardian advocates, limited guardians, and plenary guardians. The bill:

- Requires an annual review of the continued necessity of a guardianship for young adults in extended foster care who already have a guardian advocate or guardian;
- Requires development of an updated case plan for any child who may require the assistance of a guardian advocate, limited guardian, or plenary guardian;
- Provides that upon a judge's finding that no less restrictive decision-making assistance will meet the child's needs:
 - The Department of Children and Families (DCF) must complete a report and identify individuals who are willing to serve as a guardian advocate or as a plenary or limited guardian; and
 - Proceedings for the appointment of a guardian advocate, plenary guardian, or limited guardian must be initiated in a separate proceeding in probate court within 180 days of the child's 17th birthday.
- Provides that a minor who is 17 and one-half years of age and is subject to guardianship proceedings must receive all the due process rights of an adult; and
- Provides that a child's parents are considered to be the child's natural guardians, unless the dependency or probate court determines it is not in the child's best interest or the parents' rights have been terminated.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

When a minor¹ with developmental disabilities or some level of incapacity ages out of the dependency system, there is a gap between the time he or she turns 18 years of age and the time a guardian advocate, plenary guardian, or limited guardian is appointed.² This creates a period in which the individual who may be in need of a guardian is considered an adult (*sui juris*, or "of one's own right")³ but likely unable to adequately make decisions for himself or herself. Two separate issues create this gap. First, the lack of a procedure within the dependency system to identify adults willing to serve as guardians or guardian advocates for these minors as they reach 18 years of age; and second, a jurisdictional issue in which probate courts will only exercise jurisdiction and begin guardianship proceedings after the child reaches 18 years of age. There is a distinction in current law between adult guardianships and guardianships for minors. This distinction is the largest barrier to getting guardians for minors who need them when they turn 18.⁴

While both the dependency and probate courts are circuit courts in the state with general jurisdiction, each operates under different rules of procedure and areas of statute. Dependency courts work primarily within ch. 39, F.S., handling cases that deal with the abandonment, abuse, and neglect of children, whereas probate court works primarily with chs. 731 through 735, 744, and 747, F.S., dealing with wills, trusts, estates, guardianships, conservatorships, and other property and succession matters.

Guardianships

There is a wide range of options to provide decision-making assistance to people with developmental disabilities or other incapacity that are not as restrictive as guardianships.⁵ Examples include a power of attorney to officially act for the owner of a bank account;⁶ general powers of attorney;⁷ durable powers of attorney;⁸ representative payee of benefits; advance directives; medical proxies; trusts; and guardian advocates (a less restrictive form of guardianship that does not require an adjudication of incapacity).⁹ Guardianships that place decision-making authority for property and person with another individual require an examining committee to determine that the alleged incapacitated adult lacks decision-making capacity, and requires an adjudication of incapacity by a judge.¹⁰ This form of guardianship is considered the most restrictive and generally a last resort because it removes fundamental and civil rights of an individual to make decisions concerning his or her property and, in the most restrictive cases, his or her own care.¹¹ The level of decision-making assistance should not be more restrictive than required for that particular individual's needs and capacity.

For adult guardianships, current law requires an adjudication of incapacity based on the recommendation of an examining committee, the adult must have an attorney appointed to represent

¹ Any person who has not attained the age of 18 years, s. 1.01(13), F.S.

² Email from Alan Abramowitz, Executive Director of the Statewide Guardian ad Litem Program, on November 7, 2014; on file with Children, Families & Seniors Subcommittee staff.

³ Section 743.07(1), F.S.

⁴ Abramowitz, *supra* note 2.

⁵ *Lighting the Way to Guardianship and Other Decision-Making Alternatives: A Manual for Individuals and Families*, 2010, Florida Developmental Disabilities Council, Inc.

⁶ Ch. 709, F.S.

⁷ *Id.*

⁸ *Id.*

⁹ Section 744.3085, F.S.

¹⁰ Section 744.331, F.S.

¹¹ *Lighting the Way to Guardianship*, *supra* note 5

him or her, and the adult must be present at the hearing before appointing a guardian.¹² For a guardianship of a minor, an adjudication of incapacity is not required, an attorney is not required, nor is the minor required to be present at the hearing.¹³ The waiver of these due process protections for minors is because the minor is not *sui juris*, and the guardianship of a minor terminates by law upon reaching this distinction.

Under current law, probate courts will not entertain a petition for an adult guardianship for a minor. According to the Guardian ad Litem program, based on their discussions with the judiciary and probate practitioners, without amending current law it is unlikely that probate courts will engage in providing adult guardianships to minors in anticipation of the minor turning 18.¹⁴ Currently, for those minors who have been identified as needing a guardianship as an adult, DCF recruits pro bono attorneys with the requisite experience to file a guardianship petition.

Effect of Proposed Changes:

The bill creates a procedure for DCF and circuit courts regarding those children within the dependency system that have been identified as possibly requiring some form of legal guardianship when they reach 18 years of age.

The bill amends s. 39.6251, F.S., to require annual reviews of the continued necessity of a guardianship for a young adult¹⁵ in extended foster care for whom a guardian advocate or guardian has already been appointed. The review must also address whether restoration of guardianship proceedings are needed when the child reaches 22 years of age.

The bill amends s. 39.701, F.S., to require DCF to create an updated case plan for any child that meets the requirements for the appointment of a guardian or guardian advocate. The updated case plan must be based on a face-to-face conference with the child and, if appropriate, the child's attorney, any court-appointed guardian ad litem, the temporary custodian of the child, and the parent, if the parent's rights have not been terminated.

If the court determines at the first judicial review hearing after the child's 17th birthday that there is a good faith basis to believe that the child qualifies for appointment of a guardian advocate, limited guardian, or plenary guardian and that no less restrictive decision-making assistance will meet the child's needs, then:

- 1) DCF must complete a multidisciplinary report, which must include, a psychosocial evaluation if one has not been completed within the previous two years.
- 2) DCF must identify individuals who are willing to serve as the guardian advocate, plenary guardian, or limited guardian. The child's parents may not be considered unless the court enters a written order finding such an appointment is in the child's best interest; and
- 3) Guardianship proceedings must be initiated within 180 days after the child's 17th birthday.

In the event that another interested party, such as a pro bono attorney, initiates guardianship proceedings, the bill requires DCF to provide all necessary documentation and information to the petitioner within 45 days after the first judicial review hearing after the child's 17th birthday.

The bill also provides that the guardianship proceedings must be conducted in the probate court, not the dependency court.

¹² Section 744.331, F.S.

¹³ Sections 744.3021 and 744.342, F.S.

¹⁴ Abramowitz, *supra* note 2.

¹⁵ "Young adult" is defined as " an individual who has attained 18 years of age but who has not attained 21 years of age."

Section 39.6251(1), F.S.

The bill amends s. 393.12, F.S., to authorize the probate court to take jurisdiction of a minor who is the subject of a ch. 39, F.S., proceeding and initiate guardianship proceedings once the minor reaches the age of 17 years and 6 months or anytime thereafter. The minor must be provided the same due process rights as an adult.

The bill amends s. 744.301, F.S., to provide that if a parent's rights have been terminated, the parent is not the natural guardian of the minor. If the minor is the subject of a ch. 39, F.S., proceeding, the parents retain their rights as natural guardians unless the court finds that it is not in the child's best interest.

The bill amends s. 744.3021, F.S., requiring minors who are the subject of a ch. 39, F.S., proceeding and aged 17 years and 6 months be given the same due process rights as an adult. It also requires the order of adjudication of incapacity and the letters of limited or plenary guardianship to issue upon the minor's 18th birthday or as soon thereafter as possible.

B. SECTION DIRECTORY:

Section 1 amends s. 39.6251, F.S., relating to continuing care for young adults.

Section 2 amends s. 39.701, F.S., relating to judicial review.

Section 3 amends s. 393.12, F.S., relating to capacity; appointment of guardian advocate.

Section 4 amends s. 744.301, F.S., relating to natural guardians.

Section 5 amends s. 744.3021, F.S., relating to guardians of minors.

Section 6 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:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill directs that certain guardianship cases be referred to the probate division of the circuit court. The apparent intent is to avoid referral of such cases to a dependency court. However, case referral to divisions is a matter set by the local rules and practices of the circuit court. Additionally, while it is believed that most of the state's judicial circuits refer guardianship cases to a probate division, at least one of the circuits refers them to the family division and another is considering removing guardianship cases from the probate division to a separate guardianship division.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 17, 2015, the Children, Families & Seniors Subcommittee adopted a strike-all amendment. The amendment made the following changes:

- Amends s. 39.6251, F.S., to require annual review of the continued necessity of guardianship for a young adult in extended foster care already appointed a guardian advocate or guardian.
- Changes language to incorporate the requirements of ch. 744, F.S., and s. 393.12, F.S., to determine any child that may require the appointment of a guardian advocate or guardian, removing the language specifying, "developmentally disabled or incapacitated."
- Adds language requiring a court to determine a good-faith basis for requesting appointment of a guardian advocate or guardian as well as a determination that no less restrictive decision-making assistance will meet the child's needs.
- Removes language requiring the DCF to initiate guardianship proceedings in probate court.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute as passed by the Children, Families & Seniors Subcommittee.

1 A bill to be entitled
 2 An act relating to guardians for dependent children
 3 who are developmentally disabled or incapacitated;
 4 amending s. 39.6251, F.S.; requiring the continued
 5 review of the necessity of guardianships for young
 6 adults; amending s. 39.701, F.S.; requiring an updated
 7 case plan developed in a face-to-face conference with
 8 the child, if appropriate, and other specified
 9 persons; providing requirements for the Department of
 10 Children and Families when a court determines that
 11 there is a good faith basis to appoint a guardian
 12 advocate, limited guardian, or plenary guardian for
 13 the child and that no less restrictive decisionmaking
 14 assistance will meet the child's needs; requiring the
 15 department to provide specified information if another
 16 interested party or participant initiates proceedings
 17 for the appointment of a guardian advocate, plenary
 18 guardian, or limited guardian for the child; requiring
 19 that proceedings seeking appointment of a guardian
 20 advocate or a determination of incapacity and the
 21 appointment of a guardian be conducted in a separate
 22 proceeding in probate court; amending s. 393.12, F.S.;
 23 providing that the probate court has jurisdiction over
 24 proceedings for appointment of a guardian advocate if
 25 petitions are filed for certain minors who are subject
 26 to chapter 39, F.S., proceedings if such minors have

27 attained a specified age; providing that such minor
 28 has the same due process rights as certain adults;
 29 providing requirements for when an order appointing a
 30 guardian advocate must be issued; amending s. 744.301,
 31 F.S.; providing that if a child is subject to
 32 proceedings under chapter 39, F.S., the parents may
 33 act as natural guardians unless the dependency or
 34 probate court finds that it is not in the child's best
 35 interests or their parental rights have been
 36 terminated; amending s. 744.3021, F.S.; requiring the
 37 probate court to initiate proceedings for appointment
 38 of guardians for certain minors who are subject to
 39 chapter 39, F.S., proceedings if petitions are filed
 40 and if such minors have reached a specified age;
 41 providing that such minor has the same due process
 42 rights as certain adults; providing requirements for
 43 when an order of adjudication and letters of limited
 44 or plenary guardianship must be issued; providing an
 45 effective date.

46
 47 Be It Enacted by the Legislature of the State of Florida:

48
 49 Section 1. Subsection (8) of section 39.6251, Florida
 50 Statutes, is amended to read:

51 39.6251 Continuing care for young adults.—

52 (8) During the time that a young adult is in care, the

53 | court shall maintain jurisdiction to ensure that the department
 54 | and the lead agencies are providing services and coordinate
 55 | with, and maintain oversight of, other agencies involved in
 56 | implementing the young adult's case plan, individual education
 57 | plan, and transition plan. The court shall review the status of
 58 | the young adult at least every 6 months and hold a permanency
 59 | review hearing at least annually. If the young adult is
 60 | appointed a guardian under chapter 744 or a guardian advocate
 61 | under s. 393.12, at the permanency review hearing the court
 62 | shall review the necessity of continuing the guardianship and
 63 | whether restoration of guardianship proceedings are needed when
 64 | the young adult reaches 22 years of age. The court may appoint a
 65 | guardian ad litem or continue the appointment of a guardian ad
 66 | litem with the young adult's consent. The young adult or any
 67 | other party to the dependency case may request an additional
 68 | hearing or review.

69 | Section 2. Paragraphs (b) and (c) of subsection (3) of
 70 | section 39.701, Florida Statutes, are amended to read:

71 | 39.701 Judicial review.—

72 | (3) REVIEW HEARINGS FOR CHILDREN 17 YEARS OF AGE.—

73 | (b) At the first judicial review hearing held subsequent
 74 | to the child's 17th birthday, the department shall provide the
 75 | court with an updated case plan that includes specific
 76 | information related to the independent living skills that the
 77 | child has acquired since the child's 13th birthday, or since the
 78 | date the child came into foster care, whichever came later.

79 1. For any child that may meet the requirements for
 80 appointment of a guardian pursuant to chapter 744, or a guardian
 81 advocate pursuant to s. 393.12, the updated case plan must be
 82 developed in a face-to-face conference with the child, if
 83 appropriate; the child's attorney; any court-appointed guardian
 84 ad litem; the temporary custodian of the child; and the parent,
 85 if the parent's rights have not been terminated.

86 2. At the judicial review hearing, if the court determines
 87 pursuant to the procedures and requirements of chapter 744 and
 88 the Florida Probate Rules that there is a good faith basis to
 89 believe that the child qualifies for appointment of a guardian
 90 advocate, limited guardian, or plenary guardian for the child
 91 and that no less restrictive decisionmaking assistance will meet
 92 the child's needs:

93 a. The department shall complete a multidisciplinary
 94 report which must include, but is not limited to, a psychosocial
 95 evaluation and educational report if such a report has not been
 96 completed within the previous 2 years.

97 b. The department shall identify one or more individuals
 98 who are willing to serve as the guardian advocate pursuant to s.
 99 393.12 or as the plenary or limited guardian pursuant to chapter
 100 744 and the Florida Probate Rules. Any other interested parties
 101 or participants may make efforts to identify such a guardian
 102 advocate, limited guardian, or plenary guardian. The child's
 103 biological or adoptive family members, including the child's
 104 parents if the parents' rights have not been terminated, may not

105 be considered for service as the plenary or limited guardian
 106 unless the court enters a written order finding that such an
 107 appointment is in the child's best interests.

108 c. Proceedings shall be initiated within 180 days after
 109 the child's 17th birthday for the appointment of a guardian
 110 advocate, plenary guardian, or limited guardian for the child in
 111 the court with proper jurisdiction over probate matters
 112 according to the local rules of judicial administration and the
 113 procedures and requirements of chapter 744 and the Florida
 114 Probate Rules.

115 3. In the event another interested party or participant
 116 initiates proceedings for the appointment of a guardian
 117 advocate, plenary guardian, or limited guardian for the child,
 118 the department shall provide all necessary documentation and
 119 information to the petitioner to complete a petition under
 120 chapter 393 or chapter 744 within 45 days after the first
 121 judicial review hearing after the child's 17th birthday.

122 4. Any proceedings seeking appointment of a guardian
 123 advocate or a determination of incapacity and the appointment of
 124 a guardian must be conducted in a separate proceeding in the
 125 court with proper jurisdiction over probate matters according to
 126 local rules of judicial administration and the procedures and
 127 requirements of chapter 744 and the Florida Probate Rules.

128 (c) If the court finds at the judicial review hearing that
 129 the department has not met its obligations to the child as
 130 stated in this part, in the written case plan, or in the

131 provision of independent living services, the court may issue an
 132 order directing the department to show cause as to why it has
 133 not done so. If the department cannot justify its noncompliance,
 134 the court may give the department 30 days within which to
 135 comply. If the department fails to comply within 30 days, the
 136 court may hold the department in contempt.

137 Section 3. Paragraph (c) is added to subsection (2) of
 138 section 393.12, Florida Statutes, to read:

139 393.12 Capacity; appointment of guardian advocate.—

140 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

141 (c) If a petition is filed pursuant to this section
 142 requesting appointment of a guardian advocate for a minor who is
 143 the subject of any proceeding under chapter 39, the court with
 144 proper jurisdiction over probate matters according to local
 145 rules of judicial administration and the Florida Probate Rules
 146 has jurisdiction over the proceedings pursuant to this section
 147 when the minor reaches the age of 17 years and 6 months or
 148 anytime thereafter. The minor shall be provided all the due
 149 process rights conferred upon an alleged developmentally
 150 disabled adult pursuant to this chapter. The order of
 151 appointment of a guardian advocate under this section shall
 152 issue upon the minor's 18th birthday or as soon thereafter as
 153 possible.

154 Section 4. Subsection (1) of section 744.301, Florida
 155 Statutes, is amended to read:

156 744.301 Natural guardians.—

157 (1) The parents jointly are the natural guardians of their
 158 own children and of their adopted children, during minority,
 159 unless the parents' parental rights have been terminated
 160 pursuant to chapter 39. If a child is the subject of any
 161 proceeding under chapter 39, the parents may act as natural
 162 guardians under this section unless the dependency or probate
 163 court finds that it is not in the child's best interests. If one
 164 parent dies, the surviving parent remains the sole natural
 165 guardian even if he or she remarries. If the marriage between
 166 the parents is dissolved, the natural guardianship belongs to
 167 the parent to whom sole parental responsibility has been
 168 granted, or if the parents have been granted shared parental
 169 responsibility, both continue as natural guardians. If the
 170 marriage is dissolved and neither parent is given parental
 171 responsibility for the child, neither may act as natural
 172 guardian of the child. The mother of a child born out of wedlock
 173 is the natural guardian of the child and is entitled to primary
 174 residential care and custody of the child unless the court
 175 enters an order stating otherwise.

176 Section 5. Subsection (1) of section 744.3021, Florida
 177 Statutes, is amended, and subsection (4) is added to that
 178 section, to read:

179 744.3021 Guardians of minors.—

180 (1) Except as provided in subsection (4), upon petition of
 181 a parent, brother, sister, next of kin, or other person
 182 interested in the welfare of a minor, a guardian for a minor may

183 be appointed by the court without the necessity of adjudication
 184 pursuant to s. 744.331. A guardian appointed for a minor,
 185 whether of the person or property, has the authority of a
 186 plenary guardian.

187 (4) If a petition is filed pursuant to this section
 188 requesting appointment of a guardian for a minor who is the
 189 subject of any proceeding under chapter 39 and who is aged 17
 190 years and 6 months or older, the court with proper jurisdiction
 191 over probate matters according to local rules of judicial
 192 administration and the procedures and requirements of this
 193 chapter and the Florida Probate Rules has jurisdiction over the
 194 proceedings under s. 744.331. The alleged incapacitated minor
 195 under this subsection shall be provided all the due process
 196 rights conferred upon an alleged incapacitated adult pursuant to
 197 this chapter and the Florida Probate Rules. The order of
 198 adjudication under s. 744.331 and the letters of limited or
 199 plenary guardianship may issue upon the minor's 18th birthday or
 200 as soon thereafter as possible.

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



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
2 Representative Adkins offered the following:

Amendment (with title amendment)

Remove lines 87-200 and insert:

3
4
5
6 pursuant to the requirements of chapter 744 that there is a good
7 faith basis to believe that the child qualifies for appointment
8 of a guardian advocate, limited guardian, or plenary guardian
9 for the child and that no less restrictive decisionmaking
10 assistance will meet the child's needs:

11 a. The department shall complete a multidisciplinary
12 report which must include, but is not limited to, a psychosocial
13 evaluation and educational report if such a report has not been
14 completed within the previous 2 years.

15 b. The department shall identify one or more individuals
16 who are willing to serve as the guardian advocate pursuant to s.
17 393.12 or as the plenary or limited guardian pursuant to chapter



Amendment No. 1

18 744. Any other interested parties or participants may make
19 efforts to identify such a guardian advocate, limited guardian,
20 or plenary guardian. The child's biological or adoptive family
21 members, including the child's parents if the parents' rights
22 have not been terminated, may not be considered for service as
23 the plenary or limited guardian unless the court enters a
24 written order finding that such an appointment is in the child's
25 best interests.

26 c. Proceedings may be initiated within 180 days after the
27 child's 17th birthday for the appointment of a guardian
28 advocate, plenary guardian, or limited guardian for the child in
29 a separate proceeding in the court division with proper
30 jurisdiction over guardianship matters and pursuant to chapter
31 744. The legislature encourages the use of pro bono
32 representation to initiate proceedings under this section.

33 3. In the event another interested party or participant
34 initiates proceedings for the appointment of a guardian
35 advocate, plenary guardian, or limited guardian for the child,
36 the department shall provide all necessary documentation and
37 information to the petitioner to complete a petition under
38 chapter 393 or chapter 744 within 45 days after the first
39 judicial review hearing after the child's 17th birthday.

40 4. Any proceedings seeking appointment of a guardian
41 advocate or a determination of incapacity and the appointment of
42 a guardian must be conducted in a separate proceeding in the
43 court division with jurisdiction over guardianship matters and



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44 pursuant to chapter 744.

45 (c) If the court finds at the judicial review hearing that
46 the department has not met its obligations to the child as
47 stated in this part, in the written case plan, or in the
48 provision of independent living services, the court may issue an
49 order directing the department to show cause as to why it has
50 not done so. If the department cannot justify its noncompliance,
51 the court may give the department 30 days within which to
52 comply. If the department fails to comply within 30 days, the
53 court may hold the department in contempt.

54 Section 3. Paragraph (c) is added to subsection (2) of
55 section 393.12, Florida Statutes, to read:

56 393.12 Capacity; appointment of guardian advocate.—

57 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

58 (c) If a petition is filed pursuant to this section
59 requesting appointment of a guardian advocate for a minor who is
60 the subject of any proceeding under chapter 39, the division of
61 the court with jurisdiction over guardianship matters has
62 jurisdiction over the proceedings pursuant to this section when
63 the minor reaches the age of 17 years and 6 months or anytime
64 thereafter. The minor shall be provided all the due process
65 rights conferred upon an alleged developmentally disabled adult
66 pursuant to this chapter. The order of appointment of a guardian
67 advocate under this section shall issue upon the minor's 18th
68 birthday or as soon thereafter as possible. Any proceeding
69 pursuant to this paragraph shall be conducted separately from



Amendment No. 1

70 any other proceeding.

71 Section 4. Subsection (1) of section 744.301, Florida
72 Statutes, is amended to read:

73 744.301 Natural guardians.—

74 (1) The parents jointly are the natural guardians of their
75 own children and of their adopted children, during minority,
76 unless the parents' parental rights have been terminated
77 pursuant to chapter 39. If a child is the subject of any
78 proceeding under chapter 39, the parents may act as natural
79 guardians under this section unless the dependency or probate
80 court finds that it is not in the child's best interests. If one
81 parent dies, the surviving parent remains the sole natural
82 guardian even if he or she remarries. If the marriage between
83 the parents is dissolved, the natural guardianship belongs to
84 the parent to whom sole parental responsibility has been
85 granted, or if the parents have been granted shared parental
86 responsibility, both continue as natural guardians. If the
87 marriage is dissolved and neither parent is given parental
88 responsibility for the child, neither may act as natural
89 guardian of the child. The mother of a child born out of wedlock
90 is the natural guardian of the child and is entitled to primary
91 residential care and custody of the child unless the court
92 enters an order stating otherwise.

93 Section 5. Subsection (1) of section 744.3021, Florida
94 Statutes, is amended, and subsection (4) is added to that
95 section, to read:



Amendment No. 1

96 744.3021 Guardians of minors.—

97 (1) Except as provided in subsection (4), upon petition of
98 a parent, brother, sister, next of kin, or other person
99 interested in the welfare of a minor, a guardian for a minor may
100 be appointed by the court without the necessity of adjudication
101 pursuant to s. 744.331. A guardian appointed for a minor,
102 whether of the person or property, has the authority of a
103 plenary guardian.

104 (4) If a petition is filed pursuant to this section
105 requesting appointment of a guardian for a minor who is the
106 subject of any proceeding under chapter 39 and who is aged 17
107 years and 6 months or older, the division of the court with
108 jurisdiction over guardianship matters has jurisdiction over the
109 proceedings under s. 744.331. The alleged incapacitated minor
110 under this subsection shall be provided all the due process
111 rights conferred upon an alleged incapacitated adult pursuant to
112 this chapter and applicable court rules. The order of
113 adjudication under s. 744.331 and the letters of limited or
114 plenary guardianship may issue upon the minor's 18th birthday or
115 as soon thereafter as possible. Any proceeding pursuant to this
116 paragraph shall be conducted in separately from any other
117 proceeding.

118 -----
119 -----

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

121 Remove lines 22-44 and insert:



Amendment No. 1

122 proceeding in guardianship court; amending s. 393.12, F.S.;

123 providing that the guardianship court has jurisdiction over

124 proceedings for appointment of a guardian advocate if petitions

125 are filed for certain minors who are subject to chapter 39,

126 F.S., proceedings if such minors have attained a specified age;

127 providing that such minor has the same due process rights as

128 certain adults; providing requirements for when an order

129 appointing a guardian advocate must be issued; providing that

130 proceedings seeking appointment of a guardian advocate for

131 certain minors be conducted in separate proceedings; amending s.

132 744.301, F.S.; providing that if a child is subject to

133 proceedings under chapter 39, F.S., the parents may act as

134 natural guardians unless the dependency or probate court finds

135 that it is not in the child's best interests or their parental

136 rights have been terminated; amending s. 744.3021, F.S.;

137 requiring the guardianship court to initiate proceedings for

138 appointment of guardians for certain minors who are subject to

139 chapter 39, F.S., proceedings if petitions are filed and if such

140 minors have reached a specified age; providing that such minor

141 has the same due process rights as certain adults; providing

142 requirements for when an order of adjudication and letters of

143 limited or plenary guardianship must be issued; providing that

144 proceedings seeking appointment of a guardian advocate for

145 certain minors be conducted in separate proceedings; providing

146 an

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 583 Single-Sex Public Facilities
SPONSOR(S): Artiles and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1464

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

SUMMARY ANALYSIS

Commonly held social conventions provide that persons should honor single-sex facilities such as bathrooms, locker rooms, changing rooms, and other similar facilities. However, no statute specifically prohibits a person of one sex from entering a facility intended for use by the other sex. The bill:

- Provides that it is a first degree misdemeanor criminal offense for a person of one sex to enter into a single-sex facility designated for persons of the opposite sex;
- Creates a civil cause of action against a person of one sex who enters a single-sex facility designated for persons of the opposite sex;
- Creates a civil cause of action against an entity that does not take steps to prevent persons of one sex from entering a single-sex facility designated for persons of the opposite sex;
- Provides exceptions that appear to conform to social norms allowing persons of one sex who enter into a single-sex facility of the opposite sex;
- Provides that exclusion of a person from a single-sex facility of the opposite sex does not violate state discrimination laws; and
- Pre-empts local ordinances that are in conflict.

The bill does not appear to have a fiscal impact on state government. The bill may have an indeterminate negative fiscal impact on local governments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Commonly held social conventions provide that persons should honor single-sex facilities such as bathrooms, locker rooms, changing rooms, and other similar facilities, with certain exceptions. However, no current law specifically prohibits a person of one sex from entering a facility intended for use by the opposite sex.

It is possible that criminal laws on voyeurism¹ and trespass² may provide for punishment of a person of one sex who enters a facility designated for the opposite sex in violation of social norms; however, there would be barriers to prosecution.³ It is possible that common law civil causes of action for intentional infliction of emotional distress or invasion of privacy might apply to situations where a person of one sex enters a facility designated for the opposite sex.

The bill creates the following legislative intent:

The purpose of this act is to secure privacy and safety for all individuals using single-sex public facilities. The Legislature finds that:

- There is a longstanding history of restricting access to single-sex public facilities on the basis of sex.
- There is an expectation of privacy in single-sex public facilities.
- Users of single-sex public facilities reasonably expect not to be exposed to individuals of the other sex while using those facilities.
- Single-sex public facilities are places of increased vulnerability and present the potential for crimes against individuals using those facilities, including, but not limited to, assault, battery, molestation, rape, voyeurism, and exhibitionism.

The bill defines:

- "Person" to mean a natural person or human being.
- "Public accommodations" to have the same meaning as provided in s. 760.02, F.S.⁴

¹ Section 810.14, F.S.

² Section 810.08, F.S.

³ Voyeurism requires proof that observation of the victim be done with "lewd, lascivious, or indecent intent" and requires that the observation be secret. Trespass requires either unauthorized entry or refusal to leave after request. No Florida case has found that trespass law means that a person is not authorized to enter a single sex facility of the opposite sex.

⁴ That statute defines the term to mean: "places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Each of the following establishments which serves the public is a place of public accommodation within the meaning of this section:

(a) Any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than four rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his or her residence.

(b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment, or any gasoline station.

(c) Any motion picture theater, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.

(d) Any establishment which is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment."

- "Single-sex public facilities" to mean bathrooms, restrooms, dressing rooms, fitting rooms, locker rooms, showers, and other similar facilities where there is a reasonable expectation of privacy; that are maintained by an owner of public accommodations, a school, or a place of employment; that are conspicuously designated with appropriate signage for use by persons of only one sex; and that are designed or designated to be used by more than one person at a time.
- "Sex" to mean a person's biological sex, either male or female, at birth. For purposes of this paragraph, the term "male" means a person born as a biological male and the term "female" means a person born as a biological female.

The bill provides that a single-sex public facility designated for girls, women, ladies, or persons of the female sex are restricted to persons who are biological females; and single-sex public facilities designated for boys, men, gentlemen, or persons of the male sex are restricted to persons who are biological males. A person who knowingly and willfully enters a single-sex public facility designated for or restricted to persons of the other biological sex commits a misdemeanor of the first degree. A first degree misdemeanor is punishable by up to one year confinement in the county jail and/or a fine up to \$1,000.

The prohibition does not apply to public facilities that are conspicuously designated for unisex or family use, or to public facilities that are designated to be used by only one person at a time.

The bill provides that it does not require any place of public accommodation, school, or place of employment to construct or maintain single-sex public facilities or to modify existing public facilities; and provides that restricting access to single-sex public facilities in the manner required by the bill is not unlawful discrimination under s. 760.08, F.S.⁵

The bill creates two separate civil causes of action:

- A person who knowingly and willfully enters a single-sex public facility designated for the other biological sex is liable in a civil action to any person who is lawfully using the same single-sex public facility at the time of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.
- An owner of public accommodations, a school, or a place of employment who maintains single-sex public facilities and advertises, who promotes or encourages use of those facilities by persons of the opposite sex, or fails to take reasonable remedial measures after learning of such use, is liable in a civil action to any person who is lawfully using those facilities at the time of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.

The provisions of this bill specifically preempt any law, regulation, policy, or decree enacted or adopted by any city, county, municipality, or other political subdivision within the state that purports to permit or require owners of public accommodations, schools, or places of employment to permit use of single-sex public facilities by persons whose biological sex is different from the sex for which such facilities are designated.

B. SECTION DIRECTORY:

Section 1 provides legislative intent.

⁵ Section 760.08, F.S., entitled "Discrimination in places of public accommodation," provides that: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this chapter, without discrimination or segregation on the ground of race, color, national origin, sex, handicap, familial status, or religion."

Section 2 creates s. 760.55, F.S., regarding privacy for persons using single-sex public facilities.

Section 3 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

The bill creates a new misdemeanor offense that may increase the local expenditures related to local law enforcement and jail costs. The potential cost is indeterminate.

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:

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. Where state preemption applies, however, it precludes a local government from exercising authority in that particular area. Preemption may be either express or implied.⁶ The bill appears to create express preemption over certain local ordinances.

This bill may implicate the Equal Protection Clause of the United States Constitution⁷ and/or the similar clause in the Florida Constitution.⁸ Sex-based discrimination by a state government is subject

⁶ Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

⁷ The 14th Amendment reads in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁸ Article I, s. 2, Fla. Const., reads in pertinent part: "All natural persons, female and male alike, are equal before the law

to intermediate scrutiny. This standard requires the government to show that its gender classification is substantially related to a sufficiently important government interest. Federal courts have found that employment discrimination based on "gender stereotype"⁹ or based on an employee's status as a transgender person¹⁰ violate the federal Equal Protection Clause. However, no controlling court has ruled on whether a law like the one created by this bill violates the Equal Protection Clause.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Several Florida local governments have enacted ordinances prohibiting discrimination based on "gender identity or gender expression." Those ordinances arguably have the effect, in part, of allowing persons of one sex to access public facilities designated for use by persons of the opposite sex where the person assumes the opposite gender identity. Those ordinances would be partially affected by the preemption provision in this bill.¹¹ It is believed that there are approximately twenty such local government ordinances as of December 2014.¹²

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁰ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

¹¹ See, e.g., Miami-Dade ordinance at art. III, s. 11A-19, as amended by Legislative Item File Number 141932 on December 2, 2014.

¹² *Miami-Dade commission to hold final vote on transgender-protections law*, The Miami Herald, December 1, 2014, viewable at <http://www.miamiherald.com/news/local/community/miami-dade/article4232851.html> (last accessed February 25, 2015).

1 A bill to be entitled
 2 An act relating to single-sex public facilities;
 3 providing purpose and legislative findings; creating
 4 s. 760.55, F.S.; providing definitions; requiring that
 5 use of single-sex public facilities be restricted to
 6 persons of the sex for which the facility is
 7 designated; prohibiting knowingly and willfully
 8 entering a single-sex public facility designated for
 9 or restricted to persons of the other biological sex;
 10 providing criminal penalties; providing exemptions;
 11 providing private cause of action against violators;
 12 providing for preemption; providing an effective date.

13
 14 Be It Enacted by the Legislature of the State of Florida:

15
 16 Section 1. (1) The purpose of this act is to secure
 17 privacy and safety for all individuals using single-sex public
 18 facilities.

19 (2) The Legislature finds that:

20 (a) There is a longstanding history of restricting access
 21 to single-sex public facilities on the basis of sex.

22 (b) There is an expectation of privacy in single-sex
 23 public facilities.

24 (c) Users of single-sex public facilities reasonably
 25 expect not to be exposed to individuals of the other sex while
 26 using those facilities.

27 (d) Single-sex public facilities are places of increased
 28 vulnerability and present the potential for crimes against
 29 individuals using those facilities, including, but not limited
 30 to, assault, battery, molestation, rape, voyeurism, and
 31 exhibitionism.

32 Section 2. Section 760.55, Florida Statutes, is created to
 33 read:

34 760.55 Privacy for persons using single-sex public
 35 facilities.—

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

37 (a) "Person" means a natural person or human being.

38 (b) "Public accommodations" has the same meaning provided
 39 in s. 760.02.

40 (c) "Single-sex public facilities" means bathrooms,
 41 restrooms, dressing rooms, fitting rooms, locker rooms, showers,
 42 and other similar facilities where there is a reasonable
 43 expectation of privacy; that are maintained by an owner of
 44 public accommodations, a school, or a place of employment; that
 45 are conspicuously designated with appropriate signage for use by
 46 persons of only one sex; and that are designed or designated to
 47 be used by more than one person at a time.

48 (d) "Sex" means a person's biological sex, either male or
 49 female, at birth. For purposes of this paragraph, the term
 50 "male" means a person born as a biological male and the term
 51 "female" means a person born as a biological female.

52 (2) PROHIBITED CONDUCT.—

53 (a) Single-sex public facilities designated for girls,
 54 women, ladies, or persons of the female sex shall be restricted
 55 to persons who are biological females.

56 (b) Single-sex public facilities designated for boys, men,
 57 gentlemen, or persons of the male sex shall be restricted to
 58 persons who are biological males.

59 (c) A person who knowingly and willfully enters a single-
 60 sex public facility designated for or restricted to persons of
 61 the other biological sex commits a misdemeanor of the first
 62 degree, punishable as provided in s. 775.082 or s. 775.083.

63 (3) EXEMPTIONS.—

64 (a) This section does not apply to public facilities that
 65 are conspicuously designated for unisex or family use.

66 (b) This section does not apply to public facilities that
 67 are designated to be used by only one person at a time.

68 (c) This section does not require any place of public
 69 accommodation, school, or place of employment to construct or
 70 maintain single-sex public facilities or to modify existing
 71 public facilities.

72 (d) Restricting access to single-sex public facilities in
 73 the manner required by subsection (2) may not be deemed unlawful
 74 discrimination under s. 760.08.

75 (4) PRIVATE CAUSE OF ACTION.—

76 (a) A person who knowingly and willfully enters a single-
 77 sex public facility designated for the other biological sex is
 78 liable in a civil action to any person who is lawfully using the

79 same single-sex public facility at the time of the unlawful
 80 entry for the damages caused by the unlawful entry, together
 81 with reasonable attorney fees and costs.

82 (b) An owner of public accommodations, a school, or a
 83 place of employment who maintains single-sex public facilities
 84 and advertises, promotes, or encourages use of those facilities
 85 in violation of subsection (2), or fails to take reasonable
 86 remedial measures after learning of such use, is liable in a
 87 civil action to any person who is lawfully using those
 88 facilities at the time of the unlawful entry for the damages
 89 caused by the unlawful entry, together with reasonable attorney
 90 fees and costs.

91 (5) PREEMPTION.—This section preempts any law, regulation,
 92 policy, or decree enacted or adopted by any city, county,
 93 municipality, or other political subdivision within the state
 94 that purports to permit or require owners of public
 95 accommodations, schools, or places of employment to permit use
 96 of single-sex public facilities by persons whose biological sex
 97 is different from the sex for which such facilities are
 98 designated.

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



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Artiles offered the following:

3

4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. (1) The purpose of this act is to secure
 7 privacy and safety for all individuals using single-sex public
 8 facilities.

9 (2) The Legislature finds that:

10 (a) There is a longstanding history of restricting access
 11 to single-sex public facilities on the basis of sex.

12 (b) There is an expectation of privacy in single-sex
 13 public facilities.

14 (c) Users of single-sex public facilities reasonably
 15 expect not to be exposed to individuals of the other sex while
 16 using those facilities.



Amendment No. 1

17 (d) Single-sex public facilities are places of increased
18 vulnerability and present the potential for crimes against
19 individuals using those facilities, including, but not limited
20 to, assault, battery, molestation, rape, voyeurism, and
21 exhibitionism.

22 Section 2. Section 760.55, Florida Statutes, is created to
23 read:

24 760.55 Privacy for persons using single-sex public
25 facilities.—

26 (1) DEFINITIONS.—As used in this section, the term:

27 (a) "Female" means a biological female or a person who has
28 a valid driver license or United States passport that describes
29 the person as female on the license or passport.

30 (b) "Male" means a biological male or a person who has a
31 valid driver license or United States passport that describes
32 the person as male on the license or passport.

33 (c) "Person" means a natural person or human being.

34 (d) "Public accommodations" has the same meaning provided
35 in s. 760.02.

36 (e) "Single-sex public facilities" means bathrooms,
37 restrooms, dressing rooms, fitting rooms, locker rooms, showers,
38 and other similar facilities where there is a reasonable
39 expectation of privacy; that are maintained by an owner of
40 public accommodations, a school, or a place of employment; that
41 are conspicuously designated with appropriate signage for use by
42 persons of only one sex; and that are designed or designated to



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43 be used by more than one person at a time.

44 (f) "Sex" means a person's gender as male or female.

45 (2) PROHIBITED CONDUCT.—

46 (a) Single-sex public facilities designated for females
47 shall be restricted to females.

48 (b) Single-sex public facilities designated for males
49 shall be restricted to males.

50 (c) A person who knowingly and willfully enters a single-
51 sex public facility designated for or restricted to persons of
52 the other sex commits a misdemeanor of the second degree,
53 punishable as provided in s. 775.082 or s. 775.083.

54 (3) PRIVATE CAUSE OF ACTION.—

55 (a) A person who knowingly and willfully enters a single-
56 sex public facility designated for the other sex is liable in a
57 civil action to any person who is lawfully using the same
58 single-sex public facility at the time of the unlawful entry for
59 the damages caused by the unlawful entry, together with
60 reasonable attorney fees and costs.

61 (b) An owner of public accommodations, a school, or a
62 place of employment who maintains single-sex public facilities
63 and knowingly advertises, promotes, or encourages use of those
64 facilities in violation of subsection (2), or fails to take
65 reasonable remedial measures after learning of such use, is
66 liable in a civil action to any person who is lawfully using
67 those facilities at the time of the unlawful entry for the
68 damages caused by the unlawful entry, together with reasonable



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69 attorney fees and costs.

70 (4) EXEMPTIONS.—This section does not apply to:

71 (a) Gender-neutral public facilities or public facilities
72 that are conspicuously designated for unisex use or family use.

73 (b) Public facilities that are designated to be used by
74 only one person at a time.

75 (c) A person of one sex who uses a single-sex facility
76 designated for the opposite sex, if such single-sex facility is
77 the only facility, single-sex, gender neutral, or otherwise,
78 reasonably available at the time of the person's use of the
79 facility.

80 (d) A family member or legal guardian of a person who
81 reasonably needs assistance in using a single-sex facility, or
82 someone designated by a family member or legal guardian of the
83 person, if the family member or legal guardian or his or her
84 designee enters a single-sex public facility that is designated
85 for the sex of the person in need of assistance in order to
86 assist the person in need of assistance.

87 (e) A person who needs assistance in using a single-sex
88 facility when the person in need of assistance enters a single-
89 sex facility that is designated for the opposite sex, if the
90 person in need of assistance enters a single-sex facility with a
91 family member or legal guardian or his or her designee who is
92 the designated sex of the single-sex facility in order to assist
93 the person in need of assistance.

94 (f) A person who enters an unoccupied single-sex facility



Amendment No. 1

95 that is designated for the opposite sex while another person
96 waits outside the entrance to the facility notifying others that
97 a person of the opposite sex is using the facility.

98 (g) A person employed to clean or maintain a single-sex
99 facility.

100 (5) RELATION TO OTHER LAWS.-

101 (a) This section does not require any place of public
102 accommodation, school, or place of employment to construct or
103 maintain single-sex public facilities or to modify existing
104 public facilities.

105 (b) Restricting access to single-sex public facilities in
106 the manner required by subsection (2) is not unlawful
107 discrimination under s. 760.08.

108 (6) PREEMPTION.-This section preempts any law, regulation,
109 policy, or decree enacted or adopted by any city, county,
110 municipality, or other political subdivision within the state
111 that purports to permit or require owners of public
112 accommodations, schools, or places of employment to permit use
113 of single-sex public facilities by persons whose sex is
114 different from the sex for which such facilities are designated.

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

117 -----

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

119 Remove everything before the enacting clause and insert:

120 A bill to be entitled



Amendment No. 1

121 An act relating to single-sex public facilities;
122 providing purpose and legislative findings; creating
123 s. 760.55, F.S.; providing definitions; requiring that
124 use of single-sex public facilities be restricted to
125 persons of the sex for which the facility is
126 designated; prohibiting knowingly and willfully
127 entering a single-sex public facility designated for
128 or restricted to persons of the other sex; providing
129 criminal penalties; providing a private cause of
130 action against violators; providing exemptions;
131 providing applicability with respect to other laws;
132 providing for preemption; providing an effective date.



Amendment No. 1a

COMMITTEE/SUBCOMMITTEE ACTION

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

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

3
 4 **Amendment to Amendment (546189) by Representative Artiles**
 5 Remove line 39 of the amendment and insert:
 6 expectation of privacy; that are maintained by a government or
 7 by an owner of



Amendment No. 1b

COMMITTEE/SUBCOMMITTEE ACTION

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

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

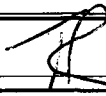
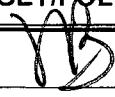
3
 4 **Amendment to Amendment (546189) by Representative Artiles**
 5 Remove line 95 of the amendment and insert:
 6 that is designated for the opposite sex and either locks the
 7 door or while either another person

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 611 Residential Properties

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: None. **IDEN./SIM. BILLS:** SB 736

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

SUMMARY ANALYSIS

When an ownership interest in a home, cooperative, or condominium is transferred, the new owner is jointly and severally liable with the previous owner for unpaid assessments owed to a homeowners, cooperative, or condominium association. Unpaid assessments may also become a lien on the parcel. To protect against undisclosed financial obligations and to transfer title that is free of any lien or encumbrance, buyers often request that the seller provide an estoppel certificate from any association of which the unit or parcel is a part. An estoppel certificate certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date.

This bill amends the law governing homeowners, cooperative and condominium associations (collectively "association") to:

- Provide for the standardization of information in an estoppel certificate issued by an association.
- Reduce the time that an association has to respond to a request for an estoppel certificate.
- Specify that an estoppel certificate may be delivered by mail, hand, or electronic means.
- Establish maximum fees an association may charge for the issuance of an estoppel certificate.
- Revise the time for payment of fees for the preparation an estoppel certificate.
- Provide that an association waives the right to collect moneys owed if such moneys are not stated in the estoppel certificate or if the association fails to issue the certificate.

The changes reflect recommendations made to the Legislature by the Community Association Living Study Council.

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

The bill takes effect July 1, 2015.

HB 611, as filed, was referred to the Civil Justice Subcommittee, the Business and Professions Subcommittee, and the Judiciary Committee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominium¹ and cooperative² associations are governed internally by an association whose members are the owners of units within the association. Many, but not all, residential communities are similarly governed by a homeowners association³ made up of parcel owners. Associations are in effect a partnership between unit or parcel owners with a common interest in real property. To operate, an association must collect regular assessments from the unit owners and parcels owners in order to pay for common expenses, management, maintenance, insurance, and reserves for anticipated future major expenses. Sections 718.111(4), 719.104(5), and 720.308, F.S., provide for the assessment and collection of periodic and special assessments to fund an association. A unit or parcel owner is liable for all assessments that come due while he or she is the owner, and is jointly liable with past owners for any assessment owed by such previous owners.⁴ Unpaid assessments may also become a lien on the parcel.⁵

To protect against undisclosed financial obligations and to ensure that title is transferred free of any lien or encumbrance, buyers in an ordinary sale of a unit or parcel insist that all assessments be brought current through the date of sale, and an owner's title insurance company (if purchased) insures the buyer should the closing agent not properly see to payment of assessments through closing.

Accordingly, buyers, sellers, lenders, and other entities involved in the sale or refinance of a unit or parcel rely on estoppel certificates issued by an association to ascertain the amount to be collected and applied at closing. An estoppel certificate issued by an association certifies the total debt owed to the association for unpaid financial obligations by a parcel owner, unit owner, or mortgagee as of a specified date. The association is legally bound⁶ by the amount in the estoppel certificate and is barred from asserting a claim of moneys due that contradicts the information provided in the estoppel certificate against any third party who relies on such certificate.⁷

Fees for Preparation of Estoppel Certificate

A homeowners or condominium association may charge a fee for the preparation of an estoppel certificate as long as the fee is established by a written resolution adopted by the board, or provided by a written management, bookkeeping, or maintenance contract.⁸ A cooperative association may also charge a fee, but there is currently no similar condition in ch. 719, F.S., on the establishment of such fee. Current law also provides no limitation on the amount of the fee that may be charged by an

¹ A condominium association means, in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership. Section 718.103(2), F.S.

² A cooperative association means the corporation for profit or not for profit that owns the record interest in the cooperative property or a leasehold of the property of a cooperative and that is responsible for the operation of the cooperative. Section 719.103(2), F.S.

³ A homeowners' association is a Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, and in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel. Section 720.301(9), F.S.

⁴ Sections 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.

⁵ Sections 718.116(5), 719.108(4), and 720.3085, F.S.

⁶ "Estoppel" means a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

⁷ Sections 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

⁸ Sections 718.116(8)(d) and 720.30851(3), F.S.

association other than that such amount must be "reasonable."⁹ Neither the Legislature nor the courts have provided guidance on what constitutes a reasonable fee for an estoppel certificate. This has caused variations in the amount of the fee charged by associations for the preparation of an estoppel certificate.

Additionally, any fee charged by a homeowners' or condominium association for an estoppel certificate is payable upon preparation of the certificate.¹⁰ As estoppel certificates are generally required to close the sale or refinancing of a home and must be requested earlier than the time of closing, the funds must be paid solely by one party to the transaction, usually the seller, rather than from the closing settlement proceeds. However, current law does provide that if the certificate was requested in conjunction with the sale or mortgage of a unit or parcel but the sale does not occur, a homeowners or condominium association must refund the fee, but only to a non-owner payor.¹¹ The refund becomes the obligation of the unit or parcel owner and the homeowners or condominium association may collect it from the owner in the same manner as an assessment.¹² Accordingly, owners may be required to pay an estoppel fee even where closing does not occur due to the early payment requirement or the obligation to reimburse a homeowners or condominium association for a fee refund given to a non-owner payor.

After a series of public meetings in 2014, the Community Association Living Study Council,¹³ by unanimous vote, recommended to the Legislature that a reasonable cap be established for estoppel certificate fees and that such fees be tiered.¹⁴ The Council proposed several additional factors that should be considered when determining the amount of the fee including whether or not the owner is current in fees, delinquent in fees, or estoppel certificates were requested in conjunction with a bulk purchase.¹⁵

Effect of Proposed Changes - Fees for Preparation of Estoppel Certificate

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., to authorize an association to charge a fee for the delivery as well as the preparation of an estoppel certificate. The bill establishes a maximum fee of \$100 for the preparation and delivery of an estoppel certificate. An association may charge an additional supplemental fee of up to \$50 under each of the following circumstances:

- The owner is delinquent with respect to moneys owed to the association and his or her account has been referred for collection;
- Expedited delivery of an estoppel certificate is requested and made; or
- An additional estoppel certificate is requested within 30 days after the most recently delivered estoppel certificate.

However, notwithstanding the authority to charge up to \$100 for an estoppel certificate, if a unit or parcel owner meets certain requirements and makes a simultaneous request for the estoppel certificate of multiple units owned by the unit or parcel owner, the association may deliver the statement of moneys due in one or more estoppel certificates and the total fee that may be charged may not exceed:

⁹ Sections 718.116(8)(c) and 719.108(6), F.S.; There is no corresponding requirement in ch. 720, F.S., that the fee charged by a homeowners' association be reasonable.

¹⁰ Sections 718.116(8)(d) and 720.30851(3), F.S.; The time for payment of the fee to a cooperative association is not provided under current law.

¹¹ *Id.*

¹² *Id.*

¹³ The Community Association Living Study Council was created by the Legislature in 2008 to receive input from the public regarding issues of concern with respect to community association living and to advise the Legislature concerning revisions and improvements to the laws relating to community associations. The council consisted of seven members appointed by the President of the Senate, the Speaker of the House Representatives, and the Governor. An ex officio nonvoting member was appointed by the Director of the Division of Florida Condominiums, Timeshares, and Mobile Homes. The Council was abolished by the Legislature in 2014. See s. 718.50151, F.S. (2013); Ch. 2014-133, L.O.F.

¹⁴ Community Association Living Study Council, *Final Report*, March 31, 2014, available at <http://www.myfloridalicense.com/Dbpr/lsc/documents/2014CALSCReport.pdf> (last visited Feb. 26, 2015).

¹⁵ *Id.*

- \$750 for 25 or fewer units or parcels;
- \$1,000 for 26 to 50 units or parcels;
- \$1,500 for 51 to 100 units or parcels; or
- \$2,500 for more than 100 units or parcels.

The bill also repeals the requirement that the fee for an estoppel certificate be paid upon preparation by an association. Where an estoppel certificate is requested in conjunction with the sale or refinancing of a unit or parcel, the fee and any supplemental fees are due and payable to an association no earlier than the closing and must be paid from the closing settlement proceeds. Since the fees must be paid from the closing settlement proceeds, the bill repeals the provision authorizing a refund of fees by a homeowners or condominium association to a non-owner payor as no fee will have previously been paid. However, if the sale does not occur within 60 days after the estoppel certificate is delivered, the fee is the obligation of the owner and may be collected by an association in the same manner as an assessment.

The preparation and delivery of an estoppel certificate may not be conditioned upon the payment of any other fees not authorized by the bill.

Form and Delivery of Estoppel Certificate

An association is required to provide an estoppel certificate within 15 days after receiving a request¹⁶ from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.¹⁷ Although the certificate acts as a bar and prevents the association from later asserting a claim or right that contradicts the information in the certificate, current law is largely silent on the specific contents and form the certificate. An estoppel certificate issued by a homeowners or condominium association must only set forth all assessments and other moneys owed to the association with respect to the unit or parcel, disclose any fee charged by the association for the preparation of such certificate, and be signed by an officer or authorized agent of the association.¹⁸ An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.¹⁹ Some associations provide the amount of assessments and other moneys owed to the association in one lump sum while others provide an itemized breakdown of assessments, late fees, interest, etc. The amount in the certificate may reflect the amount presently owed or the amount owed through a given date a few weeks or months into the future. Accordingly, the information provided in estoppel certificates varies among associations.

Additionally, although current law does not restrict the method in which an association may provide an estoppel certificate to an owner or mortgagee, the Community Association Living Study Council, by unanimous vote, recommended to the Legislature that the law governing community associations authorize the use of digital communications.²⁰

Effect of Proposed Changes - Form and Delivery of Estoppel Certificate

The bill amends ss. 720.30851 and 718.116(8), F.S., relating to homeowners and condominium associations, to provide additional specific requirements for the form and content of an estoppel certificate. An estoppel certificate must be dated as of the date it is delivered and set forth all assessments and other moneys owed to the association, including costs and reasonable attorney's fees incurred in collection of the unpaid assessments, as reflected in the official records of the association, through at least 30 days after the date of the estoppel certificate.

¹⁶ A request to a condominium association must be in writing. Section 718.116(8), F.S.

¹⁷ Sections 718.116(8), 719.108(6), and 720.30851, F.S. The cooperative act does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.

¹⁸ *Id.*

¹⁹ Section 719.108(6), F.S.

²⁰ *Supra* at note 14.

Section 719.108(6), F.S. is also amended to provide that an estoppel certificate issued by a cooperative association be in the same form provided in current law for an estoppel certificate issued by homeowners and condominium associations with such additional information required for homeowners and condominium estoppel certificates as provided by this bill.

The bill reduces the period of time in which an association must respond to a request for an estoppel certificate from 15 days to 10 days and specifies that the certificate may be delivered by mail, hand, or electronic means. All requests for an estoppel certificate from an association must be written and may also be made the designee of an owner or mortgagee.

Compliance by Association

Under current law, a unit or parcel owner may compel compliance with the provisions governing the issuance of an estoppel certificate from a homeowners' or condominium association by bringing a summary procedure pursuant to s. 51.011, F.S.²¹ The prevailing party is entitled to recover reasonable attorney's fees and costs.²²

The bill repeals the authority to compel compliance from a homeowners or condominium association by resort to the summary procedure specified in s. 51.011, F.S. If an association fails to respond to a request for an estoppel certificate, the bill provides that the association waives any claim, including a claim of lien against the unit or parcel, for moneys owed to the association that should have been shown on the estoppel certificate against any person who in good faith would have relied on such certificate, as well as that person's successors and assigns.

Other Changes

Any person, other than the owner of a unit or parcel, who relies upon an estoppel certificate issued by an association, is protected by the estoppel effect of the certificate.²³ Accordingly, an association would be unable to assert a claim for an amount of unpaid assessments against a purchaser of a unit or parcel if that amount contradicted the amount of unpaid assessments provided by the association in an estoppel certificate during the closing of the sale. However, the protections of the estoppel effect extend only to such third parties and although an owner may pay a fee to obtain the certified amount of unpaid assessments and moneys owed to the association, the association is not estopped from asserting a contradictory claim in the future against the owner. The bill amends current law to expressly provide that the association waives the right to collect any money owed in excess of the amount set forth in the estoppel certificate. Such waiver extends to any person, which would include any owner, who in good faith relied upon the certificate as well as the person's successors and assigns.

B. SECTION DIRECTORY:

Section 1 amends s. 718.116, F.S., relating to assessments; liability; lien and priority; interest; collection.

Section 2 amends s. 719.108, F.S., relating to rents and assessments; liability; lien and priority; interest; collection; cooperative ownership.

Section 3 amends s. 720.30851, F.S., relating to estoppel certificates.

²¹ Sections 718.116(8)(b) and 720.30851(2), F.S.; Section 51.011, F.S., specifies a summary procedure for actions that specifically provide for this procedure by statute or rule. Under the summary procedure, all defenses of law or fact are required to be contained in the defendant's answer which must be filed within five days after service of process of the plaintiff's complaint. If the answer incorporates a counterclaim, the plaintiff must include all defenses of law or fact in his or her answer to the counterclaim and serve it within five days after service of the counterclaim. (Fla. R. Civ. Pro. 1.140, requires an answer, including any counterclaims, within 20 days after service of the complaint.) No other pleadings are permitted, and all defensive motions, including motions to quash, are heard by the court prior to trial. Postponements are not permitted for discovery, and the procedure also provides for an immediate trial, if requested.

²² *Id.*

²³ Sections 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.

Section 4 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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:

To the extent that an association charges more than \$100 for the issuance of an estoppel certificate, the bill may have a positive economic impact on unit and parcel owners of such association by reducing the amount of fees required to obtain an estoppel certificate. In such instance there would be a corresponding negative reduction in such fees collected by associations.

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:

Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the state constitution both prohibit the legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted.

The United States Supreme Court has set forth the following principles in examining a law under an impairment analysis, ruling:

[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Referring to the *Allied* opinion, the Florida Supreme Court added the following clarification to the analysis:

(a) Was the law enacted to deal with a broad, generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774, 779 (Fla. 1979).

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

1 A bill to be entitled
 2 An act relating to residential properties; amending
 3 ss. 718.116, 719.108 and 720.30851, F.S.; providing
 4 requirements relating to the request for an estoppel
 5 certificate by a unit or parcel owner; providing that
 6 the association waives the right to collect any moneys
 7 owed in excess of the amounts set forth in the
 8 estoppel certificate under certain conditions;
 9 providing that the association waives any claim
 10 against a person or entity who would have relied in
 11 good faith upon the estoppel certificate under certain
 12 conditions; providing and revising estoppel
 13 certificate fee and supplemental fee requirements;
 14 repealing provisions regarding expedited court action
 15 to compel issuance of an estoppel certificate;
 16 providing an effective date.

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

19
 20 Section 1. Subsection (8) of section 718.116, Florida
 21 Statutes, is amended to read:

22 718.116 Assessments; liability; lien and priority;
 23 interest; collection.--

24 (8) Within 10 ~~15~~ days after receiving a written request
 25 for an estoppel certificate ~~therefor~~ from a unit owner or his or
 26 her designee, or a unit mortgagee or his or her designee, the

27 association shall deliver by mail, hand, or electronic means an
 28 estoppel ~~provide~~ a certificate signed by an officer or agent of
 29 the association. The estoppel certificate must be dated as of
 30 the date it is delivered, must be valid for at least 30 days,
 31 and must state ~~stating~~ all assessments and other moneys,
 32 including costs and reasonable attorney's fees incurred in
 33 collection as authorized by subsection (3) or paragraph (5)(b),
 34 that are owed to the association by the unit owner with respect
 35 to the unit, as reflected in records maintained pursuant to s.
 36 718.111(12), through a date that is at least 30 days after the
 37 date of the estoppel certificate ~~condominium parcel.~~

38 (a) An association waives the right to collect any moneys
 39 owed in excess of the amounts set forth in the estoppel
 40 certificate from any person who in good faith relies upon the
 41 estoppel certificate, and from that person's successors and
 42 assigns ~~Any person other than the owner who relies upon such~~
 43 ~~certificate shall be protected thereby.~~

44 (b) If an association receives a written request for an
 45 estoppel certificate from a unit owner or his or her designee,
 46 or a unit mortgagee or his or her designee, and fails to deliver
 47 an estoppel certificate as required by this section, the
 48 association waives, as to any person who would have in good
 49 faith relied on the estoppel certificate and as to that person's
 50 successors and assigns, any claim, including a claim for a lien
 51 against the unit, for any amounts owed to the association that
 52 should have been shown on the estoppel certificate ~~A summary~~

53 ~~proceeding pursuant to s. 51.011 may be brought to compel~~
 54 ~~compliance with this subsection, and in any such action the~~
 55 ~~prevailing party is entitled to recover reasonable attorney's~~
 56 ~~fees.~~

57 (c) Notwithstanding any limitation on transfer fees
 58 contained in s. 718.112(2)(i), an ~~the~~ association or its
 59 ~~authorized~~ agent may charge an estoppel certificate a reasonable
 60 fee as provided in this paragraph for the preparation and
 61 delivery of the estoppel certificate. The amount of the estoppel
 62 certificate fee must be included on the estoppel certificate. If
 63 the estoppel certificate is requested in conjunction with the
 64 sale or refinancing of a unit, the estoppel certificate fee and
 65 any supplemental estoppel certificate fees pursuant to this
 66 paragraph shall be due and payable no earlier than the closing
 67 of the sale or refinancing, and shall be paid from closing
 68 settlement proceeds. If the closing does not occur within 60
 69 days after the date the estoppel certificate is delivered, the
 70 fee for the estoppel certificate is the obligation of the unit
 71 owner and the association may collect the fee only in the same
 72 manner as an assessment against the unit owner as set forth in
 73 this section. The preparation and delivery of an estoppel
 74 certificate may not be conditioned upon the payment of any other
 75 fees. The estoppel certificate fee may not exceed \$100. However,
 76 one or more of the following supplemental estoppel certificate
 77 fees may be added:

78 1. If the unit owner is delinquent with respect to moneys

79 owed to the association, and the association has referred the
 80 account to an attorney or other agent for collection, an
 81 additional estoppel certificate fee not to exceed \$50 may be
 82 charged.

83 2. If a request to expedite delivery of the estoppel
 84 certificate is made and the estoppel certificate is delivered no
 85 later than the date requested, an additional estoppel
 86 certificate fee not to exceed \$50 may be charged.

87 3. If an additional estoppel certificate is requested
 88 within 30 days after the most recently delivered estoppel
 89 certificate, an additional estoppel certificate fee not to
 90 exceed \$50 for each such estoppel certificate may be charged.

91 (d) If estoppel certificates for multiple units owned by
 92 the same unit owner are simultaneously requested from the same
 93 association and there are no past due monetary obligations owed
 94 to the association, the statement of moneys due for those units
 95 may be delivered in one or more estoppel certificates, and,
 96 though the estoppel certificate fee for each unit shall be
 97 computed as set forth in paragraph (c), the total estoppel
 98 certificate fee that the association may charge for the
 99 preparation and delivery of the estoppel certificate or estoppel
 100 certificates may not exceed, in the aggregate:

- 101 1. For 25 or fewer units, \$750.
- 102 2. For 26 to 50 units, \$1,000.
- 103 3. For 51 to 100 units, \$1,500.
- 104 4. For more than 100 units, \$2,500.

105 ~~(e)(d)~~ The authority to charge a fee for the estoppel
 106 certificate shall be established by a written resolution adopted
 107 by the board or provided by a written management, bookkeeping,
 108 or maintenance contract ~~and is payable upon the preparation of~~
 109 ~~the certificate. If the certificate is requested in conjunction~~
 110 ~~with the sale or mortgage of a unit but the closing does not~~
 111 ~~occur and no later than 30 days after the closing date for which~~
 112 ~~the certificate was sought the preparer receives a written~~
 113 ~~request, accompanied by reasonable documentation, that the sale~~
 114 ~~did not occur from a payor that is not the unit owner, the fee~~
 115 ~~shall be refunded to that payor within 30 days after receipt of~~
 116 ~~the request. The refund is the obligation of the unit owner, and~~
 117 ~~the association may collect it from that owner in the same~~
 118 ~~manner as an assessment as provided in this section.~~

119 Section 2. Subsection (6) of section 719.108, Florida
 120 Statutes, is amended to read:

121 719.108 Rents and assessments; liability; lien and
 122 priority; interest; collection; cooperative ownership.—

123 (6) Within 10 ~~15~~ days after receiving a written request
 124 for an estoppel certificate from by a unit owner or his or her
 125 designee, or a mortgagee or his or her designee, the association
 126 shall deliver by mail, hand, or electronic means an estoppel
 127 ~~provide a~~ certificate signed by an officer or agent of the
 128 association. The estoppel certificate must be dated as of the
 129 date it is delivered, must be valid for at least 30 days, and
 130 must state stating all assessments and other moneys, including

131 costs and reasonable attorney's fees as authorized by subsection
 132 (3) or paragraph (4)(b), that are owed to the association by the
 133 unit owner with respect to the cooperative parcel, as reflected
 134 in records maintained pursuant to s. 719.104(2), through a date
 135 that is at least 30 days after the date of the estoppel
 136 certificate.

137 (a) An association waives the right to collect any moneys
 138 owed in excess of the amounts set forth in the estoppel
 139 certificate from any person who in good faith relies upon the
 140 estoppel certificate, and from that person's successors and
 141 assigns ~~Any person other than the unit owner who relies upon~~
 142 ~~such certificate shall be protected thereby.~~

143 (b) If an association receives a written request for an
 144 estoppel certificate from a unit owner or his or her designee,
 145 or a unit mortgagee or his or her designee, and fails to deliver
 146 an estoppel certificate as required by this section, the
 147 association waives, as to any person who would have in good
 148 faith relied on the estoppel certificate and as to that person's
 149 successors and assigns, any claim, including a claim for a lien
 150 against the unit, for any amounts owed to the association that
 151 should have been shown on the estoppel certificate.

152 (c) Notwithstanding any limitation on transfer fees
 153 contained in s. 719.106(1)(i), ~~an~~ the association or its
 154 ~~authorized~~ agent may charge an estoppel certificate a reasonable
 155 fee as provided in this paragraph for the preparation and
 156 delivery of the estoppel certificate. The amount of the estoppel

157 certificate fee must be included on the estoppel certificate. If
 158 the estoppel certificate is requested in conjunction with the
 159 sale or refinancing of a unit, the estoppel certificate fee and
 160 any supplemental estoppel certificate fees pursuant to this
 161 paragraph shall be due and payable no earlier than the closing
 162 of the sale or refinancing, and shall be paid from closing
 163 settlement proceeds. If the closing does not occur within 60
 164 days after the date the estoppel certificate is delivered, the
 165 estoppel certificate fee for the estoppel certificate is the
 166 obligation of the unit owner and the association may collect the
 167 estoppel certificate fee only in the same manner as an
 168 assessment against the unit owner as set forth in this section.
 169 The preparation and delivery of an estoppel certificate may not
 170 be conditioned upon the payment of any other fees. The estoppel
 171 certificate fee may not exceed \$100. However, one or more of the
 172 following supplemental estoppel certificate fees may be added:
 173 1. If the unit owner is delinquent with respect to moneys
 174 owed to the association, and the association has referred the
 175 account to an attorney or other agent for collection, an
 176 additional estoppel certificate fee not to exceed \$50 may be
 177 charged.
 178 2. If a request to expedite delivery of the estoppel
 179 certificate is made and the estoppel certificate is delivered no
 180 later than the date requested, an additional estoppel
 181 certificate fee not to exceed \$50 may be charged.
 182 3. If an additional estoppel certificate is requested

183 within 30 days after the most recently delivered estoppel
 184 certificate, an additional estoppel certificate fee not to
 185 exceed \$50 for each such estoppel certificate may be charged.

186 (d) If estoppel certificates for multiple units owned by
 187 the same unit owner are simultaneously requested from the same
 188 association and there are no past due monetary obligations owed
 189 to the association, the statement of moneys due for those units
 190 may be delivered in one or more estoppel certificates, and,
 191 though the estoppel certificate fee for each unit shall be
 192 computed as set forth in paragraph (c), the total estoppel
 193 certificate fee that the association may charge for the
 194 preparation and delivery of the estoppel certificate or estoppel
 195 certificates may not exceed, in the aggregate:

- 196 1. For 25 or fewer units, \$750.
- 197 2. For 26 to 50 units, \$1,000.
- 198 3. For 51 to 100 units, \$1,500.
- 199 4. For more than 100 units, \$2,500.

200 (e) The authority to charge a fee for the estoppel
 201 certificate shall be established by a written resolution adopted
 202 by the board or provided by a written management, bookkeeping,
 203 or maintenance contract.

204 Section 3. Section 720.30851, Florida Statutes, is amended
 205 to read:

206 720.30851 Estoppel certificates.—Within 10 ~~15~~ days after
 207 receiving the date on which a written request for an estoppel
 208 certificate is received from a parcel owner or his or her

209 designee, or a mortgagee, or his or her designee, the
 210 association shall deliver by mail, hand, or electronic means an
 211 estoppel ~~provide~~ a certificate signed by an officer or
 212 ~~authorized~~ agent of the association. The estoppel certificate
 213 must be dated as of the date it is delivered, must be valid for
 214 at least 30 days, and must state ~~stating~~ all assessments and
 215 other moneys, including costs and attorney's fees incurred by
 216 the association incident to the collection process as authorized
 217 by s. 720.3085, that are owed to the association by the parcel
 218 owner or mortgagee with respect to the parcel, as reflected in
 219 records maintained pursuant to s. 720.303(4), through a date
 220 that is at least 30 days after the date of the estoppel
 221 certificate. An association may charge a fee for the preparation
 222 ~~of such certificate, and the amount of such fee must be stated~~
 223 ~~on the certificate.~~

224 (1) An association waives the right to collect any moneys
 225 owed in excess of the amounts set forth in the estoppel
 226 certificate from any person who in good faith relies upon that
 227 certificate, and from that person's successors and assigns ~~Any~~
 228 ~~person other than a parcel owner who relies upon a certificate~~
 229 ~~receives the benefits and protection thereof.~~

230 (2) If an association receives a written request for an
 231 estoppel certificate from a parcel owner or his or her designee,
 232 or a mortgagee or his or her designee, and fails to deliver an
 233 estoppel certificate as required by this section, the
 234 association waives, as to any person who would have in good

235 faith relied on the estoppel certificate and as to that person's
 236 successors and assigns, any claim, including a claim for a lien
 237 against the parcel, for any amounts owed to the association that
 238 should have been shown on the estoppel certificate ~~A summary~~
 239 ~~proceeding pursuant to s. 51.011 may be brought to compel~~
 240 ~~compliance with this section, and the prevailing party is~~
 241 ~~entitled to recover reasonable attorney's fees.~~

242 (3) An association or its agent may charge an estoppel
 243 certificate fee as provided in this subsection for the
 244 preparation and delivery of the estoppel certificate. The amount
 245 of the estoppel certificate fee must be included on the estoppel
 246 certificate. If the estoppel certificate is requested in
 247 conjunction with the sale or refinancing of a parcel, the
 248 estoppel certificate fee and any supplemental estoppel
 249 certificate fees pursuant to this subsection shall be due and
 250 payable no earlier than the closing of the sale or refinancing,
 251 and shall be paid from the closing settlement proceeds. If the
 252 closing does not occur within 60 days after the date the
 253 estoppel certificate is delivered, the estoppel certificate fee
 254 for the estoppel certificate is the obligation of the parcel
 255 owner and the association may collect the estoppel certificate
 256 fee only in the same manner as an assessment against the parcel
 257 owner as set forth in s. 720.3085. The preparation and delivery
 258 of an estoppel certificate may not be conditioned upon the
 259 payment of any other fees. The amount of the estoppel
 260 certificate fee for the estoppel letter may not exceed \$100.

261 However, one or more of the following supplemental estoppel
 262 certificate fees may be added:

263 (a) If the parcel owner is delinquent with respect to
 264 moneys owed to the association, and the association has referred
 265 the account to an attorney or other agent for collection, an
 266 additional estoppel certificate fee not to exceed \$50 may be
 267 charged.

268 (b) If a request to expedite delivery of the estoppel
 269 certificate is made and the estoppel certificate is delivered no
 270 later than the date requested, an additional estoppel
 271 certificate fee not to exceed \$50 may be charged.

272 (c) If an additional estoppel certificate is requested
 273 within 30 days after the most recently delivered estoppel
 274 certificate, an additional estoppel certificate fee not to
 275 exceed \$50 for each such estoppel certificate may be charged.

276 (4) If estoppel certificates for multiple parcels owned by
 277 the same parcel owner are simultaneously requested from the same
 278 association and there are no past due monetary obligations owed
 279 to the association, the statement of moneys due for those
 280 parcels may be delivered in one or more estoppel certificates,
 281 and, though the estoppel certificate fee for each parcel shall
 282 be computed as set forth in subsection (3), the total estoppel
 283 certificate fee that the association may charge for the
 284 preparation and delivery of the estoppel certificate or estoppel
 285 certificates may not exceed, in the aggregate:

286 (a) For 25 or fewer parcels, \$750.

287 | (b) For 26 to 50 parcels, \$1,000.
 288 | (c) For 51 to 100 parcels, \$1,500.
 289 | (d) For more than 100 parcels, \$2,500.
 290 | (5) The authority to charge a fee for the estoppel
 291 | certificate shall be established by a written resolution adopted
 292 | by the board or provided by a written management, bookkeeping,
 293 | or maintenance contract and is payable upon the preparation of
 294 | the certificate. If the certificate is requested in conjunction
 295 | with the sale or mortgage of a parcel but the closing does not
 296 | occur and no later than 30 days after the closing date for which
 297 | the certificate was sought the preparer receives a written
 298 | request, accompanied by reasonable documentation, that the sale
 299 | did not occur from a payor that is not the parcel owner, the fee
 300 | shall be refunded to that payor within 30 days after receipt of
 301 | the request. The refund is the obligation of the parcel owner,
 302 | and the association may collect it from that owner in the same
 303 | manner as an assessment as provided in this section.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 625 Florida Civil Rights Act
SPONSOR(S): Cortes
TIED BILLS: None IDEN./SIM. BILLS: SB 982

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR or BUDGET/POLICY CHIEF. Row 1: 1) Civil Justice Subcommittee, Robinson, Bond.

SUMMARY ANALYSIS

Title II of the Civil Rights Act of 1964 prohibits discrimination because of race, color, religion, or national origin in certain places of public accommodations, such as hotels, restaurants, and places of entertainment. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Title VII was amended in 1978 to specifically include discrimination based on pregnancy, childbirth, and related medical conditions as prohibited forms of sex discrimination in employment.

Patterned after Title II and Title VII, but providing even broader protections, the Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status..." in places of public accommodation and employment. However, although Title VII expressly includes pregnancy status as a component of sex discrimination in employment, the FCRA does not. The fact that the FCRA is patterned after Title VII but does not expressly prohibit discrimination based on pregnancy status caused division among both federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status in employment. In 2014, the Florida Supreme Court concluded that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in employment practices, consistent with the express provisions of Title VII. The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

The bill codifies the Florida Supreme Court decision by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FRCA to prohibit discrimination on the basis of pregnancy in places of public accommodation.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title II and VII of the Civil Rights Act of 1964¹

Title II of the Civil Rights Act of 1964 (Title II) prohibits discrimination because of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees² and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.³

Pregnancy Discrimination Act⁴

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*⁵ that Title VII did not include pregnancy discrimination as a form of sex discrimination under its prohibition against unlawful employment practices. In response to the decision, Congress passed the Pregnancy Discrimination Act (PDA) in 1978. The PDA amended Title VII to expressly define the terms “because of sex” or “on the basis of sex,” to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.⁶ Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, or any other term or condition of employment.⁷

Florida Civil Rights Act of 1992

Patterned after Title II and Title VII, but providing broader protections, the Florida Civil Rights Act of 1992 (FCRA) was enacted to “secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status...”⁸ in employment and places of public accommodations.⁹ Similar to Title VII, the FCRA provides a number of actions that, if undertaken because of or on the basis of an individual's race, color, religion, sex, national origin, age, handicap, or marital status, are considered unlawful employment practices, including:¹⁰

¹ 42 U.S.C. § 2000a *et seq.*; 42 U.S.C. § 2000e *et seq.*

² 42 U.S.C. § 2000e(b)

³ 42 U.S.C. § 2000e-2(a).

⁴ Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978), codified as 42 U.S.C. § 2000e(k).

⁵ 429 U.S. 125, 145 (1976).

⁶ The PDA defines the terms “because of sex” or “on the basis of sex” to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so affected but has similar ability or inability to work.

⁷ For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, <http://www.eeoc.gov/facts/fs-preg.html> (last visited February 24, 2015).

⁸ Section 760.01, F.S.

⁹ “Public accommodations” means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. Section 760.02(11), F.S.

¹⁰ Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.

- Failing to hire an individual, or otherwise discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment;
- Limiting, segregating, or classifying employees or applicants for employment in ways that would deprive such individuals of employment opportunities or adversely affect such individual's status as an employee;
- Failing or refusing to refer an individual for employment;
- Excluding or expelling an individual from membership in a labor organization or limiting, segregating, or classifying the membership of a labor organization;
- Discriminating in admission to, or employment in, any program established to provide apprenticeship or other training for a profession, occupation, or trade;
- Discriminating in licensing, certification, credentials, examinations, or organizational membership required to engage in a profession, occupation or trade; and
- Printing or publishing ads related to membership in certain labor organizations or employment that indicate a preference, limitation, specification, or discrimination.

Unlike Title VII, the FCRA has not been amended to specifically include discrimination based on the pregnancy status of an individual as an unlawful employment practice. The FCRA also does not prohibit pregnancy discrimination in places of public accommodation.

Pregnancy Discrimination in Florida

The fact that the FCRA is patterned after Title VII but has not been amended to expressly include pregnancy status as a component of sex discrimination in employment caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection from discrimination on the basis of pregnancy under state law. Thus, the ability to bring a claim based on pregnancy discrimination varied among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under Florida law was *O'Laughlin v. Pinchback*.¹¹ In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeal held that the Florida Human Rights Act¹² (predecessor to the FCRA) stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."¹³ The court held that both federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII, as amended, preempted Florida law "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."¹⁴ By finding the Florida Human Rights Act to be preempted by federal law, the court did not reach the question of whether the Florida law on its own prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.¹⁵

The Fourth District Court of Appeal in *Carsillo v. City of Lake Worth*¹⁶ found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination.¹⁷ The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent, as expressed by the PDA, was to prohibit this type of

¹¹ 579 So.2d 788 (Fla. 1st DCA 1991).

¹² This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, Chs. 69-287, 72-48, and 77-341, L.O.F., and which was also patterned after Title VII.

¹³ *O'Laughlin*, at 792.

¹⁴ *Id.*

¹⁵ *Id.* at 791.

¹⁶ 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).

¹⁷ *Id.* at 1119.

discrimination it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.¹⁸

In contrast, the Third District Court of Appeal in *Delva v. Continental Group, Inc. (Delva I)*¹⁹ held that the FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status.²⁰ The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin*. The court certified the conflict²¹ with the *Carsillo* case to the Florida Supreme Court.²²

In 2014, the Florida Supreme Court reviewed the *Delva I* decision in *Delva v. Continental Group, Inc. (Delva II)*²³ and quashed the decision, holding that:

The statutory phrase making it an "unlawful employment practice for an employer... to discriminate... because of... sex," as used in the FCRA, includes discrimination based on pregnancy, which is a natural condition and primary characteristic unique to the female sex."²⁴

The court reasoned that such a construction of the FCRA was consistent with legislative intent, as expressed in the FCRA itself, that the FCRA be liberally construed to further its purpose to secure for all individuals within the state freedom from discrimination because of sex.²⁵ Indeed, the court found that to conclude that the FCRA does not protect women from discrimination based on pregnancy—a primary characteristic of the female sex—would undermine the very protection provided in the FCRA to prevent an employer from discriminating against women because of their sex.²⁶ The court ascribed no legal significance to the Legislature's failure to amend the FCRA to include pregnancy discrimination after the *Gilbert* decision and rejected the argument that the failure to do so was an indication of the Legislature's intent not to include pregnancy within the meaning of sex discrimination.²⁷

The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

Claims and Remedies under Title VII and the FCRA

A Florida employee may now file a charge of an unlawful employment practice based upon pregnancy discrimination with either the federal Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

¹⁸ *Id.* at 1120.

¹⁹ 96 So.3d 956 (Fla. 3d DCA 2012).

²⁰ *Id.* at 958.

²¹ *Id.*

²² Federal courts interpreting the FCRA similarly wrestled with whether pregnancy status is covered by its provisions. Like the state courts, the federal courts that found that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. See *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011), and *Glass v. Captain Katanna's, Inc.*, 950 F.Supp.2d 1235 (M.D. Fla. 2013). The courts that found that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status. See *Frazier v. T-Mobile USA, Inc.*, 495 F.Supp.2d 1185 (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011).

²³ 137 So. 3d 371 (Fla. 2014)

²⁴ *Id.* at 372.

²⁵ *Id.*

²⁶ *Id.* at 375.

²⁷ *Id.*

A person who wishes to file a complaint with the EEOC must do so within 300 days of a violation in a jurisdiction with a fair employment practices agency (such as Florida, which has the FCHR).²⁸ The EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.²⁹ If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the EEOC must engage in informal conferencing, conciliation, and persuasion to remedy the unlawful employment practice.³⁰ After the EEOC concludes its investigation and issues a "right-to-sue" letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.³¹

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation.³² The FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.³³ If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.³⁴ A plaintiff is required to file a state claim in civil court under the FCRA within 1 year of the determination of reasonable cause by the FCHR.³⁵

Remedies available to persons who bring claims based upon pregnancy discrimination differ depending on whether the claim is brought under Title VII or under the FCRA. If a plaintiff prevails under Title VII or the FCRA, the plaintiff might be entitled to an order prohibiting the discriminatory practice, as well as reinstatement or hiring, with or without back pay.³⁶ Depending upon the number of persons employed by the defendant employer, a Title VII claimant may also recover from \$50,000 to \$300,000 in aggregated compensatory and punitive damages.³⁷ In contrast, there is no limit on compensatory damages under the FCRA, which include "damages for mental anguish, loss of dignity, and any other intangible injuries."³⁸ Punitive damages under the FCRA may not exceed \$100,000.³⁹ However, the total recovery, including back pay, for a claimant who brings a discrimination claim against the state or its subdivisions is limited under the FCRA to \$300,000.⁴⁰

Effect of the Bill

The bill codifies the Florida Supreme Court decision in *DeIva II* by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FCRA to prohibit discrimination on the basis of pregnancy in places of public accommodation. Accordingly, pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:

- By places of public accommodations; or
- With respect to employment, provided that the discriminatory act constitutes an unlawful employment practice.

²⁸ 42 U.S.C. § 2000e-5(e)(1). The enforcement procedures referenced in this paper do not apply to individuals affected by federal agencies, who have a separate process. 29 C.F.R. part 1614.

²⁹ 42 U.S.C. §. 2000e-5(b).

³⁰ *Id.*

³¹ 42 U.S.C. § 2000e-5(f)(1).

³² Section 760.11(1), F.S.

³³ Section 760.11(3), F.S.

³⁴ Section 760.11(4), F.S.

³⁵ Section 760.11(5), F.S.

³⁶ Section 760.11(5), F.S.; 42 U.S.C. § 2000e-5(g).

³⁷ 42 U.S.C. §1981a(b)(3)

³⁸ Section 760.11(5), F.S.

³⁹ Section 760.11(5), F.S.

⁴⁰ Section 760.11(5), F.S., referring to the limited waiver of sovereign immunity in section 768.28, F.S. Unlike the FCRA, there apparently is no limitation on total recovery, including back pay, for a claimant who brings suit against the state or its subdivisions under Title VII, though the caps on compensatory and punitive damages would apply.

Persons injured by a violation of the FCRA due to pregnancy discrimination are entitled to all rights and remedies under the FCRA.

B. SECTION DIRECTORY:

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments.

Section 2 amends s. 760.01, F.S., relating to the purpose and construction of the FCRA.

Section 3 amends s. 760.05, F.S., relating to functions of the Florida Commission on Human Relations.

Section 4 amends s. 760.07, F.S., relating to remedies for unlawful discrimination.

Section 5 amends s. 760.08, F.S., relating to discrimination in places of public accommodation.

Section 6 amends s. 760.10, F.S., relating to unlawful employment practices.

Section 7 reenacts s. 760.11(1), F.S., to incorporate pregnancy discrimination into provisions relating to administrative and civil remedies for violations of the FCRA.

Section 8 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to the Florida Civil Rights Act;
 3 amending s. 509.092, F.S.; prohibiting discrimination
 4 on the basis of pregnancy in public lodging and food
 5 service establishments; amending s. 760.01, F.S.;
 6 revising the general purpose of the Florida Civil
 7 Rights Act of 1992; amending s. 760.05, F.S.; revising
 8 the function of the Florida Commission on Human
 9 Relations; amending s. 760.07, F.S.; providing civil
 10 and administrative remedies for discrimination on the
 11 basis of pregnancy; amending s. 760.08, F.S.;
 12 prohibiting discrimination on the basis of pregnancy
 13 in places of public accommodation; amending s. 760.10,
 14 F.S.; prohibiting employment discrimination on the
 15 basis of pregnancy; prohibiting discrimination on the
 16 basis of pregnancy by labor organizations, joint
 17 labor-management committees, and employment agencies;
 18 prohibiting discrimination on the basis of pregnancy
 19 in occupational licensing, certification, and
 20 membership organizations; providing an exception to
 21 unlawful employment practices based on pregnancy;
 22 reenacting s. 760.11(1), F.S., relating to
 23 administrative and civil remedies for violations of
 24 the Florida Civil Rights Act of 1992, to incorporate
 25 the amendments made to s. 760.10(5), F.S., in a
 26 reference thereto; providing an effective date.

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

Section 1. Section 509.092, Florida Statutes, is amended to read:

509.092 Public lodging establishments and public food service establishments; rights as private enterprises.—Public lodging establishments and public food service establishments are private enterprises, and the operator has the right to refuse accommodations or service to any person who is objectionable or undesirable to the operator, but such refusal may not be based upon race, creed, color, sex, pregnancy, physical disability, or national origin. A person aggrieved by a violation of this section or a violation of a rule adopted under this section has a right of action pursuant to s. 760.11.

Section 2. Subsection (2) of section 760.01, Florida Statutes, is amended to read:

760.01 Purposes; construction; title.—

(2) The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general

53 welfare, and to promote the interests, rights, and privileges of
 54 individuals within the state.

55 Section 3. Section 760.05, Florida Statutes, is amended to
 56 read:

57 760.05 Functions of the commission.—The commission shall
 58 promote and encourage fair treatment and equal opportunity for
 59 all persons regardless of race, color, religion, sex, pregnancy,
 60 national origin, age, handicap, or marital status and mutual
 61 understanding and respect among all members of all economic,
 62 social, racial, religious, and ethnic groups; and shall endeavor
 63 to eliminate discrimination against, and antagonism between,
 64 religious, racial, and ethnic groups and their members.

65 Section 4. Section 760.07, Florida Statutes, is amended to
 66 read:

67 760.07 Remedies for unlawful discrimination.—Any violation
 68 of any Florida statute making unlawful discrimination because of
 69 race, color, religion, gender, pregnancy, national origin, age,
 70 handicap, or marital status in the areas of education,
 71 employment, housing, or public accommodations gives rise to a
 72 cause of action for all relief and damages described in s.
 73 760.11(5), unless greater damages are expressly provided for. If
 74 the statute prohibiting unlawful discrimination provides an
 75 administrative remedy, the action for equitable relief and
 76 damages provided for in this section may be initiated only after
 77 the plaintiff has exhausted his or her administrative remedy.
 78 The term "public accommodations" does not include lodge halls or

79 other similar facilities of private organizations which are made
 80 available for public use occasionally or periodically. The right
 81 to trial by jury is preserved in any case in which the plaintiff
 82 is seeking actual or punitive damages.

83 Section 5. Section 760.08, Florida Statutes, is amended to
 84 read:

85 760.08 Discrimination in places of public accommodation.—
 86 All persons are ~~shall be~~ entitled to the full and equal
 87 enjoyment of the goods, services, facilities, privileges,
 88 advantages, and accommodations of any place of public
 89 accommodation, ~~as defined in this chapter,~~ without
 90 discrimination or segregation on the ground of race, color,
 91 national origin, sex, pregnancy, handicap, familial status, or
 92 religion.

93 Section 6. Subsections (1) and (2), paragraphs (a) and (b)
 94 of subsection (3), subsections (4) through (6), and paragraph
 95 (a) of subsection (8) of section 760.10, Florida Statutes, are
 96 amended to read:

97 760.10 Unlawful employment practices.—

98 (1) It is an unlawful employment practice for an employer:

99 (a) To discharge or to fail or refuse to hire any
 100 individual, or otherwise to discriminate against any individual
 101 with respect to compensation, terms, conditions, or privileges
 102 of employment, because of such individual's race, color,
 103 religion, sex, pregnancy, national origin, age, handicap, or
 104 marital status.

105 (b) To limit, segregate, or classify employees or
 106 applicants for employment in any way which would deprive or tend
 107 to deprive any individual of employment opportunities, or
 108 adversely affect any individual's status as an employee, because
 109 of such individual's race, color, religion, sex, pregnancy,
 110 national origin, age, handicap, or marital status.

111 (2) It is an unlawful employment practice for an
 112 employment agency to fail or refuse to refer for employment, or
 113 otherwise to discriminate against, any individual because of
 114 race, color, religion, sex, pregnancy, national origin, age,
 115 handicap, or marital status or to classify or refer for
 116 employment any individual on the basis of race, color, religion,
 117 sex, pregnancy, national origin, age, handicap, or marital
 118 status.

119 (3) It is an unlawful employment practice for a labor
 120 organization:

121 (a) To exclude or to expel from its membership, or
 122 otherwise to discriminate against, any individual because of
 123 race, color, religion, sex, pregnancy, national origin, age,
 124 handicap, or marital status.

125 (b) To limit, segregate, or classify its membership or
 126 applicants for membership, or to classify or fail or refuse to
 127 refer for employment any individual, in any way that ~~which~~ would
 128 deprive or tend to deprive any individual of employment
 129 opportunities, or adversely affect any individual's status as an
 130 employee or as an applicant for employment, because of such

131 individual's race, color, religion, sex, pregnancy, national
 132 origin, age, handicap, or marital status.

133 (4) It is an unlawful employment practice for any
 134 employer, labor organization, or joint labor-management
 135 committee controlling apprenticeship or other training or
 136 retraining, including on-the-job training programs, to
 137 discriminate against any individual because of race, color,
 138 religion, sex, pregnancy, national origin, age, handicap, or
 139 marital status in admission to, or employment in, any program
 140 established to provide apprenticeship or other training.

141 (5) Whenever, in order to engage in a profession,
 142 occupation, or trade, it is required that a person receive a
 143 license, certification, or other credential, become a member or
 144 an associate of any club, association, or other organization, or
 145 pass any examination, it is an unlawful employment practice for
 146 any person to discriminate against any other person seeking such
 147 license, certification, or other credential, seeking to become a
 148 member or associate of such club, association, or other
 149 organization, or seeking to take or pass such examination,
 150 because of such other person's race, color, religion, sex,
 151 pregnancy, national origin, age, handicap, or marital status.

152 (6) It is an unlawful employment practice for an employer,
 153 labor organization, employment agency, or joint labor-management
 154 committee to print, or cause to be printed or published, any
 155 notice or advertisement relating to employment, membership,
 156 classification, referral for employment, or apprenticeship or

157 other training, indicating any preference, limitation,
 158 specification, or discrimination, based on race, color,
 159 religion, sex, pregnancy, national origin, age, absence of
 160 handicap, or marital status.

161 (8) Notwithstanding any other provision of this section,
 162 it is not an unlawful employment practice under ss. 760.01-
 163 760.10 for an employer, employment agency, labor organization,
 164 or joint labor-management committee to:

165 (a) Take or fail to take any action on the basis of
 166 religion, sex, pregnancy, national origin, age, handicap, or
 167 marital status in those certain instances in which religion,
 168 sex, condition of pregnancy, national origin, age, absence of a
 169 particular handicap, or marital status is a bona fide
 170 occupational qualification reasonably necessary for the
 171 performance of the particular employment to which such action or
 172 inaction is related.

173 Section 7. For the purpose of incorporating the amendment
 174 made by this act to section 760.10(5), Florida Statutes, in a
 175 reference thereto, subsection (1) of section 760.11, Florida
 176 Statutes, is reenacted to read:

177 760.11 Administrative and civil remedies; construction.—

178 (1) Any person aggrieved by a violation of ss. 760.01-
 179 760.10 may file a complaint with the commission within 365 days
 180 of the alleged violation, naming the employer, employment
 181 agency, labor organization, or joint labor-management committee,
 182 or, in the case of an alleged violation of s. 760.10(5), the

183 person responsible for the violation and describing the
 184 violation. Any person aggrieved by a violation of s. 509.092 may
 185 file a complaint with the commission within 365 days of the
 186 alleged violation naming the person responsible for the
 187 violation and describing the violation. The commission, a
 188 commissioner, or the Attorney General may in like manner file
 189 such a complaint. On the same day the complaint is filed with
 190 the commission, the commission shall clearly stamp on the face
 191 of the complaint the date the complaint was filed with the
 192 commission. In lieu of filing the complaint with the commission,
 193 a complaint under this section may be filed with the federal
 194 Equal Employment Opportunity Commission or with any unit of
 195 government of the state which is a fair-employment-practice
 196 agency under 29 C.F.R. ss. 1601.70-1601.80. If the date the
 197 complaint is filed is clearly stamped on the face of the
 198 complaint, that date is the date of filing. The date the
 199 complaint is filed with the commission for purposes of this
 200 section is the earliest date of filing with the Equal Employment
 201 Opportunity Commission, the fair-employment-practice agency, or
 202 the commission. The complaint shall contain a short and plain
 203 statement of the facts describing the violation and the relief
 204 sought. The commission may require additional information to be
 205 in the complaint. The commission, within 5 days of the complaint
 206 being filed, shall by registered mail send a copy of the
 207 complaint to the person who allegedly committed the violation.
 208 The person who allegedly committed the violation may file an

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209 | answer to the complaint within 25 days of the date the complaint
210 | was filed with the commission. Any answer filed shall be mailed
211 | to the aggrieved person by the person filing the answer. Both
212 | the complaint and the answer shall be verified.

213 | Section 8. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 775 Appointment of a Guardian Ad Litem

SPONSOR(S): Powell

TIED BILLS: None **IDEN./SIM. BILLS:** SB 922

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

SUMMARY ANALYSIS

Service of process is essential to satisfy jurisdictional requirements over the subject matter and the parties in a civil action. In some cases, a plaintiff is unable to effectuate actual service of process on a party because the party's identity or location may be unknown, the party may be evading service, the party may be away on active military service, or the party may have died. Despite the inability to effect actual service of process on such persons, a plaintiff may proceed in certain actions by providing such persons constructive service of process through publication of a legal notice.

In such actions, constitutional due process may require that a court appoint a representative for the party who is unknown or who cannot be found. Such representative may be known as a "guardian ad litem," an "attorney ad litem", or an "administrator ad litem," depending upon the interests represented. The ad litem has the responsibility to ensure that the absent party's due process rights are considered by the court, even if the person cannot ultimately be located. Practitioners report that some courts are reluctant to appoint an ad litem because there is no statutory authority for such appointments.

This bill creates a statutory framework for the appointment of a guardian ad litem, attorney ad litem, or administrator ad litem to represent certain persons in civil litigation who are unknown or cannot be located.

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

The effective date of the bill is upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Constructive Service of Process

The basic due process guarantee of the United States Constitution and the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.¹ Procedural due process ensures that defendants in legal actions are given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure before being deprived of property.² In civil actions, this usually requires that a person being sued receive notification of the lawsuit so that he or she can assert his or her rights and lawful defenses.³ This notice in a civil action is commonly referred to as "service of process." Service of original process or "actual service of process" is made by personally delivering notice along with a copy of the complaint, or other initial pleading or paper, of the civil action to the person to be served.⁴ However, in some cases, actual service of process may be impossible because a party's identity or location may be unknown, the party may be evading service, the party may be away on active military service, or the party may have died.

Where the goal of the lawsuit is to obtain a judgment against the person, due process requires that such person receive actual service of process to confer personal jurisdiction over such person upon the court,⁵ and in the absence thereof, the lawsuit may not proceed. Examples of such lawsuits include tort claims, actions to collect on a debt, and injunctions.

However, s. 49.011, F.S. specifies 15 actions or proceedings that may proceed even if actual service of process cannot be made because a party is unknown or cannot be located, including foreclosure, repossession, probate, and quiet title actions.⁶ Such proceedings are actions *in rem*, the purpose of which are to determine title to or to affect interests in specific property.⁷ Courts have subject matter jurisdiction to adjudicate the class of cases listed in s. 49.011, F.S. and have territorial jurisdiction or authority over the property, or "res" that is the object of the action,⁸ therefore the court does not need personal jurisdiction over the defendant. Although the court needs no personal jurisdiction over the defendant, service of process upon the defendant is still required in order to obtain a valid judgment over the "res" of the action. In cases or proceedings specified in s. 49.011, F.S. where the party is

¹ U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, s. 9.

² *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991); *See also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (procedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

³ *State ex rel. Merritt v. Heffernan*, 195 So. 145, 147 (Fla. 1940).

⁴ Section 48.031(1)(a), F.S.; A copy of the notice may also be left at the party's home with another resident who is at least 15 years of age.

⁵ *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So.2d 1225, 1227 (Fla. 1986) (holding that a personal judgment against a defendant based upon constructive service of process would deprive a defendant of his property without due process of law).

⁶ The law prefers actual service of process in all cases, and there are drawbacks to a suit without actual service of process. If constructive service of process must be used, then it confers only in rem or quasi in rem jurisdiction upon the court. For instance, a foreclosure suit can proceed against a party without actual service of process, but cannot yield a deficiency judgment as part of the suit because a personal judgment against a defendant based upon constructive service of process would deprive a defendant of his property without due process of law. Likewise, a divorce without actual service of process cannot provide for alimony or child support. *See Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986).

⁷ *Rosado v. Bieluch*, 827 So. 2d 1115, 1117 (Fla. 4th DCA 2002).

⁸ *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Mobile Oil Corp.*, 455 So. 2d 412, 415-16 (Fla. 2d DCA 1984).

unknown or cannot be found, service of process may be accomplished service of process by publication, otherwise known as "constructive service of process." Chapter 49, F.S., authorizes constructive service through publication of a legal notice provided certain conditions are met. An in rem proceeding, when properly commenced and noticed, becomes binding as to the resulting adjudication.⁹

Court Appointed Representatives of an Unknown or Absent Party

One or more of the known or unknown parties in such actions may be a minor, an incompetent person, or a person under some other legal disability. Because the court's ruling may bind such persons, due process may further require that the trial court appoint one or more of an administrator ad litem, a guardian ad litem, or an attorney ad litem to protect the interests of the known or unknown party.

The distinction between a guardian ad litem, attorney ad litem, or administrator ad litem depends upon the interests they were appointed to represent.

- Guardian ad litem: A court appoints a guardian ad litem to represent a minor or incompetent person.¹⁰
- Attorney ad litem: A court appoints an attorney ad litem to represent the interests of an unknown entity or person, including a person who is away on active military service.¹¹
- Administrator ad litem: A court appoints an administrator ad litem to represent the estate of a decedent.¹²

The ad litem has the legal duty to make a diligent effort to find the interest for which he or she was appointed and to determine if the interest is competent to handle their own affairs, and if the interest is competent, to inform the interest of the pending litigation.¹³ If the absent party is not located before the case is submitted to the court for judgment, the ad litem is nevertheless obligated to represent the absent party's interest in good faith.¹⁴

Current law and court rules provide for the appointment of a guardian ad litem, administrator ad litem, or attorney ad litem for the estates of a deceased person, minors, persons under a legal disability, or unknown parties in specific contexts and situations, for instance:

- Quiet title actions.¹⁵
- The administration of or in judicial proceedings involving estates of decedents.¹⁶
- Termination of parental rights proceedings.¹⁷
- Dissolution of marriage or custody proceedings.¹⁸
- Claims against a dissolved limited liability company, corporation, or limited partnership.¹⁹
- Eminent domain proceedings.²⁰
- Conservatorships.²¹

⁹ *Pitts v. Pitts*, 162 So. 708 (Fla. 1935).

¹⁰ Fla. R. Civ. P. 1.210(b).

¹¹ The Service Members Civil Relief Act of 2003 requires that a court appoint an attorney to represent a member of the armed services on active duty. 50 App. U.S.C. § 521(b)(2).

¹² Section 733.308, F.S.; Fla. Prob. R. 5.120.

¹³ *Rodriguez v. Levin*, 524 So. 2d 1107, 1108 (Fla. 3d DCA 1988).

¹⁴ *Id.*

¹⁵ Section 65.061(2), F.S.

¹⁶ Sections 731.303(4) and 733.308, F.S.

¹⁷ Section 39.807(2)(a), F.S.

¹⁸ Section 61.401, F.S.

¹⁹ Sections 605.0711(7), 605.0713(3), 607.1406(7), 608.4421(7), 617.1408(7), and 620.1806(7), F.S.

²⁰ Section 73.021(4), F.S.

²¹ Sections 747.031(3) and 747.052(5), F.S.

- Guardianship.²²
- Settlement of certain civil claims by a minor.²³

However, under current law, there is no statute that specifically authorizes a court to appoint an ad litem to protect the rights and lawful defenses of all persons who have been constructively served in a proceeding specified in s. 49.011, F.S. In light of various statutes expressly mandating or permitting the appointment of ad litem in specific contexts/cases, some courts have concluded that absent express statutory authority to appoint an ad litem in a particular case, the court lacked inherent authority to appoint an ad litem - even in cases where the court thought it otherwise appropriate.²⁴ As a result of the lack of such specific authority, there has been inconsistency among the courts, in that some courts have nevertheless appointed an ad litem, while other courts have refused to do so.²⁵

The inability to obtain the appointment of an ad litem may affect the sufficiency of certain legal proceedings, particularly those involving real property, such as quiet title actions and foreclosures. Accordingly, lack of an ad litem may impair the marketability of real estate titles at the conclusion of such litigation.²⁶

Effect of Proposed Changes

The bill amends s. 49.021, F.S., the statute on "constructive service of process", or service of process by publication, to allow for appointment of a guardian ad litem, attorney ad litem, or administrator ad litem, as appropriate, for any party served by publication in a proceeding specified in s. 49.011, F.S. who fails to respond to an action in the time required by law. The ad litem:

- Is not required to post a bond or designate a resident agent in order to serve.
- Serves through final judgment unless otherwise discharged by the court.
- Is entitled to a fee for services and costs which are assessed against the party requesting the ad litem or as otherwise ordered by the court.
- May not be appointed to represent an interest for which a personal representative, guardian of the property, or trustee is serving.

If a guardian ad litem is appointed and he or she discovers that a personal representative, guardian of the property, or trustee is serving and represents the interest for which the guardian ad litem was appointed, the guardian ad litem must promptly report that finding to the court and must file a petition for discharge as to any interest for which a personal representative, guardian of the property, or trustee is serving. If a guardian ad litem is appointed to represent an interest and discovers that the person whose interest is represented is deceased and there is no personal representative, guardian of the property, or trustee to represent the decedent's interest, the guardian ad litem must use reasonable efforts to locate any spouse, heir, devisee, or beneficiary of the decedent, must report to the court the name and address of any such person the guardian ad litem locates, and must petition for discharge as to any interest of the person located.

These statutory requirements regarding the conduct of an ad litem are consistent with normal practice and expectations of an ad litem.

²² Section 744.1075(4)(b), F.S.; Fla. Prob. R. 5.120.

²³ Section 744.3025, F.S.

²⁴ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to §49.021, Fla. Stats., Concerning Appointment of Ad Litem*s (on file with the Civil Justice Subcommittee, Florida House of Representatives).

²⁵ *Id.*

²⁶ *Damiano v. Weinstein*, 355 So.2d 819, 820 (Fla. 3d DCA 1978).

The bill also provides a savings clause regarding prior litigation. It provides that a proceeding adjudicated before the effective date of the bill in which the court appointed a guardian ad litem may not be declared ineffective solely due to lack of statutory authority to have appointed a guardian ad litem.

The bill does not abrogate the common law authority of a court to appoint a guardian ad litem.

B. SECTION DIRECTORY:

Section 1 amends s. 49.021, F.S., regarding service of process by publication.

Section 2 provides direction regarding a proceeding adjudicated before the effective date of this bill.

Section 3 amends s. 49.011, F.S., regarding service of process by publication; cases in which allowed.

Section 4 provides an effective date of 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:

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:

Lines 48-49 of the bill authorize a court to appoint an attorney ad litem, administrator ad litem, or guardian ad litem for certain parties served by constructive service. However, the remaining provisions of the bill only refer specifically to guardian ad litem. It is unclear if the remaining provisions of the bill also apply to attorney ad litem and administrator ad litem or if the term "guardian ad litem" encompasses attorney ad litem and administrator ad litem.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to the appointment of a guardian ad
 3 litem; amending s. 49.021, F.S.; providing for the
 4 appointment of a guardian ad litem to represent known
 5 or unknown persons claiming by, through, under, or
 6 against a person who is deceased or unknown;
 7 specifying that common law authority to appoint a
 8 guardian ad litem is not abrogated; providing that a
 9 guardian ad litem may not be appointed in certain
 10 circumstances; providing duties of a guardian ad litem
 11 appointed in certain circumstances; confirming the
 12 validity of a guardian ad litem appointed before a
 13 specified date; amending s. 49.011, F.S.; conforming a
 14 cross-reference; providing an effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Section 49.021, Florida Statutes, is amended to
 19 read:

20 49.021 Service of process by publication, upon whom;
 21 appointment of guardian ad litem.-

22 (1) (a) Where personal service of process or, if
 23 appropriate, service of process under s. 48.194 cannot be had,
 24 service of process by publication may be had upon any party,
 25 natural or corporate, known or unknown, including:

26 1.~~(1)~~ Any known or unknown natural person, and, when

27 | described as such, the unknown spouse, heirs, devisees,
 28 | grantees, creditors, or other parties claiming by, through,
 29 | under, or against any known or unknown person who is known to be
 30 | dead or is not known to be either dead or alive;

31 | 2.~~(2)~~ Any corporation or other legal entity, whether its
 32 | domicile be foreign, domestic, or unknown, and whether dissolved
 33 | or existing, including corporations or other legal entities not
 34 | known to be dissolved or existing, and, when described as such,
 35 | the unknown assigns, successors in interest, trustees, or any
 36 | other party claiming by, through, under, or against any named
 37 | corporation or legal entity;

38 | 3.~~(3)~~ Any group, firm, entity, or persons who operate or
 39 | do business, or have operated or done business, in this state,
 40 | under a name or title that ~~which~~ includes the word
 41 | "corporation," "company," "incorporated," "inc.," or any
 42 | combination thereof, or under a name or title that ~~which~~
 43 | indicates, tends to indicate, or leads one to believe ~~think~~ that
 44 | the same may be a corporation or other legal entity; and

45 | 4.~~(4)~~ All claimants under any of such parties.

46 | (b) Unknown parties may be proceeded against exclusively
 47 | or together with other parties.

48 | (2) The court may appoint an attorney, administrator, or
 49 | guardian ad litem for any party, whether known or unknown, upon
 50 | whom constructive service of process under this chapter is
 51 | properly made and who fails to file or serve any paper in the
 52 | action within the time required by law. The guardian ad litem is

53 not required to post a bond or designate a resident agent in
 54 order to serve in the capacity of a guardian ad litem.

55 (a) The guardian ad litem is deemed discharged when the
 56 final judgment is entered or as otherwise ordered by the court.

57 (b) The guardian ad litem is entitled to an award of a
 58 reasonable fee for services rendered and costs, which shall be
 59 assessed against the party requesting the appointment of the
 60 guardian ad litem or as otherwise ordered by the court.

61 (3) This section does not abrogate the common law
 62 authority of a court to appoint a guardian ad litem.

63 (4) (a) A guardian ad litem may not be appointed to
 64 represent an interest for which a personal representative,
 65 guardian of the property, or trustee is serving. If a guardian
 66 ad litem is appointed and he or she discovers that a personal
 67 representative, guardian of the property, or trustee is serving
 68 and represents the interest for which the guardian ad litem was
 69 appointed, the guardian ad litem shall promptly report that
 70 finding to the court and shall file a petition for discharge as
 71 to any interest for which a personal representative, guardian of
 72 the property, or trustee is serving.

73 (b) If a guardian ad litem is appointed to represent an
 74 interest and discovers that the person whose interest is
 75 represented is deceased and there is no personal representative,
 76 guardian of the property, or trustee to represent the decedent's
 77 interest, the guardian ad litem shall use reasonable efforts to
 78 locate any spouse, heir, devisee, or beneficiary of the

79 decedent, shall report to the court the name and address of any
 80 such person the guardian ad litem locates, and shall petition
 81 for discharge as to any interest of the person located.

82 Section 2. A proceeding adjudicated before the effective
 83 date of this act in which the court appointed a guardian ad
 84 litem may not be declared ineffective solely due to lack of
 85 statutory authority to have appointed a guardian ad litem.

86 Section 3. Section 49.011, Florida Statutes, is amended to
 87 read:

88 49.011 Service of process by publication; cases in which
 89 allowed.—Service of process by publication may be made in any
 90 court on any party identified in s. 49.021(1) ~~49.021~~ in any
 91 action or proceeding:

92 (1) To enforce any legal or equitable lien or claim to any
 93 title or interest in real or personal property within the
 94 jurisdiction of the court or any fund held or debt owing by any
 95 party on whom process can be served within this state.

96 (2) To quiet title or remove any encumbrance, lien, or
 97 cloud on the title to any real or personal property within the
 98 jurisdiction of the court or any fund held or debt owing by any
 99 party on whom process can be served within this state.

100 (3) To partition real or personal property within the
 101 jurisdiction of the court.

102 (4) For dissolution or annulment of marriage.

103 (5) For the construction of any will, deed, contract, or
 104 other written instrument and for a judicial declaration or

105 enforcement of any legal or equitable right, title, claim, lien,
 106 or interest thereunder.

107 (6) To reestablish a lost instrument or record which has
 108 or should have its situs within the jurisdiction of the court.

109 (7) In which a writ of replevin, garnishment, or
 110 attachment has been issued and executed.

111 (8) In which any other writ or process has been issued and
 112 executed which places any property, fund, or debt in the custody
 113 of a court.

114 (9) To revive a judgment by motion or scire facias.

115 (10) For adoption.

116 (11) In which personal service of process or notice is not
 117 required by the statutes or constitution of this state or by the
 118 Constitution of the United States.

119 (12) In probate or guardianship proceedings in which
 120 personal service of process or notice is not required by the
 121 statutes or constitution of this state or by the Constitution of
 122 the United States.

123 (13) For termination of parental rights pursuant to part
 124 VIII of chapter 39 or chapter 63.

125 (14) For temporary custody of a minor child, under chapter
 126 751.

127 (15) To determine paternity, but only as to the legal
 128 father in a paternity action in which another man is alleged to
 129 be the biological father, in which case it is necessary to serve
 130 process on the legal father in order to establish paternity with

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131 | regard to the alleged biological father.

132 | Section 4. This act shall take effect upon becoming a law.



Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Powell offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 49.31, Florida Statutes, is created to read:

49.31 Appointment of ad litem.--

(1) As used in this section, the term "ad litem" means an attorney, administrator, or guardian ad litem.

(2) The court may appoint an ad litem for any party, whether known or unknown, upon whom service of process by publication under this chapter has been properly made and who has failed to file or serve any paper in the action within the time required by law. A court may not appoint an ad litem to represent an interest for which a personal representative, guardian of property, or trustee is serving.



Amendment No. 1

18 (a) If the court has appointed an ad litem and the ad
19 litem discovers that a personal representative, guardian of
20 property, or trustee is serving who represents the interest for
21 which the ad litem was appointed, the ad litem must promptly
22 report that finding to the court and must file a petition for
23 discharge as to any interest for which the personal
24 representative, guardian of the property, or trustee is serving.

25 (b) If the court has appointed an ad litem to represent an
26 interest and the ad litem discovers that the person whose
27 interest he or she represents is deceased, and there is no
28 personal representative, guardian of the property, or trustee to
29 represent the decedent's interest, the ad litem must make a
30 reasonable attempt to locate any spouse, heir, devisee, or
31 beneficiaries of the decedent, must report to the court the name
32 and address of any such persons that the ad litem locates, and
33 must petition for discharge as to any interest of the person
34 located.

35 (3) The court may not require an ad litem to post a bond
36 or designate a resident agent in order to serve as an ad litem.

37 (4) The court shall discharge the ad litem when the final
38 judgment is entered or as otherwise ordered by the court.

39 (5) The ad litem is entitled to an award of a reasonable
40 fee for services rendered and costs, which shall be assessed
41 against the party requesting the appointment of the ad litem, or
42 as otherwise ordered by the court.



Amendment No. 1

43 (6) In all cases adjudicated in which the court appointed
44 an ad litem, a proceeding may not be declared ineffective solely
45 due to lack of statutory authority to appoint an ad litem.

46 (7) This section does not abrogate a court's common law
47 authority to appoint an ad litem.

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

49

50

51

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

52

Remove everything before the enacting clause and insert:

53

An act relating to the appointment of an ad litem; creating s.

54

49.31, F.S.; defining the term "ad litem"; authorizing a court

55

to appoint an ad litem for a party upon whom service of process

56

by publication is made; prohibiting a court from appointing an

57

ad litem to represent an interest for which a personal

58

representative, guardian of property, or trustee is serving;

59

requiring an ad litem, upon discovery that the party it

60

represents is already represented by a personal representative,

61

guardian of property, or trustee, or is deceased, to take

62

certain actions; prohibiting a court from requiring an ad litem

63

to post a bond or designate a resident agent in order to serve

64

as ad litem; requiring courts to discharge an ad litem when the

65

final judgment is entered or as otherwise ordered by the court;

66

providing that an ad litem is entitled to an award of a

67

reasonable fee for services rendered and costs that must be

68

assessed by the court against a specified party or as otherwise



Amendment No. 1



69 | ordered by the court; prohibiting a proceeding in which the
70 | court appointed an ad litem from being declared ineffective
71 | solely due to a lack of statutory authority to appoint an ad
72 | litem; providing that the section does not abrogate a court's
73 | common law authority to appoint an ad litem; providing an
74 | effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 15-01 Offenses Concerning Racketeering and Illegal Debts

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: PCB CJS 15-02 **IDEN./SIM. BILLS:** SB 1514

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

SUMMARY ANALYSIS

The Florida RICO (Racketeer Influenced and Corrupt Organization) Act imposes criminal and civil liability on any person who engages in racketeering or the collection of unlawful debt to acquire real property or establish or operate any enterprise or be associated with such an enterprise. Any property that is used in the course of or derived from the illegal conduct is subject to forfeiture by the state. The bill makes a number of changes to the civil enforcement provisions of the RICO Act:

- If property subject to forfeiture is diminished in value, an investigative agency may pursue an action in circuit court to recover fair market value of the property;
- Investigative agencies may recover fair market value of any property that is diminished in value or made unavailable for forfeiture regardless of when the property is diminished in value or rendered unavailable for forfeiture;
- A court may order the forfeiture of any other property of the defendant up to the value of any property that is unavailable or is diminished in value;
- Civil penalties of up to \$100,000 for a natural person and up to \$1 million for any other person may be imposed for violations of the RICO Act;
- All investigatory subpoenas issued pursuant to the RICO Act are confidential for 120 days after the date of its issuance;
- Any party to a RICO Act civil action may petition the court for entry of a consent decree or for approval of a settlement agreement; and
- Requires a court to order distribution of forfeiture proceeds to the victims of the racketeering activity.

The bill appears to have an indeterminate positive fiscal impact on state revenues. The bill does not appear to have a fiscal impact on local government.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida RICO Act

The Florida RICO (Racketeer Influenced and Corrupt Organization) Act¹ makes it a first-degree felony for any person to engage in, or conspire to engage in, racketeering activity or the collection of unlawful debt to acquire real property or establish or operate any enterprise or to be associated with such an enterprise.² The term "racketeering activity" encompasses a broad range of state and federal criminal offenses identified in current law.³

In addition to criminal penalties, the RICO Act imposes civil liability for violations of the Act, including forfeiture to the state of all property, including money, "used in the course of, intended for use in the course of, derived from, or realized through conduct" in violation of the Act.⁴

The bill makes a number of changes to the RICO Act:

Property Rendered Unavailable for Forfeiture

Current law, s. 895.05(2), F.S., provides that if property subject to forfeiture is conveyed, alienated, disposed of, or otherwise rendered unavailable for forfeiture after the filing of a RICO lien notice⁵ or after the filing of a civil or criminal proceeding pursuant to the Act, whichever is earlier, the investigative agency⁶ may institute an action to recover an amount equal to the fair market value of the property, together with investigative costs and attorney's fees incurred by the investigative agency in the action.

The bill amends s. 895.05(2), F.S., to include property subject to forfeiture that is diminished in value among the conditions that an investigative agency may pursue an action in circuit court to recover fair market value of the property. The bill also repeals that portion of s. 895.05(2), F.S., that provided investigative agencies the authority to pursue an action to recover fair market value of the unavailable property only if the property became unavailable "after the filing of a RICO lien notice or after the filing of a civil proceeding or criminal proceeding." Consequently, the bill gives investigative agencies the authority to pursue an action to recover fair market value of the unavailable property regardless of when the property is conveyed, alienated, disposed of, diminished in value, or rendered unavailable for forfeiture.

In addition to recovering the fair market value of the property of the unavailable or diminished property, the bill allows a court to order the forfeiture of any other property of the defendant up to the value of the unavailable property.

Civil Proceedings by Investigative Agencies and the Department of Legal Affairs

The bill restates and reorganizes current law provisions in s. 895.05, F.S., that provide for the filing of RICO Act civil proceedings by an investigative agency and the Department of Legal Affairs.

¹ Chapter 895, F.S.

² Sections 895.03, 895.04, F.S.

³ Section 895.02(1)(a), F.S.

⁴ Section 895.05(2)(a), F.S.

⁵ An investigative agency may file a RICO lien notice in the county public records when it initiates a civil proceeding. The RICO lien notice creates a lien in favor of the state on the real property or beneficial interest situated in the county where the lien is filed. Section 895.07, F.S.

⁶ "Investigative agency means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney." Section 895.02(7), F.S.

An investigative agency may institute a civil proceeding for forfeiture in the judicial circuit in which the defendant's real or personal tangible property is located and may institute a civil proceeding for forfeiture in any circuit court in the state regarding the defendant's intangible property.

The Department of Legal Affairs may bring an action to obtain injunctive relief, attorney fees, and costs incurred in the investigation and prosecution under the RICO Act. Money recovered by the Department of Legal Affairs for attorney fees and costs must be deposited in the Legal Affairs Revolving Trust Fund.

The Department of Legal Affairs may also bring an action for newly created civil penalties. Any natural person who violates the RICO Act is subject to a civil penalty of up to \$100,000, any other person is subject to a civil penalty of up to \$1 million. Money recovered for civil penalties must be deposited into the General Revenue Fund.

Court Approval of Consent Decrees and Settlement Agreements

Current law does not address consent decrees or settlement agreements in civil actions for RICO Act violations brought by the Department. The bill provides that any party to such a civil action may petition the court for entry of a consent decree or for approval of a settlement agreement. The proposed decree or settlement must specify the alleged violations, the future obligations of the parties, the agreed upon relief, and the reasons for entering into the decree or settlement.

Confidentiality of Subpoenas

During the course of a civil enforcement investigation, an investigating agency may subpoena witnesses or material.⁷ Generally, investigatory subpoenas are used to obtain information from third-parties through the production of documents, files, and records or through testimony. Section 895.06, F.S., authorizes investigative agencies to apply ex parte to a circuit court for an order directing that a person or entity who has been subpoenaed not disclose the existence of the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days. The 90 day time limit may be extended by the court for good cause shown by the investigative agency.

The bill amends s. 895.06, F.S., to make all subpoenas issued pursuant to the RICO Act automatically confidential for 120 days. The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period. The subpoena must include a reference to the confidentiality of the subpoena and a notice to the recipient that disclosure of the existence of the subpoena to anyone except the subpoenaed person's or entity's attorney is prohibited. The investigative agency may apply for an extension of the confidentiality period for good cause.

The bill also provides that an investigative agency may stipulate to protective orders with respect to documents and information submitted in response to a subpoena.

Restitution for Victims of RICO Act Violations

Current law requires a court to direct the distribution of the proceeds from a forfeiture in the following priority: the clerk of the court to cover statutory fees; claims by people whose interests in the property are preserved (known as "innocent persons"); and claims by the Board of Trustees of the Internal Improvement Trust Fund.⁸ Remaining funds are split between 4 government funds. However, current law does not authorize restitution to the victims of RICO Act violations.

⁷ Section 895.06, F.S.

⁸ Section 859.09(1), F.S.

The bill amends s. 895.09(1), F.S., to require a court to direct the distribution of the proceeds from a forfeiture to claims for restitution for victims of the racketeering activity after the proceeds have been distributed to the clerk, innocent persons, and claims of the Board of Trustees. If the forfeiture action was brought by the Department of Legal Affairs, the restitution must be distributed through the Legal Affairs Revolving Trust Fund; otherwise, the restitution will be distributed by the clerk of the court.

Other Effects of the Bill

The bill deletes duplicative definitions, updates cross-references, and makes conforming changes.

The bill reenacts trust funds in current law for the purpose of incorporating changes made to s. 895.05, F.S.

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

B. SECTION DIRECTORY:

Section 1 amends s. 895.02, F.S., related to definitions.

Section 2 amends s. 895.05, F.S., related to civil remedies.

Section 3 amends s. 895.06, F.S., related to civil investigative subpoenas.

Section 4 amends s. 895.09, F.S., related to the disposition of funds obtained through forfeiture.

Section 5 amends s. 16.56, F.S., related to the Office of Statewide Prosecution.

Section 6 amends s. 905.34, F.S., related to the powers and duties of a statewide grand jury; law applicable.

Section 7 reenacts s. 16.53, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S. Section 7 also corrects a cross-reference.

Section 8 reenacts s. 27.345, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S.

Section 9 reenacts s. 92.142, F.S., for the purpose of incorporating the amendment by the bill to s. 895.05, F.S.

Section 10 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The civil penalties of up to \$100,000 for a natural person and up to \$1 million for any other person for RICO Act violations created by the bill may have an indeterminate positive revenue impact on the General Revenue Fund.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1 A bill to be entitled
 2 An act relating to offenses concerning racketeering
 3 and illegal debts; amending s. 895.02, F.S.;
 4 reordering and conforming a cross-reference; amending
 5 s. 895.05, F.S.; authorizing an investigative agency
 6 to institute a civil proceeding for forfeiture in a
 7 circuit court in certain circumstances; adding the
 8 diminution in value as a reason that the investigative
 9 agency may bring an action under certain
 10 circumstances; deleting reasons for which the
 11 investigative agency may bring an action under certain
 12 circumstances; authorizing a court to order the
 13 forfeiture of other property of the defendant up to
 14 the value of unavailable property in certain
 15 circumstances; authorizing the Department of Legal
 16 Affairs to bring an action for a certain violation to
 17 obtain specified relief, fees, and costs for certain
 18 purposes; creating civil penalties of a certain amount
 19 for a natural person and any other person who violates
 20 certain prohibited activities; requiring certain
 21 moneys recovered by the department for certain
 22 violations be deposited in the Legal Affairs Revolving
 23 Trust Fund; authorizing a party to a specific civil
 24 action to petition the court for entry of a consent
 25 decree or for approval of a settlement agreement,
 26 which must state specified information; amending s.

27 895.06, F.S.; repealing the definition of
 28 "investigative agency"; providing that a subpoena must
 29 be confidential for a certain time; restricting to
 30 whom the subpoenaed person or entity may disclose the
 31 existence of the subpoena; requiring certain
 32 information be included in the subpoena; authorizing
 33 the investigative agency to apply for an order
 34 extending the amount of time the subpoena remains
 35 confidential rather than having it extended by the
 36 court for a specified period; providing that the
 37 investigative agency has the authority to stipulate to
 38 protective orders with respect to documents and
 39 information submitted in response to a subpoena;
 40 amending s. 895.09, F.S.; requiring the court to
 41 direct distribution of funds to victims; defining the
 42 term "victim"; amending ss. 16.56 and 905.34, F.S.;
 43 conforming cross-references; reenacting ss. 16.53(4),
 44 (5)(a), and (6), 27.345(1), and 92.142(3), F.S., to
 45 incorporate the amendment made to s. 895.05, F.S., in
 46 references thereto; providing an effective date.

47
 48 Be It Enacted by the Legislature of the State of Florida:

49
 50 Section 1. Section 895.02, Florida Statutes, is reordered
 51 and amended to read:

52 895.02 Definitions.—As used in ss. 895.01-895.08, the

53 term:

54 (8)~~(1)~~ "Racketeering activity" means to commit, to attempt
 55 to commit, to conspire to commit, or to solicit, coerce, or
 56 intimidate another person to commit:

57 (a) Any crime that is chargeable by petition, indictment,
 58 or information under the following provisions of the Florida
 59 Statutes:

60 1. Section 210.18, relating to evasion of payment of
 61 cigarette taxes.

62 2. Section 316.1935, relating to fleeing or attempting to
 63 elude a law enforcement officer and aggravated fleeing or
 64 eluding.

65 3. Section 403.727(3)(b), relating to environmental
 66 control.

67 4. Section 409.920 or s. 409.9201, relating to Medicaid
 68 fraud.

69 5. Section 414.39, relating to public assistance fraud.

70 6. Section 440.105 or s. 440.106, relating to workers'
 71 compensation.

72 7. Section 443.071(4), relating to creation of a
 73 fictitious employer scheme to commit reemployment assistance
 74 fraud.

75 8. Section 465.0161, relating to distribution of medicinal
 76 drugs without a permit as an Internet pharmacy.

77 9. Section 499.0051, relating to crimes involving
 78 contraband and adulterated drugs.

- 79 | 10. Part IV of chapter 501, relating to telemarketing.
- 80 | 11. Chapter 517, relating to sale of securities and
- 81 | investor protection.
- 82 | 12. Section 550.235 or s. 550.3551, relating to dogracing
- 83 | and horseracing.
- 84 | 13. Chapter 550, relating to jai alai frontons.
- 85 | 14. Section 551.109, relating to slot machine gaming.
- 86 | 15. Chapter 552, relating to the manufacture,
- 87 | distribution, and use of explosives.
- 88 | 16. Chapter 560, relating to money transmitters, if the
- 89 | violation is punishable as a felony.
- 90 | 17. Chapter 562, relating to beverage law enforcement.
- 91 | 18. Section 624.401, relating to transacting insurance
- 92 | without a certificate of authority, s. 624.437(4)(c)1., relating
- 93 | to operating an unauthorized multiple-employer welfare
- 94 | arrangement, or s. 626.902(1)(b), relating to representing or
- 95 | aiding an unauthorized insurer.
- 96 | 19. Section 655.50, relating to reports of currency
- 97 | transactions, when such violation is punishable as a felony.
- 98 | 20. Chapter 687, relating to interest and usurious
- 99 | practices.
- 100 | 21. Section 721.08, s. 721.09, or s. 721.13, relating to
- 101 | real estate timeshare plans.
- 102 | 22. Section 775.13(5)(b), relating to registration of
- 103 | persons found to have committed any offense for the purpose of
- 104 | benefiting, promoting, or furthering the interests of a criminal

- 105 | gang.
- 106 | 23. Section 777.03, relating to commission of crimes by
- 107 | accessories after the fact.
- 108 | 24. Chapter 782, relating to homicide.
- 109 | 25. Chapter 784, relating to assault and battery.
- 110 | 26. Chapter 787, relating to kidnapping or human
- 111 | trafficking.
- 112 | 27. Chapter 790, relating to weapons and firearms.
- 113 | 28. Chapter 794, relating to sexual battery, but only if
- 114 | such crime was committed with the intent to benefit, promote, or
- 115 | further the interests of a criminal gang, or for the purpose of
- 116 | increasing a criminal gang member's own standing or position
- 117 | within a criminal gang.
- 118 | 29. Former section 796.03, former s. 796.035, s. 796.04,
- 119 | s. 796.05, or s. 796.07, relating to prostitution.
- 120 | 30. Chapter 806, relating to arson and criminal mischief.
- 121 | 31. Chapter 810, relating to burglary and trespass.
- 122 | 32. Chapter 812, relating to theft, robbery, and related
- 123 | crimes.
- 124 | 33. Chapter 815, relating to computer-related crimes.
- 125 | 34. Chapter 817, relating to fraudulent practices, false
- 126 | pretenses, fraud generally, and credit card crimes.
- 127 | 35. Chapter 825, relating to abuse, neglect, or
- 128 | exploitation of an elderly person or disabled adult.
- 129 | 36. Section 827.071, relating to commercial sexual
- 130 | exploitation of children.

- 131 37. Section 828.122, relating to fighting or baiting
- 132 animals.
- 133 38. Chapter 831, relating to forgery and counterfeiting.
- 134 39. Chapter 832, relating to issuance of worthless checks
- 135 and drafts.
- 136 40. Section 836.05, relating to extortion.
- 137 41. Chapter 837, relating to perjury.
- 138 42. Chapter 838, relating to bribery and misuse of public
- 139 office.
- 140 43. Chapter 843, relating to obstruction of justice.
- 141 44. Section 847.011, s. 847.012, s. 847.013, s. 847.06, or
- 142 s. 847.07, relating to obscene literature and profanity.
- 143 45. Chapter 849, relating to gambling, lottery, gambling
- 144 or gaming devices, slot machines, or any of the provisions
- 145 within that chapter.
- 146 46. Chapter 874, relating to criminal gangs.
- 147 47. Chapter 893, relating to drug abuse prevention and
- 148 control.
- 149 48. Chapter 896, relating to offenses related to financial
- 150 transactions.
- 151 49. Sections 914.22 and 914.23, relating to tampering with
- 152 or harassing a witness, victim, or informant, and retaliation
- 153 against a witness, victim, or informant.
- 154 50. Sections 918.12 and 918.13, relating to tampering with
- 155 jurors and evidence.
- 156 (b) Any conduct defined as "racketeering activity" under

157 | 18 U.S.C. s. 1961(1).

158 | ~~(12)~~(2) "Unlawful debt" means any money or other thing of
 159 | value constituting principal or interest of a debt that is
 160 | legally unenforceable in this state in whole or in part because
 161 | the debt was incurred or contracted:

162 | (a) In violation of any one of the following provisions of
 163 | law:

164 | 1. Section 550.235 or s. 550.3551, relating to dogracing
 165 | and horseracing.

166 | 2. Chapter 550, relating to jai alai frontons.

167 | 3. Section 551.109, relating to slot machine gaming.

168 | 4. Chapter 687, relating to interest and usury.

169 | 5. Section 849.09, s. 849.14, s. 849.15, s. 849.23, or s.
 170 | 849.25, relating to gambling.

171 | (b) In gambling activity in violation of federal law or in
 172 | the business of lending money at a rate usurious under state or
 173 | federal law.

174 | ~~(5)~~(3) "Enterprise" means any individual, sole
 175 | proprietorship, partnership, corporation, business trust, union
 176 | chartered under the laws of this state, or other legal entity,
 177 | or any unchartered union, association, or group of individuals
 178 | associated in fact although not a legal entity; and it includes
 179 | illicit as well as licit enterprises and governmental, as well
 180 | as other, entities. A criminal gang, as defined in s. 874.03,
 181 | constitutes an enterprise.

182 | ~~(7)~~(4) "Pattern of racketeering activity" means engaging

183 in at least two incidents of racketeering conduct that have the
 184 same or similar intents, results, accomplices, victims, or
 185 methods of commission or that otherwise are interrelated by
 186 distinguishing characteristics and are not isolated incidents,
 187 provided at least one of such incidents occurred after the
 188 effective date of this act and that the last of such incidents
 189 occurred within 5 years after a prior incident of racketeering
 190 conduct.

191 (4)~~(5)~~ "Documentary material" means any book, paper,
 192 document, writing, drawing, graph, chart, photograph,
 193 phonorecord, magnetic tape, computer printout, other data
 194 compilation from which information can be obtained or from which
 195 information can be translated into usable form, or other
 196 tangible item.

197 (10)~~(6)~~ "RICO lien notice" means the notice described in
 198 s. 895.05(13) ~~s. 895.05(12)~~ or in s. 895.07.

199 (6)~~(7)~~ "Investigative agency" means the Department of
 200 Legal Affairs, the Office of Statewide Prosecution, or the
 201 office of a state attorney.

202 (1)~~(8)~~ "Beneficial interest" means any of the following:

203 (a) The interest of a person as a beneficiary under a
 204 trust established pursuant to s. 689.07 or s. 689.071 in which
 205 the trustee for the trust holds legal or record title to real
 206 property;

207 (b) The interest of a person as a beneficiary under any
 208 other trust arrangement pursuant to which a trustee holds legal

209 or record title to real property for the benefit of such person;
 210 or

211 (c) The interest of a person under any other form of
 212 express fiduciary arrangement pursuant to which any other person
 213 holds legal or record title to real property for the benefit of
 214 such person.

215
 216 The term "beneficial interest" does not include the interest of
 217 a stockholder in a corporation or the interest of a partner in
 218 either a general partnership or a limited partnership. A
 219 beneficial interest shall be deemed to be located where the real
 220 property owned by the trustee is located.

221 (9) "Real property" means any real property or any
 222 interest in such real property, including, but not limited to,
 223 any lease of or mortgage upon such real property.

224 (11)~~(10)~~ "Trustee" means any of the following:

225 (a) Any person acting as trustee pursuant to a trust
 226 established under s. 689.07 or s. 689.071 in which the trustee
 227 holds legal or record title to real property.

228 (b) Any person who holds legal or record title to real
 229 property in which any other person has a beneficial interest.

230 (c) Any successor trustee or trustees to any or all of the
 231 foregoing persons.

232

233 However, the term "trustee" does not include any person
 234 appointed or acting as a personal representative as defined in

235 s. 731.201 or appointed or acting as a trustee of any
 236 testamentary trust or as a trustee of any indenture of trust
 237 under which any bonds have been or are to be issued.

238 ~~(3)(11)~~ "Criminal proceeding" means any criminal
 239 proceeding commenced by an investigative agency under s. 895.03
 240 or any other provision of the Florida RICO Act.

241 ~~(2)(12)~~ "Civil proceeding" means any civil proceeding
 242 commenced by an investigative agency under s. 895.05 or any
 243 other provision of the Florida RICO Act.

244 Section 2. Present subsections (9) through (12) of section
 245 895.05, Florida Statutes, are redesignated as subsections (10)
 246 through (13), respectively, subsection (2) and present
 247 subsections (9) and (10) of that section are amended, and a new
 248 subsection (9) is added to that section, to read:

249 895.05 Civil remedies.—

250 (2)(a) All property, real or personal, including money,
 251 used in the course of, intended for use in the course of,
 252 derived from, or realized through conduct in violation of a
 253 provision of ss. 895.01-895.05 is subject to civil forfeiture to
 254 the state.

255 (b) An investigative agency may, on behalf of the state,
 256 institute a civil proceeding for forfeiture in the circuit court
 257 for any judicial circuit in which any real or personal tangible
 258 property described in paragraph (a) is located. An investigative
 259 agency may, on behalf of the state, institute a civil proceeding
 260 for forfeiture in any circuit court in the state regarding

261 intangible property described in paragraph (a).

262 (c) Upon the entry of a final judgment of forfeiture in
 263 favor of the state, the title of the state to the forfeited
 264 property shall relate back:

265 1. In the case of real property or a beneficial interest,
 266 to the date of filing of the RICO lien notice in the official
 267 records of the county where the real property or beneficial
 268 trust is located; if no RICO lien notice is filed, then to the
 269 date of the filing of any notice of lis pendens under s.
 270 895.07(5)(a) in the official records of the county where the
 271 real property or beneficial interest is located; and if no RICO
 272 lien notice or notice of lis pendens is filed, then to the date
 273 of recording of the final judgment of forfeiture in the official
 274 records of the county where the real property or beneficial
 275 interest is located.

276 2. In the case of personal property, to the date the
 277 personal property was seized by the investigating agency.

278 (d) If property subject to forfeiture is conveyed,
 279 alienated, disposed of, diminished in value, or otherwise
 280 rendered unavailable for forfeiture ~~after the filing of a RICO~~
 281 ~~lien notice or after the filing of a civil proceeding or~~
 282 ~~eriminal proceeding, whichever is earlier~~, the investigative
 283 agency may, on behalf of the state, institute an action in any
 284 circuit court against the person named in the RICO lien notice
 285 or the defendant in the civil proceeding or criminal proceeding,
 286 and the court shall enter final judgment against the person

287 | named in the RICO lien notice or the defendant in the civil
 288 | proceeding or criminal proceeding in an amount equal to the fair
 289 | market value of the property, together with investigative costs
 290 | and attorney ~~attorney's~~ fees incurred by the investigative
 291 | agency in the action. In the alternative, the court may order
 292 | the forfeiture of any other property of the defendant up to the
 293 | value of the property subject to forfeiture. If a civil
 294 | proceeding is pending, such action shall be filed only in the
 295 | court where the civil proceeding is pending.

296 | (e) ~~(e)~~ The state shall dispose of all forfeited property
 297 | as soon as commercially feasible. If property is not exercisable
 298 | or transferable for value by the state, it shall expire. All
 299 | forfeitures or dispositions under this section shall be made
 300 | with due provision for the rights of innocent persons. The
 301 | proceeds realized from such forfeiture and disposition shall be
 302 | promptly distributed in accordance with the provisions of s.
 303 | 895.09.

304 | (9) The Department of Legal Affairs may bring an action
 305 | for a violation of s. 895.03 to obtain injunctive relief, civil
 306 | penalties as provided in this subsection, attorney fees, and
 307 | costs incurred in the investigation and prosecution of any
 308 | action under this chapter.

309 | (a) Any natural person who violates s. 895.03 is subject
 310 | to a civil penalty of up to \$100,000. Any other person who
 311 | violates s. 895.03 is subject to a civil penalty of up to \$1
 312 | million. Moneys recovered for civil penalties under this

313 paragraph shall be deposited into the General Revenue Fund.

314 (b) Moneys recovered by the Department of Legal Affairs
 315 for attorney fees and costs under this subsection shall be
 316 deposited in the Legal Affairs Revolving Trust Fund, which may
 317 be used to investigate and enforce this chapter.

318 (c) In a civil action brought under this subsection by the
 319 Department of Legal Affairs, any party to such action may
 320 petition the court for entry of a consent decree or for approval
 321 of a settlement agreement. The proposed decree or settlement
 322 shall specify the alleged violations, the future obligations of
 323 the parties, the relief agreed upon, and the reasons for
 324 entering into the consent decree or settlement agreement.

325 (10)(9) The Department of Legal Affairs may, upon timely
 326 application, intervene in any civil action or proceeding brought
 327 under subsection (6) or subsection (7) if it certifies that, in
 328 its opinion, the action or proceeding is of general public
 329 importance. In such action or proceeding, the state shall be
 330 entitled to the same relief as if the Department of Legal
 331 Affairs had instituted the action or proceeding.

332 (11)(10) Notwithstanding any other provision of law, a
 333 criminal or civil action or proceeding under this act may be
 334 commenced at any time within 5 years after the conduct in
 335 violation of a provision of this act terminates or the cause of
 336 action accrues. If a criminal prosecution or civil action or
 337 other proceeding is brought, or intervened in, to punish,
 338 prevent, or restrain any violation of the provisions of this

339 act, the running of the period of limitations prescribed by this
 340 section with respect to any cause of action arising under
 341 subsection (6), ~~or~~ subsection (7), or subsection (9) which is
 342 based in whole or in part upon any matter complained of in any
 343 such prosecution, action, or proceeding shall be suspended
 344 during the pendency of such prosecution, action, or proceeding
 345 and for 2 years following its termination.

346 (12)~~(11)~~ The application of one civil remedy under any
 347 provision of this act does not preclude the application of any
 348 other remedy, civil or criminal, under this act or any other
 349 provision of law. Civil remedies under this act are
 350 supplemental, and not mutually exclusive.

351 (13)~~(12)~~(a) In addition to the authority to file a RICO
 352 lien notice set forth in s. 895.07(1), the Department of Legal
 353 Affairs, the Office of Statewide Prosecution, or the office of a
 354 state attorney may apply ex parte to a criminal division of a
 355 circuit court and, upon petition supported by sworn affidavit,
 356 obtain an order authorizing the filing of a RICO lien notice
 357 against real property upon a showing of probable cause to
 358 believe that the property was used in the course of, intended
 359 for use in the course of, derived from, or realized through
 360 conduct in violation of a provision of ss. 895.01-895.05. If the
 361 lien notice authorization is granted, the department shall,
 362 after filing the lien notice, forthwith provide notice to the
 363 owner of the property by one of the following methods:

- 364 1. By serving the notice in the manner provided by law for

365 the service of process.

366 2. By mailing the notice, postage prepaid, by ~~registered~~
 367 ~~or~~ certified mail to the person to be served at his or her last
 368 known address and evidence of the delivery.

369 3. If neither of the foregoing can be accomplished, by
 370 posting the notice on the premises.

371 (b) The owner of the property may move the court to
 372 discharge the lien, and such motion shall be set for hearing at
 373 the earliest possible time.

374 (c) The court shall discharge the lien if it finds that
 375 there is no probable cause to believe that the property was used
 376 in the course of, intended for use in the course of, derived
 377 from, or realized through conduct in violation of a provision of
 378 ss. 895.01-895.05 or if it finds that the owner of the property
 379 neither knew nor reasonably should have known that the property
 380 was used in the course of, intended for use in the course of,
 381 derived from, or realized through conduct in violation of a
 382 provision of ss. 895.01-895.05.

383 (d) No testimony presented by the owner of the property at
 384 the hearing is admissible against him or her in any criminal
 385 proceeding except in a criminal prosecution for perjury or false
 386 statement, nor shall such testimony constitute a waiver of the
 387 owner's constitutional right against self-incrimination.

388 (e) A lien notice secured under the provisions of this
 389 subsection is valid for a period of 90 days from the date the
 390 court granted authorization, which period may be extended for an

391 additional 90 days by the court for good cause shown, unless a
 392 civil proceeding is instituted under this section and a lien
 393 notice is filed under s. 895.07, in which event the term of the
 394 lien notice is governed by s. 895.08.

395 (f) The filing of a lien notice, whether or not
 396 subsequently discharged or otherwise lifted, shall constitute
 397 notice to the owner and knowledge by the owner that the property
 398 was used in the course of, intended for use in the course of,
 399 derived from, or realized through conduct in violation of a
 400 provision of ss. 895.01-895.05, such that lack of such notice
 401 and knowledge shall not be a defense in any subsequent civil or
 402 criminal proceeding under this chapter.

403 Section 3. Section 895.06, Florida Statutes, is amended to
 404 read:

405 895.06 Civil investigative subpoenas.—

406 ~~(1) As used in this section, the term "investigative~~
 407 ~~agency" means the Department of Legal Affairs, the Office of~~
 408 ~~Statewide Prosecution, or the office of a state attorney.~~

409 (1)~~(2)~~ If, pursuant to the civil enforcement provisions of
 410 s. 895.05, an investigative agency has reason to believe that a
 411 person or other enterprise has engaged in, or is engaging in,
 412 activity in violation of this act, the investigative agency may
 413 administer oaths or affirmations, subpoena witnesses or
 414 material, and collect evidence.

415 (2)~~(3)~~ A subpoena issued pursuant to this chapter is
 416 confidential for 120 days after the date of its issuance. The

417 subpoenaed person or entity may not disclose the existence of
 418 the subpoena to any person or entity other than his or her
 419 attorney during the 120-day period. The subpoena must include a
 420 reference to the confidentiality of the subpoena and a notice to
 421 the recipient of the subpoena that disclosure of the existence
 422 of the subpoena to any other person or entity except the
 423 subpoenaed person's or entity's attorney is prohibited. The
 424 investigative agency may apply ex parte to the circuit court for
 425 the circuit in which a subpoenaed person or entity resides, is
 426 found, or transacts business for an order directing that the
 427 subpoenaed person or entity not disclose the existence of the
 428 subpoena to any other person or entity except the subpoenaed
 429 person's attorney for an additional a period of time ~~90 days,~~
 430 ~~which time may be extended by the court~~ for good cause shown by
 431 the investigative agency. The order shall be served on the
 432 subpoenaed person or entity with the subpoena, and the subpoena
 433 must ~~shall~~ include a reference to the order and a notice to the
 434 recipient of the subpoena that disclosure of the existence of
 435 the subpoena to any other person or entity in violation of the
 436 order may subject the subpoenaed person or entity to punishment
 437 for contempt of court. Such an order may be granted by the court
 438 only upon a showing:

439 (a) Of sufficient factual grounds to reasonably indicate a
 440 violation of ss. 895.01-895.06;

441 (b) That the documents or testimony sought appear
 442 reasonably calculated to lead to the discovery of admissible

443 evidence; and

444 (c) Of facts that ~~which~~ reasonably indicate that
 445 disclosure of the subpoena would hamper or impede the
 446 investigation or would result in a flight from prosecution.

447 ~~(3)~~(4) If matter that the investigative agency seeks to
 448 obtain by the subpoena is located outside the state, the person
 449 or enterprise subpoenaed may make such matter available to the
 450 investigative agency or its representative for examination at
 451 the place where such matter is located. The investigative agency
 452 may designate representatives, including officials of the
 453 jurisdiction in which the matter is located, to inspect the
 454 matter on its behalf and may respond to similar requests from
 455 officials of other jurisdictions.

456 ~~(4)~~(5) Upon failure of a person or enterprise, without
 457 lawful excuse, to obey a subpoena issued under this section or a
 458 subpoena issued in the course of a civil proceeding instituted
 459 pursuant to s. 895.05, and after reasonable notice to such
 460 person or enterprise, the investigative agency may apply to the
 461 circuit court in which such civil proceeding is pending or, if
 462 no civil proceeding is pending, to the circuit court for the
 463 judicial circuit in which such person or enterprise resides, is
 464 found, or transacts business for an order compelling compliance.
 465 Except in a prosecution for perjury, an individual who complies
 466 with a court order to provide testimony or material after
 467 asserting a privilege against self-incrimination to which the
 468 individual is entitled by law shall not have the testimony or

469 material so provided, or evidence derived therefrom, received
 470 against him or her in any criminal investigation or proceeding.

471 ~~(5)(6)~~ A person who fails to obey a court order entered
 472 pursuant to this section may be punished for contempt of court.

473 (6) The investigative agency may stipulate to protective
 474 orders with respect to documents and information submitted in
 475 response to a subpoena issued under this section.

476 Section 4. Paragraph (b) of subsection (1) of section
 477 895.09, Florida Statutes, is amended, and paragraph (d) is added
 478 to that section, to read:

479 895.09 Disposition of funds obtained through forfeiture
 480 proceedings.—

481 (1) A court entering a judgment of forfeiture in a
 482 proceeding brought pursuant to s. 895.05 shall retain
 483 jurisdiction to direct the distribution of any cash or of any
 484 cash proceeds realized from the forfeiture and disposition of
 485 the property. The court shall direct the distribution of the
 486 funds in the following order of priority:

487 (b) Any claims against the property by persons who have
 488 previously been judicially determined to be innocent persons,
 489 pursuant to the provisions of s. 895.05(2)(e) ~~895.05(2)(e)~~, and
 490 whose interests are preserved from forfeiture by the court and
 491 not otherwise satisfied. Such claims may include any claim by a
 492 person appointed by the court as receiver pending litigation.

493 (d) Any claims for restitution by victims of the
 494 racketeering activity. Where the forfeiture action was brought

495 by the Department of Legal Affairs, the restitution shall be
 496 distributed though the Legal Affairs Revolving Trust Fund;
 497 otherwise, the restitution shall be distributed by the clerk of
 498 the court.

499 Section 5. Paragraph (a) of subsection (1) of section
 500 16.56, Florida Statutes, is amended to read:

501 16.56 Office of Statewide Prosecution.—

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

506 (a) Investigate and prosecute the offenses of:

507 1. Bribery, burglary, criminal usury, extortion, gambling,
 508 kidnapping, larceny, murder, prostitution, perjury, robbery,
 509 carjacking, and home-invasion robbery;

510 2. Any crime involving narcotic or other dangerous drugs;

511 3. Any violation of the provisions of the Florida RICO
 512 (Racketeer Influenced and Corrupt Organization) Act, including
 513 any offense listed in the definition of racketeering activity in
 514 s. 895.02(8)(a) ~~s. 895.02(1)(a)~~, providing such listed offense
 515 is investigated in connection with a violation of s. 895.03 and
 516 is charged in a separate count of an information or indictment
 517 containing a count charging a violation of s. 895.03, the
 518 prosecution of which listed offense may continue independently
 519 if the prosecution of the violation of s. 895.03 is terminated
 520 for any reason;

- 521 4. Any violation of the provisions of the Florida Anti-
 522 Fencing Act;
- 523 5. Any violation of the provisions of the Florida
 524 Antitrust Act of 1980, as amended;
- 525 6. Any crime involving, or resulting in, fraud or deceit
 526 upon any person;
- 527 7. Any violation of s. 847.0135, relating to computer
 528 pornography and child exploitation prevention, or any offense
 529 related to a violation of s. 847.0135 or any violation of
 530 chapter 827 where the crime is facilitated by or connected to
 531 the use of the Internet or any device capable of electronic data
 532 storage or transmission;
- 533 8. Any violation of the provisions of chapter 815;
- 534 9. Any criminal violation of part I of chapter 499;
- 535 10. Any violation of the provisions of the Florida Motor
 536 Fuel Tax Relief Act of 2004;
- 537 11. Any criminal violation of s. 409.920 or s. 409.9201;
- 538 12. Any crime involving voter registration, voting, or
 539 candidate or issue petition activities;
- 540 13. Any criminal violation of the Florida Money Laundering
 541 Act;
- 542 14. Any criminal violation of the Florida Securities and
 543 Investor Protection Act; or
- 544 15. Any violation of the provisions of chapter 787, as
 545 well as any and all offenses related to a violation of the
 546 provisions of chapter 787;

547
 548 or any attempt, solicitation, or conspiracy to commit any of the
 549 crimes specifically enumerated above. The office shall have such
 550 power only when any such offense is occurring, or has occurred,
 551 in two or more judicial circuits as part of a related
 552 transaction, or when any such offense is connected with an
 553 organized criminal conspiracy affecting two or more judicial
 554 circuits. Informations or indictments charging such offenses
 555 shall contain general allegations stating the judicial circuits
 556 and counties in which crimes are alleged to have occurred or the
 557 judicial circuits and counties in which crimes affecting such
 558 circuits or counties are alleged to have been connected with an
 559 organized criminal conspiracy.

560 Section 6. Section 905.34, Florida Statutes, is amended to
 561 read:

562 905.34 Powers and duties; law applicable.—The jurisdiction
 563 of a statewide grand jury impaneled under this chapter shall
 564 extend throughout the state. The subject matter jurisdiction of
 565 the statewide grand jury shall be limited to the offenses of:

566 (1) Bribery, burglary, carjacking, home-invasion robbery,
 567 criminal usury, extortion, gambling, kidnapping, larceny,
 568 murder, prostitution, perjury, and robbery;

569 (2) Crimes involving narcotic or other dangerous drugs;

570 (3) Any violation of the provisions of the Florida RICO
 571 (Racketeer Influenced and Corrupt Organization) Act, including
 572 any offense listed in the definition of racketeering activity in

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573 | s. 895.02(8)(a) ~~s. 895.02(1)(a)~~, providing such listed offense
574 | is investigated in connection with a violation of s. 895.03 and
575 | is charged in a separate count of an information or indictment
576 | containing a count charging a violation of s. 895.03, the
577 | prosecution of which listed offense may continue independently
578 | if the prosecution of the violation of s. 895.03 is terminated
579 | for any reason;

580 | (4) Any violation of the provisions of the Florida Anti-
581 | Fencing Act;

582 | (5) Any violation of the provisions of the Florida
583 | Antitrust Act of 1980, as amended;

584 | (6) Any violation of the provisions of chapter 815;

585 | (7) Any crime involving, or resulting in, fraud or deceit
586 | upon any person;

587 | (8) Any violation of s. 847.0135, s. 847.0137, or s.
588 | 847.0138 relating to computer pornography and child exploitation
589 | prevention, or any offense related to a violation of s.
590 | 847.0135, s. 847.0137, or s. 847.0138 or any violation of
591 | chapter 827 where the crime is facilitated by or connected to
592 | the use of the Internet or any device capable of electronic data
593 | storage or transmission;

594 | (9) Any criminal violation of part I of chapter 499;

595 | (10) Any criminal violation of s. 409.920 or s. 409.9201;

596 | (11) Any criminal violation of the Florida Money
597 | Laundering Act;

598 | (12) Any criminal violation of the Florida Securities and

599 Investor Protection Act; or
 600 (13) Any violation of chapter 787, as well as any and all
 601 offenses related to a violation of chapter 787;
 602
 603 or any attempt, solicitation, or conspiracy to commit any
 604 violation of the crimes specifically enumerated above, when any
 605 such offense is occurring, or has occurred, in two or more
 606 judicial circuits as part of a related transaction or when any
 607 such offense is connected with an organized criminal conspiracy
 608 affecting two or more judicial circuits. The statewide grand
 609 jury may return indictments and presentments irrespective of the
 610 county or judicial circuit where the offense is committed or
 611 triable. If an indictment is returned, it shall be certified and
 612 transferred for trial to the county where the offense was
 613 committed. The powers and duties of, and law applicable to,
 614 county grand juries shall apply to a statewide grand jury except
 615 when such powers, duties, and law are inconsistent with the
 616 provisions of ss. 905.31-905.40.
 617 Section 7. For the purpose of incorporating the amendment
 618 made by this act to section 895.05, Florida Statutes, in a
 619 reference thereto, subsection (4), and paragraph (a) of
 620 subsection (5), of section 16.53, Florida Statutes, are
 621 reenacted, and subsection (6) is amended, to read:
 622 16.53 Legal Affairs Revolving Trust Fund.-
 623 (4) Subject to the provisions of s. 895.09, when the
 624 Attorney General files an action pursuant to s. 895.05, funds

625 provided to the Department of Legal Affairs pursuant to s.
 626 895.09(2)(a) or, alternatively, attorneys' fees and costs,
 627 whichever is greater, shall be deposited in the fund.

628 (5)(a) In the case of a forfeiture action pursuant to s.
 629 895.05, the remainder of the moneys recovered shall be
 630 distributed as set forth in s. 895.09.

631 (6) "Moneys recovered" means damages or penalties or any
 632 other monetary payment, including monetary proceeds from
 633 property forfeited to the state pursuant to s. 895.05 remaining
 634 after satisfaction of any valid claims made pursuant to s.
 635 895.09(1)(a)-(d) ~~895.09(1)(a)-(e)~~, which damages, penalties, or
 636 other monetary payment is made by any defendant by reason of any
 637 decree or settlement in any Racketeer Influenced and Corrupt
 638 Organization Act or state or federal antitrust action prosecuted
 639 by the Attorney General, but excludes attorneys' fees and costs.

640 Section 8. For the purpose of incorporating the amendment
 641 made by this act to section 895.05, Florida Statutes, in a
 642 reference thereto, subsection (1) of section 27.345, Florida
 643 Statutes, is reenacted to read:

644 27.345 State Attorney RICO Trust Fund; authorized use of
 645 funds; reporting.-

646 (1) Subject to the provisions of s. 895.09, when a state
 647 attorney files an action pursuant to s. 895.05, funds provided
 648 to the state attorney pursuant to s. 895.09(2)(a) or,
 649 alternatively, attorneys' fees and costs, whichever is greater,
 650 shall be deposited in the State Attorney RICO Trust Fund.

651 Section 9. For the purpose of incorporating the amendment
 652 made by this act to section 895.05, Florida Statutes, in a
 653 reference thereto, subsection (3) of section 92.142, Florida
 654 Statutes, is reenacted to read:


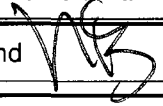
655 92.142 Witnesses; pay.—

656 (3) Any witness subpoenaed to testify on behalf of the
 657 state in any action brought pursuant to s. 895.05 or chapter 542
 658 who is required to travel outside his or her county of residence
 659 and more than 50 miles from his or her residence, or who is
 660 required to travel from out of state, shall be entitled to per
 661 diem and travel expenses at the same rate provided for state
 662 employees under s. 112.061 in lieu of any state witness fee.

663 Section 10. This act shall take effect July 1, 2015.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 15-02 Public Records
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: PCB CJS 15-01 **IDEN./SIM. BILLS:** SB 1536

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

SUMMARY ANALYSIS

The bill creates a public records exemption related to investigations of violations of the Florida RICO (Racketeer Influenced and Corrupt Organization) Act. Information held by an investigative agency during an investigation of RICO Act violations is generally confidential and exempt from a public records request.

The bill also contains Legislative finds that it is a public necessity that the information held by an investigative agency related to an investigation of RICO Act violations be confidential and exempt because premature release of the information could thwart the investigation and impair the ability of the agency to enforce the Act and because it protects the reputation of potential defendants in the event the investigation is closed without further action.

The bill contains a sunset provision and will be repealed on October 2, 2020, unless it is reenacted.

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

The bill provides that the exemption will take effect on the same date as PCB CJS 15-01 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law - In General

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

Exempt versus Confidential and Exempt

There is a difference between records the Legislature has determined to be exempt and those which have been determined to be confidential and exempt.² If the Legislature has determined the information to be confidential then the information is not subject to inspection by the public.³ Also, if the information is deemed to be confidential it may only be released to those person and entities designated in statute.⁴ However, the agency is not prohibited from disclosing the records in all circumstances where the records are deemed only exempt.⁵

Civil Investigative Subpoenas

Under the RICO Act, an investigative agency⁶ may, during the course of an investigation into civil violations of the RICO Act, subpoena witnesses and material if the agency has reason to believe that a person or other enterprise has engaged in conduct that violates the RICO Act. Generally, investigatory subpoenas are used to obtain information from third-parties through the production of documents, files, and records or through testimony.

Section 895.06, F.S., authorizes investigative agencies to apply ex parte to a circuit court for an order directing that a person or entity who has been subpoenaed not disclose the existence of the subpoena to anyone except the subpoenaed person's attorney for a period of 90 days.

PCB CJS 15-01 amends s. 895.06, F.S., to make all subpoenas issued pursuant to the RICO Act automatically confidential for 120 days after the date of its issuance. The subpoenaed person or entity may only disclose the existence of the subpoena to his or her attorney during the 120-day period.

Effect of the Bill

The bill creates a public records exemption that corresponds to the investigative subpoena non-disclosure requirement in PCB CJS 15-01. Specifically, the bill provides that information held by an investigative agency pursuant to an investigation of a violation of the RICO Act is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. However, information that is

¹ Art I., s. 24(c), Fla. Const.

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

³ *Id.*

⁴ *Id.*

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

⁶ "Investigative agency means the Department of Legal Affairs, the Office of Statewide Prosecution, or the office of a state attorney." Section 895.02(7), F.S.

confidential and exempt may be disclosed by the investigative agency to a government entity in the performance of its official duties and a court or tribunal. The information is no longer confidential and exempt once all investigations to which the information pertains are completed, unless the information is otherwise protected by law. An investigation is considered complete once the investigative agency either files an action or closes its investigation without filing an action.

The bill provides that the exemption it creates is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill includes a public necessity statement.

B. SECTION DIRECTORY:

Section 1 amends s. 895.06, F.S., regarding civil investigative subpoenas.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of PCB CJS 15-01, if adopted in the same legislative session.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the Department of Legal Affairs and law enforcement agencies. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Vote Requirement

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

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption related to investigative subpoenas and, similar to other investigative subpoenas, provides that the record is open to public inspection as soon as the investigation is complete.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to relating to public records;
 3 amending s. 895.06, F.S.; providing that certain
 4 documents and information held by an investigative
 5 agency pursuant to an investigation relating to an
 6 activity prohibited under the Florida RICO Act are
 7 confidential and exempt; providing for legislative
 8 review and repeal of the exemption under the Open
 9 Government Sunset Review Act; providing exceptions to
 10 the exemption; providing a statement of public
 11 necessity; providing a contingent effective date.

12
 13 Be It Enacted by the Legislature of the State of Florida:
 14

15 Section 1. Subsection (7) is added to section 895.06,
 16 Florida Statutes, to read:

17 895.06 Civil investigative subpoenas.—

18 (7) (a) Information held by an investigative agency
 19 pursuant to an investigation of a violation of s. 895.03 is
 20 confidential and exempt from s. 119.07(1) and s. 24(a), Art. I
 21 of the State Constitution.

22 (b) Information made confidential and exempt under
 23 paragraph (a) may be disclosed by the investigative agency to:

24 1. A government entity in the performance of its official
 25 duties.

26 2. A court or tribunal.

27 (c) Information made confidential and exempt under
 28 paragraph (a) is no longer confidential and exempt once all
 29 investigations to which the information pertains are completed,
 30 unless the information is otherwise protected by law.

31 (d) For purposes of this subsection, an investigation is
 32 considered complete once the investigative agency either files
 33 an action or closes its investigation without filing an action.

34 (e) This subsection is subject to the Open Government
 35 Sunset Review Act in accordance with s. 119.15 and shall stand
 36 repealed on October 2, 2020, unless reviewed and saved from
 37 repeal through reenactment by the Legislature.

38 Section 2. The Legislature finds that it is a public
 39 necessity that the information held by an investigative agency
 40 pursuant to an investigation of a violation of s. 895.03,
 41 Florida Statutes, relating to an activity prohibited under the
 42 Florida RICO Act, be made confidential and exempt from public
 43 records requirements. Because a Florida RICO Act investigation
 44 conducted by an investigative agency may lead to the filing of a
 45 civil action, the premature release of the information held by
 46 such investigative agency could frustrate or thwart the
 47 investigation and impair the ability of the investigative agency
 48 to effectively and efficiently administer its duties under the
 49 Florida RICO Act, ss. 895.01-895.09, Florida Statutes. This
 50 exemption also protects the reputation of the potential
 51 defendant in the event the investigation is closed without the
 52 filing of a civil action. Further, without this exemption, a

53 potential defendant under the Florida RICO Act may learn of the
54 investigation and dissipate his or her assets and thwart any
55 future enforcement action under the act. Therefore, the
56 Legislature finds that it is a public necessity that the
57 documents and information held by the investigative agency
58 pursuant to an investigation of a violation of s. 895.03,
59 Florida Statutes, relating to an activity prohibited under the
60 Florida RICO Act, be made confidential and exempt from public
61 records requirements.

62 Section 3. This act shall take effect on the same date
63 that HB ____ or similar legislation takes effect, if such
64 legislation is enacted in the same legislative session or an
65 extension thereof and becomes law.