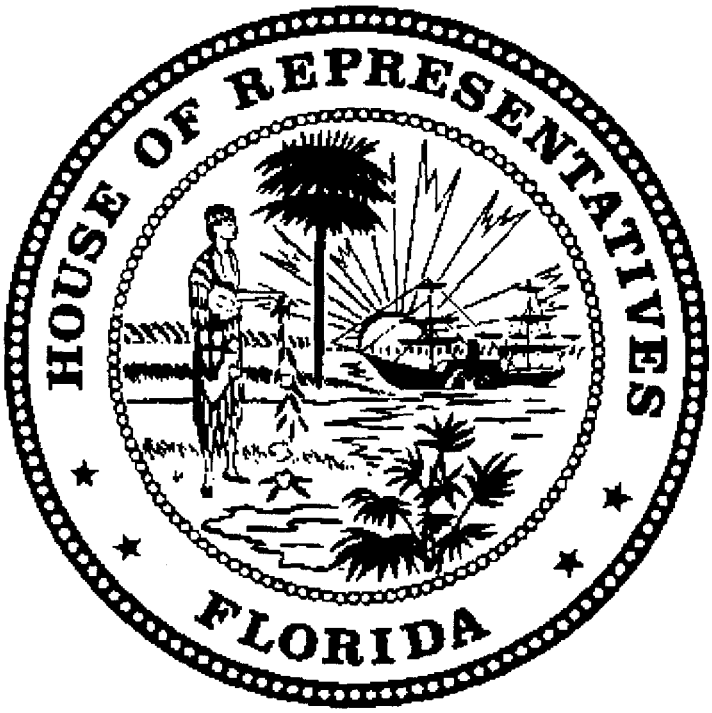

Civil Justice & Claims Subcommittee

Monday, March 13, 2017
1:30 PM
404 HOB

Meeting Packet

Richard Corcoran
Speaker

Heather Fitzenhagen
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice & Claims Subcommittee

Start Date and Time: Monday, March 13, 2017 01:30 pm

End Date and Time: Monday, March 13, 2017 06:00 pm

Location: Sumner Hall (404 HOB)

Duration: 4.50 hrs

Consideration of the following bill(s):

CS/HB 357 Self-Service Storage Facilities by Careers & Competition Subcommittee, Moraitis
HB 441 Court Records by Diamond
HB 697 Federal Immigration Enforcement by Metz
HB 6507 Relief/Angela Sanford/Leon County by Beshears
HB 6525 Relief/C.M.H./Department of Children and Families by Grant, J.
HB 6527 Relief/Charles Pandrea/North Broward Hospital District by Harrison
HB 6535 Relief/Vonshelle Brothers/Department of Health by Jenne
HB 6539 Relief/Eddie Weekley and Charlotte Williams/Agency for Persons with Disabilities by Byrd

Consideration of the following proposed committee substitute(s):

PCS for HB 267 -- Estates
PCS for HB 277 -- Electronic Wills
PCS for HB 483 -- Estoppel Certificates

NOTICE FINALIZED on 03/09/2017 4:10PM by Bowen.Erika

PCS for HB 267

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 267 Estates
SPONSOR(S): Civil Justice & Claims Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 724

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee		MM MacNamara	Bond
1) Agriculture & Property Rights Subcommittee			
2) Judiciary Committee			

SUMMARY ANALYSIS

Surviving spouses have a right to elect a share of the deceased spouse's estate, different than the spouse would have received under a will, known as the elective share. The amount of the estate a surviving spouse is entitled is 30% of the value of the decedent's assets at the time of death. Current law provides which assets are included in determining the value of a decedent's elective estate as well as procedural requirements a surviving spouse must follow in order to claim the elective share.

The state's Constitution provides protection for certain property referred to as a homestead. One protection provided for homestead property is a restriction on a homestead owner from alienating or devising the homestead property. Where a homestead owner has a spouse, the homestead property passes to the spouse upon the death of the homestead owner in certain situations. Homestead property is currently excluded in determining the value of a decedent's elective estate, and is thus not included when calculating a surviving spouse's elective share.

The bill includes the protected homestead in the elective estate, except where a wife validly waives her rights to the property, and provides a method of valuation for purposes of satisfying the elective share.

The bill assesses interest against persons who are delinquent in fulfilling their obligations to pay or contribute towards satisfaction of the elective share and creates an award of attorney fees and costs in certain elective share proceedings. The bill also extends the period of time the surviving spouse can petition a court for an extension of time to file for the elective share.

Lastly, the bill expands the scope of trusts that are included under the savings clause to include an elective share trust, even where a marital deduction is not elected.

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

The effective date of the bill is July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background: Homestead and the Elective Share

Probate is the legal process for determining and paying for the debts of the deceased and distributing the deceased's property to heirs. If the deceased left a valid will, the estate is "testate", and the assets are distributed according to the will. If the deceased did not leave a valid will, the estate is "intestate," and the assets are distributed according to statute. There are two significant exceptions to these general rules:

- The elective share provisions provide for a set inheritance for a surviving spouse, different than the spouse would otherwise receive by operation of the will; and
- Exempt property and homestead property transfer to certain surviving dependents.

Under current law, a homestead is not a property interest but is simply a constitutionally defined status. Article X, s. 4(a)(1) of the Florida Constitution provides a homestead exemption for certain property owned by "natural persons." The status of homestead which the constitution impresses on property under certain circumstances does not change the nature of the estate in the property owned by a homesteader residing in Florida, nor does the acquisition of homestead status confer any additional property interest or rights in property. Rather, the exemption merely exempts such property from certain liabilities to which it would otherwise be subject.

Specifically, the homestead is protected in three different ways: It provides the homestead with an exemption from taxes; it protects the homestead from forced sale by creditors; and it places certain restrictions on a homestead owner from alienating or devising the homestead property. Section 731.201(33), F.S., defines "protected homestead" as:

> [T]he property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For the purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Three requirements must be satisfied for real property to be impressed with the characteristics of homestead property under the Florida Constitution: (1) the property must be owned by a "natural person"; (2) the owner must have made, or intend to make, the real property his or her permanent residence or that of his family; and (3) the property must meet certain size and contiguity requirements.

Homestead property owned by the decedent in either a joint tenancy with rights of survivorship or tenancy by the entireties is not protected homestead as the decedent's interest in the homestead property terminates at death.[1] Current law, at ss. 732.401(1) and (2), F.S., addresses the descent (transfer of property to descendants) of homestead property where no devise is allowed. The statute provides:

> (1) [T]he homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.
>
> (2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining

[1] s. 732.401(5), F.S.

undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

The right of election pursuant to s. 732.401(2), F.S., may be exercised by the surviving spouse or with court approval, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime. The statute provides several requirements and guidelines for the right of election:

- The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime;
- A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election;
- Once made, the election is irrevocable; and
- The election must be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located.[2]

Prior to an election being made, expenses relating to the ownership of the homestead are allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with ch. 738, F.S. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.[3]

With respect to the elective share, the Legislature has specifically provided that, barring express waiver by a surviving spouse, a married person cannot deprive a surviving spouse of all or most of the interests in his or her estate through his or her will. Under such circumstances, when inadequate provisions are made for the surviving spouse, the spouse is given certain inheritance rights by statute; the surviving spouse may choose the greater of what was provided in the will or what the elective share statutes provide.

Specifically, the surviving spouse of a person who dies domiciled in Florida has the right to elect to take a share of the estate of the decedent, known as the elective share,[4] instead of the share of the estate provided in the will. The elective share is for the express purpose of caring for the surviving spouse.[5]

Florida's elective share laws are codified in Part II of ch. 732, F. S. Sections 732.201 - 732.2155, F. S., in the aggregate give the surviving spouse of a decedent who was domiciled in the state on his or her death the right to a forced share of the decedent's estate. Generally stated, the elective share is 30% of the aggregate value of the all of the decedent's assets at death. There are technical rules that govern what is included in the asset base against which the elective share can be taken, and the valuation of those assets for elective share purposes.

The bill amends portions of the Florida Probate Code pertaining to the treatment of homestead property as it relates to the elective share, the rights and procedural requirements of a surviving spouse taking an elective share, and provides for interest and attorney fees and costs for certain situations arising out of elective share related proceedings.

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[2] s. 732.401(2)(a-e), F.S. The statute contains language to include in the notice.
[3] s. 732.401(3), F.S.
[4] s. 732.201, F.S.
[5] *In re Anderson's Estate*, 394 So.2d 1146 (Fla. 4th DCA 1981).

Current Law and Effect of Proposed Changes

Timely Election

The surviving spouse must make a timely election to take the elective share; otherwise the right to the elective share is forfeited. The elective share is paid outright to the surviving spouse and is awarded only to the extent that the value of other assets that pass from the decedent to the surviving spouse as a part of the decedent's overall testamentary plan do not rise above the requisite 30% level.

The surviving spouse's right of election may be exercised by various persons. It, of course, may be exercised by the surviving spouse. It may also be exercised by an attorney in fact or a guardian of the property of the surviving spouse as long as there is the approval of the court having jurisdiction of the probate proceeding.[6] The court, before it approves the election, is required to determine that the election is in the best interests of the surviving spouse, during the spouse's probable lifetime.

Except as provided in s. 732.2135(2), F.S., this election is to be filed on or before the earlier of the date that is six months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or the date that is two years after the date of the decedent's death.[7]

Within the period provided in s. 732.2135(1), F.S., the surviving spouse, attorney in fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election. The court, for good cause shown, may extend the time for the election. If the court grants the petition for an extension, then the election must be filed within the time allowed by the extension.[8] A petition for an extension of time for making the election or for approval to make the election tolls the time for making the election.[9]

The bill provides that a surviving spouse, or attorney in fact, or guardian of the property, may petition the court for an extension of time for making an election. In addition to the period of time in s. 732.2135(1), F.S., the parties may petition the court for an extension:

- 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), F.S., if later than the time specified in subsection (1);
- But no more than 2 years after the decedent's death.

Elective Estate

As discussed above, the elective share for a surviving spouse is statutorily set at 30% of the elective estate.[10] The elective share is reduced by the value of any property passing to the spouse in the decedent's will, under intestacy, or as a pretermitted spouse (not mentioned in the will because the will was written prior to the marriage). The elective share is in addition to the spouse's right to exempt property, a family allowance, and homestead.[11]

Once the entry of the order determining the surviving spouse's entitlement to the elective share has occurred, the personal representative must file and serve a petition to determine the amount of the elective share.[12] The petition is to contain:

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[6] *See* s. 732.2125(2), F.S.
[7] s. 732.2135(1), F.S.
[8] s. 732.2135(2), F.S.
[9] s. 732.2135(4), F.S.
[10] s. 732.2065, F.S.
[11] s. 732.2105, F.S.
[12] Fla. Prob. R. 5.360(c).

- The name and address of each direct recipient known to the personal representative;
- A description of the proposed distribution of assets to satisfy the elective share, and the time and manner of distribution; and
- An identification of those direct recipients, if any, from whom a specified contribution will be required and a statement of the amount of contribution sought from each.

Fla. Prob. R. 5.340 requires an inventory of the elective estate that is to be served together with the petition. Within 20 days after the service of the petition to determine the amount of the elective share, any interested person is permitted to serve an objection to the amount of, or distribution of, assets to satisfy the elective share. The objection must state with particularity the grounds upon which it is based. If an objection is served, the personal representative has to promptly serve a copy of the objection on all interested persons who have not previously been served.

If no objection is timely served, the court must enter an order on the petition. The order that is entered is required to:

- State the amount of the elective share;
- Identify the assets to be distributed to the surviving spouse in satisfaction of the elective estate; and
- If contribution is necessary, specify the amount of contribution for which each direct recipient is liable.

The bill includes the protected homestead in the value of the elective estate. Additionally, the bill provides rules governing the valuation of the interest in the protected homestead that the surviving spouse receives as part of his or hers elective share. Specifically, the bill provides that the value of the protected homestead is:

- The fair market value[13] of the protected homestead on the date of the decedent's death if the surviving spouse received a fee simple interest in the property;
- One half of the fair market value of the protected homestead on the date of the decedent's death if the spouse takes a life estate in the property or elects to take an undivided one-half interest as a tenant in common; or
- In the event the surviving spouse validly waives his or her homestead rights, but nevertheless receives an interest in the protected homestead, the value of the spouse's interest is determined as property interests that are not protected homestead.

The bill excludes the protected homestead from the elective estate if the surviving spouse waives his or her homestead rights in a marital agreement under s. 732.702, F.S., or otherwise, and receives no interest in it. This has the effect of preventing a spouse who has waived his or her right to the homestead in a premarital or post-marital agreement during the decedent's lifetime from circumventing the marital agreement by claiming a portion of the homestead's value indirectly by taking the elective share after the decedent's death.

Contribution and Attorney Fees

Contribution means the remaining unsatisfied balance of the trust or the estate at the time of the distribution.[14] Any order of contribution and the resulting personal representative's duty to collect contribution is controlled by s. 732.2145, F.S.

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[13] The bill provides a definition for fair market value for purposes of s. 732.2055, F.S., as the "net aggregate amount, as of the date of the decedent's death, of all mortgages, liens, and security interests in which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective share." HB 267, lines 234-239.

[14] *See* s. 732.2085, F.S.

Outstanding contributions bear interest at the statutory rate beginning 90 days after the order of contribution. The court's order of contribution is prima facie correct in proceedings in any court or jurisdiction.[15] Except as provided in s. 732.2145(3), F.S., the personal representative is required to collect contribution from the recipients' of the elective share as provided in the court's order of contribution.[16] If there is property within the possession or control of the personal representative that is distributable to a beneficiary or trustee who is required to contribute in satisfaction of the elective share, the personal representative must withhold the contribution required of the beneficiary or trustee from distribution.

If, after the order of contribution, the personal representative brings an action to collect contribution from property that is not within the personal representative's control, the judgment rendered shall include the personal representative's costs and reasonable attorney's fees.[17] The personal representative does not have to seek collection of any portion of the elective share from property not within the control of the personal representative until after the entry of the order of contribution. A personal representative who has the duty, under s. 732.2145, F.S., of enforcing contribution may be relieved of that duty by an order of the court finding that it is impracticable to enforce contribution in view of the improbability of collection under any judgment that might be obtained or otherwise.[18]

Nothing in s. 732.2145, F.S., relating to the order of contribution, limits the independent right of the surviving spouse to collect the elective share as provided in the court's order of contribution.[19] In fact, that right is specifically conferred by s. 732.2145(4), F.S. If the surviving spouse brings an action to enforce the order, the judgment must include the surviving spouse's reasonable attorney fees and costs.[20]

The bill also provides that direct recipients and beneficiaries who are required to make a contribution payment to the surviving spouse of some portion of the elective share are responsible for the interest on any unsatisfied amount after two years following the death of the decedent. The interest is in addition to interest accruing on unsatisfied contributions beginning 90 days after an order of contribution is entered. This payment of interest is calculated using the statutory rate allowed by Florida law.

Additionally, the bill grants courts the power to award attorney fees and costs when there is an objection or dispute over entitlement to or the amount of the elective share, the property interests included in the elective share or its value, or the satisfaction of the elective share. It adopts the same standard for granting an award of costs and attorney fees that is used in ss. 733.609, 732.615, 732.616 and 736.1004, F.S., applicable to surcharge actions and proceedings to modify a will or trust. A court may direct payment from the estate or from a party's interest in the elective share or the elective estate, or may enter a judgment that can be satisfied from other property of the party.

The Savings Clause and Elective Share Trusts

Under the Code, a trust referred to as an "elective share trust," may be established for the benefit of a surviving spouse. An elective share trust is a trust under which:

- The surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often annually;

[15] s. 732.2145(1), F.S.
[16] s. 732.2145(2), F.S.
[17] s. 732.2145(2)(b), F.S.
[18] s. 732.2145(3), F.S.
[19] s. 732.2145(4), F.S.
[20] *Id.*

- The surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and
- During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.

Moreover, s. 738.606, F.S., part of the Florida Uniform Principal Income Act, provides special protections when a marital deduction may be taken under the Internal Revenue Code or comparable law of any state. Specifically, where a deduction is allowed for all or part of a trust that must be distributed to the grantor's spouse, and the assets of which consist substantially of property that does not produce sufficient income for the spouse, the spouse may require the trustee to make the property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041, F.S., related to a trustee's power to adjust.

Under current law, not all elective share trusts will be made subject to a marital deduction election.

The bill expands the scope of the savings clause found in s. 738.606, F.S., to include an "elective share trust," as that term is defined in s. 732.2025(2), F. S. As with marital trusts intended to qualify for the estate tax marital deduction (which trusts are presently protected by the savings provisions of Section 738.606, Fla. Stat.), to qualify as an elective share trust, the governing instrument that creates the trust must give the surviving spouse the power to compel the trustee to convert property that is not productive of income into property that is so productive.

Because not all elective share trusts will also be made subject to a marital deduction election, the bill specifically extends the savings provision of this s. 738.606, F.S., to those elective share trusts for which a marital deduction is not elected in order to satisfy the requirements for an elective share trust.

B. SECTION DIRECTORY:

Section 1 amends s. 732.2025, F.S., relating to definitions.

Section 2 amends s. 732.2035, F.S. relating to property entering into the elective share.

Section 3 amends s. 732.2045, F.S., relating to exclusions and overlapping application.

Section 4 amends s. 732.2055, F.S., relating to valuation of the elective share.

Section 5 amends s. 732.2075, F.S., relating to sources from which elective share payable.

Section 6 amends s. 732.2085, F.S., relating to liability of direct recipients and beneficiaries.

Section 7 amends s. 732.2095, F.S., relating to valuation of property satisfying elective share.

Section 8 amends s. 732.2115, F.S. relating to protection of payors and other third parties.

Section 9 amends s. 732.2135, F.S., relating to time of election; extensions; withdrawal.

Section 10 amends s. 732.2145, F.S., relating to order of contribution and duty to collect.

Section 11 creates s. 732.2151, F.S., relating to award of fees and costs.

Section 12 amends s. 738.606, F.S., relating to property not productive of income.

Section 13 relates to applicability.

Section 14 provides for an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   The bill does not appear to have any impact on state government 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 may have a fiscal impact as a result of awarding attorney fees and costs in certain elective share proceedings. The impact could be positive for attorneys, beneficiaries, or spouses who are required to file actions while pursuing claims related to the elective share. The impact could also be negative on estates and beneficiaries defending against such actions as an award for attorney fees and costs against the estate could come out of assets in the estate.

The bill may have a fiscal impact for parties responsible for contributing towards the elective share and parties awaiting contributions to satisfy their elective share. An award of interest would have a negative impact on beneficiaries responsible for contributing to the elective share and a positive impact on surviving spouses who have not had their elective share satisfied.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to estates; amending s. 732.2025, F.S.; conforming cross-references; amending s. 732.2035, F.S.; providing that a decedent's property interest in the protected homestead is included in the elective estate; amending s. 732.2045, F.S.; revising the circumstances under which the decedent's property interest in the protected homestead is excluded from the elective estate; amending s. 732.2055, F.S.; providing for the valuation of the decedent's protected homestead under certain circumstances; amending s. 732.2075, F.S.; conforming cross-references; amending s. 732.2085, F.S.; requiring the payment of interest on any unpaid portion of a person's required contribution toward the elective share with respect to certain property; amending s. 732.2095, F.S.; revising provisions relating to the valuation of a surviving spouse's interest in property to include protected homestead; conforming cross-references; amending s. 732.2115; conforming a cross-reference; amending s. 732.2135, F.S.; revising the period within which a specified person may petition the court for an extension of time for making an election; removing a provision authorizing assessment of attorney fees and costs if an election is made in

bad faith; amending s. 732.2145, F.S.; requiring the payment of interest on any unpaid portion of a person's required contribution toward the elective share after a certain date; creating s. 732.2151, F.S.; providing for the award of fees and costs in certain elective share proceedings; providing that a court may direct payment from certain sources; providing applicability; amending s. 738.606, F.S.; providing that a surviving spouse may require a trustee of a marital or elective share trust to make property productive of income; providing applicability; providing an effective date.

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

Section 1. Subsections (1) and (9) of section 732.2025, Florida Statutes, are amended to read:

732.2025 Definitions.—As used in ss. 732.2025-732.2155, the term:

(1) "Direct recipient" means the decedent's probate estate and any other person who receives property included in the elective estate by transfer from the decedent, including transfers described in s. 732.2035(9) ~~s. 732.2035(8)~~, by right of survivorship, or by beneficiary designation under a governing instrument. For this purpose, a beneficiary of an insurance

policy on the decedent's life, the net cash surrender value of which is included in the elective estate, is treated as having received property included in the elective estate. In the case of property held in trust, "direct recipient" includes the trustee but excludes the beneficiaries of the trust.

(9) "Revocable trust" means a trust that is includable in the elective estate under s. 732.2035(5) ~~s. 732.2035(4)~~.

Section 2. Section 732.2035, Florida Statutes, is amended to read:

732.2035 Property entering into elective estate.—Except as provided in s. 732.2045, the elective estate consists of the sum of the values as determined under s. 732.2055 of the following property interests:

(1) The decedent's probate estate.

(2) The decedent's interest in property which constitutes the protected homestead of the decedent.

(3) The decedent's ownership interest in accounts or securities registered in "Pay On Death," "Transfer On Death," "In Trust For," or coownership with right of survivorship form. For this purpose, "decedent's ownership interest" means, in the case of accounts or securities held in tenancy by the entirety, one-half of the value of the account or security, and in all other cases, that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

(4)~~(3)~~ The decedent's fractional interest in property, other than property described in subsection (3)~~(2)~~ or subsection (8)~~(7)~~, held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety. For this purpose, "decedent's fractional interest in property" means the value of the property divided by the number of tenants.

(5)~~(4)~~ That portion of property, other than property described in subsection (2) and subsection (3), transferred by the decedent to the extent that at the time of the decedent's death the transfer was revocable by the decedent alone or in conjunction with any other person. This subsection does not apply to a transfer that is revocable by the decedent only with the consent of all persons having a beneficial interest in the property.

(6)(a)~~(5)(a)~~ That portion of property, other than property described in subsection (2)~~(3)~~, subsection (4), subsection (5), or subsection (8)~~(7)~~, transferred by the decedent to the extent that at the time of the decedent's death:

1. The decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or

2. The principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent.

In the application of this subsection, a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity, unitrust, or other payment.

(b) The amount included under this subsection is:

1. With respect to subparagraph (a)1., the value of the portion of the property to which the decedent's right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate; and

2. With respect to subparagraph (a)2., the value of the portion subject to the discretion, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate.

(c) This subsection does not apply to any property if the decedent's only interests in the property are that:

1. The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property; or

2. The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an exercise of a general power of appointment held by any person other than the decedent; or

3. The income or principal of the property is or could be

distributed in satisfaction of the decedent's obligation of support; or

4. The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.

(7) ~~(6)~~ The decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life.

(8) ~~(7)~~ The value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, this subsection shall not apply to the excess of the proceeds of any insurance policy on the decedent's life over the net cash surrender value of the policy immediately before the decedent's death.

(9) ~~(8)~~ Property that was transferred during the 1-year period preceding the decedent's death as a result of a transfer by the decedent if the transfer was either of the following types:

(a) Any property transferred as a result of the

termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection (5) ~~(4)~~ or subsection (6) ~~(5)~~ if the right, interest, or power had not terminated until the decedent's death.

(b) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:

1. Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and

2. After the application of subparagraph 1., the first annual exclusion amount of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of this subparagraph, the term "annual exclusion amount" means the amount of one annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.

(c) Except as provided in paragraph (d), for purposes of this subsection:

1. A "termination" with respect to a right or interest in property occurs when the decedent transfers or relinquishes the right or interest, and, with respect to a power over property, a

termination occurs when the power terminates by exercise, release, lapse, default, or otherwise.

2. A distribution from a trust the income or principal of which is subject to subsection (5)~~(4)~~, subsection (6)~~(5)~~, or subsection (10)~~(9)~~ shall be treated as a transfer of property by the decedent and not as a termination of a right or interest in, or a power over, property.

(d) Notwithstanding anything in paragraph (c) to the contrary:

1. A "termination" with respect to a right or interest in property does not occur when the right or interest terminates by the terms of the governing instrument unless the termination is determined by reference to the death of the decedent and the court finds that a principal purpose for the terms of the instrument relating to the termination was avoidance of the elective share.

2. A distribution from a trust is not subject to this subsection if the distribution is required by the terms of the governing instrument unless the event triggering the distribution is determined by reference to the death of the decedent and the court finds that a principal purpose of the terms of the governing instrument relating to the distribution is avoidance of the elective share.

(10)~~(9)~~ Property transferred in satisfaction of the elective share.

Section 3. Paragraph (i) of subsection (1) of section 732.2045, Florida Statutes, is amended to read:

732.2045 Exclusions and overlapping application.—

(1) EXCLUSIONS.—Section 732.2035 does not apply to:

(i) Property which constitutes the protected homestead of the decedent if the surviving spouse validly waived his or her homestead rights as provided under s. 732.702, or otherwise under applicable law, and such spouse did not receive any interest in the protected homestead upon the decedent's death ~~whether held by the decedent or by a trust at the decedent's death~~.

Section 4. Section 732.2055, Florida Statutes, is amended to read:

732.2055 Valuation of the elective estate.—For purposes of s. 732.2035, "value" means:

(1)(a) In the case of protected homestead:

1. If the surviving spouse receives a fee simple interest, the fair market value of the protected homestead on the date of the decedent's death.

2. If the spouse takes a life estate as provided in s. 732.401(1), or validly elects to take an undivided one-half interest as a tenant in common as provided in s. 732.401(2), one-half of the fair market value of the protected homestead on the date of the decedent's death.

3. If the surviving spouse validly waived his or her

homestead rights as provided under s. 732.702 or otherwise under applicable law, but nevertheless receives an interest in the protected homestead, other than an interest described in s. 732.401, including an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

(b) For purposes of this subsection, fair market value is net of the aggregate amount, as of the date of the decedent's death, of all mortgages, liens, and security interests to which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective estate.

(2) In the case of any policy of insurance on the decedent's life includable under s. 732.2035(5), (6), or (7) ~~s. 732.2035(4), (5), or (6)~~, the net cash surrender value of the policy immediately before the decedent's death.

(3)~~(2)~~ In the case of any policy of insurance on the decedent's life includable under s. 732.2035(9) ~~s. 732.2035(8)~~, the net cash surrender value of the policy on the date of the termination or transfer.

(4)~~(3)~~ In the case of amounts includable under s. 732.2035(8) ~~s. 732.2035(7)~~, the transfer tax value of the amounts on the date of the decedent's death.

(5)~~(4)~~ In the case of other property included under s. 732.2035(9) ~~s. 732.2035(8)~~, the fair market value of the

property on the date of the termination or transfer, computed after deducting any mortgages, liens, or security interests on the property as of that date.

(6)~~(5)~~ In the case of all other property, the fair market value of the property on the date of the decedent's death, computed after deducting from the total value of the property:

(a) All claims paid or payable from the elective estate; and

(b) To the extent they are not deducted under paragraph (a), all mortgages, liens, or security interests on the property.

Section 5. Paragraph (b) of subsection (1), paragraph (b) of subsection (2), and paragraph (c) of subsection (3) of section 732.2075, Florida Statutes, are amended to read:

732.2075 Sources from which elective share payable; abatement.—

(1) Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the following are applied first to satisfy the elective share:

(b) To the extent paid to or for the benefit of the surviving spouse, amounts payable under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~.

(2) If, after the application of subsection (1), the elective share is not fully satisfied, the unsatisfied balance

shall be allocated entirely to one class of direct recipients of the remaining elective estate and apportioned among those recipients, and if the elective share amount is not fully satisfied, to the next class of direct recipients, in the following order of priority, until the elective share amount is satisfied:

(b) Class 2.—Recipients of property interests, other than protected charitable interests, included in the elective estate under s. 732.2035(3), (4), or (7) ~~s. 732.2035(2), (3), or (6)~~ and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests, included under s. 732.2035(6) and (8) ~~s. 732.2035(5) and (7)~~.

For purposes of this subsection, a protected charitable interest is any interest for which a charitable deduction with respect to the transfer of the property was allowed or allowable to the decedent or the decedent's spouse under the United States gift or income tax laws.

(3) If, after the application of subsections (1) and (2), the elective share amount is not fully satisfied, the additional amount due to the surviving spouse shall be determined and satisfied as follows:

(c) If there is more than one trust to which this subsection could apply, unless otherwise provided in the

decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the unsatisfied balance shall be apportioned pro rata to all such trusts in proportion to the value, as determined under s. 732.2095(2)(f) ~~s. 732.2095(2)(d)~~, of the surviving spouse's beneficial interests in the trusts.

Section 6. Paragraph (a) of subsection (3) of section 732.2085, Florida Statutes, is amended to read:

732.2085 Liability of direct recipients and beneficiaries.—

(3) If a person pays the value of the property on the date of a sale or exchange or contributes all of the property received, as provided in paragraph (2)(b):

(a) No further contribution toward satisfaction of the elective share shall be required with respect to that property. However, if a person's required contribution is not fully paid by 2 years after the date of the death of the decedent, such person must also pay interest at the statutory rate on any portion of the required contribution that remains unpaid.

Section 7. Section 732.2095, Florida Statutes, is amended to read:

732.2095 Valuation of property used to satisfy elective share.—

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

(a) "Applicable valuation date" means:

1. In the case of transfers in satisfaction of the elective share, the date of the decedent's death.

2. In the case of property held in a qualifying special needs trust on the date of the decedent's death, the date of the decedent's death.

3. In the case of other property irrevocably transferred to or for the benefit of the surviving spouse during the decedent's life, the date of the transfer.

4. In the case of property distributed to the surviving spouse by the personal representative, the date of distribution.

5. Except as provided in subparagraphs 1., 2., and 3., in the case of property passing in trust for the surviving spouse, the date or dates the trust is funded in satisfaction of the elective share.

6. In the case of property described in s. 732.2035(2), (3), or (4) ~~s. 732.2035(2) or (3)~~, the date of the decedent's death.

7. In the case of proceeds of any policy of insurance payable to the surviving spouse, the date of the decedent's death.

8. In the case of amounts payable to the surviving spouse under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~, the date of the decedent's death.

9. In all other cases, the date of the decedent's death or the date the surviving spouse first comes into possession of the

property, whichever occurs later.

(b) "Qualifying power of appointment" means a general power of appointment that is exercisable alone and in all events by the decedent's spouse in favor of the spouse or the spouse's estate. For this purpose, a general power to appoint by will is a qualifying power of appointment if the power may be exercised by the spouse in favor of the spouse's estate without the consent of any other person.

(c) "Qualifying invasion power" means a power held by the surviving spouse or the trustee of an elective share trust to invade trust principal for the health, support, and maintenance of the spouse. The power may, but need not, provide that the other resources of the spouse are to be taken into account in any exercise of the power.

(2) Except as provided in this subsection, the value of property for purposes of s. 732.2075 is the fair market value of the property on the applicable valuation date.

(a) If the surviving spouse has a life interest in property not in trust that entitles the spouse to the use of the property for life, <u>including, without limitation, a life estate in protected homestead as provided in s. 732.401(1),</u> the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

<u>(b) If the surviving spouse elects to take an undivided one-half interest in protected homestead as a tenant in common</u>

as provided in s. 732.401(2), the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

(c) If the surviving spouse validly waived his or her homestead rights as provided in s. 732.702 or otherwise under applicable law but nevertheless receives an interest in protected homestead, other than an interest described in s. 732.401, including, without limitation, an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

(d) ~~(b)~~ If the surviving spouse has an interest in a trust, or portion of a trust, which meets the requirements of an elective share trust, the value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows:

1. One hundred percent if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment.

2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment.

3. Fifty percent in all other cases.

(e) ~~(c)~~ If the surviving spouse is a beneficiary of a trust, or portion of a trust, which meets the requirements of a qualifying special needs trust, the value of the principal of

the trust, or trust portion, on the applicable valuation date.

(f)~~(d)~~ If the surviving spouse has an interest in a trust that does not meet the requirements of either an elective share trust or a qualifying special needs trust, the value of the spouse's interest is the transfer tax value of the interest on the applicable valuation date; however, the aggregate value of all of the spouse's interests in the trust shall not exceed one-half of the value of the trust principal on the applicable valuation date.

(g)~~(e)~~ In the case of any policy of insurance on the decedent's life the proceeds of which are payable outright or to a trust described in paragraph (d)~~(b)~~, paragraph (e)~~(c)~~, or paragraph (f)~~(d)~~, the value of the policy for purposes of s. 732.2075 and paragraphs (d), (e), and (f) ~~(b), (c), and (d)~~ is the net proceeds.

(h)~~(f)~~ In the case of a right to one or more payments from an annuity or under a similar contractual arrangement or under any plan or arrangement described in s. 732.2035(8) ~~s. 732.2035(7)~~, the value of the right to payments for purposes of s. 732.2075 and paragraphs (d), (e), and (f) ~~(b), (c), and (d)~~ is the transfer tax value of the right on the applicable valuation date.

Section 8. Section 732.2115, Florida Statutes, is amended to read:

732.2115 Protection of payors and other third parties.—

Although a property interest is included in the decedent's elective estate under s. 732.2035(3)-(9) ~~s. 732.2035(2)-(8)~~, a payor or other third party is not liable for paying, distributing, or transferring the property to a beneficiary designated in a governing instrument, or for taking any other action in good faith reliance on the validity of a governing instrument.

Section 9. Section 732.2135, Florida Statutes, is amended to read:

732.2135 Time of election; extensions; withdrawal.—

(1) Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or the date that is 2 years after the date of the decedent's death.

(2) Within the period provided in subsection (1), or 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), whichever is later, but no more than 2 years after the decedent's death, the surviving spouse or an attorney in fact or guardian of the property of the surviving spouse may petition the court for an extension of time for making an election. For good cause shown, the court may extend the time for election. If the court grants the petition for an extension,

the election must be filed within the time allowed by the extension.

(3) The surviving spouse or an attorney in fact, guardian of the property, or personal representative of the surviving spouse may withdraw an election at any time within 8 months after the decedent's death and before the court's order of contribution.

(4) A petition for an extension of the time for making the election or for approval to make the election shall toll the time for making the election.

~~(5) If the court determines that an election is made or pursued in bad faith, the court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate.~~

Section 10. Subsection (1) of section 732.2145, Florida Statutes, is amended to read:

732.2145 Order of contribution; personal representative's duty to collect contribution.—

(1) The court shall determine the elective share and contribution. Any amount of the elective share not satisfied within 2 years of the date of death of the decedent shall bear interest at the statutory rate until fully satisfied, even if an order of contribution has not yet been entered. Contributions shall bear interest at the statutory rate beginning 90 days after the order of contribution. The order is prima facie

correct in proceedings in any court or jurisdiction.

Section 11. Section 732.2151, Florida Statutes, is created to read:

732.2151 Award of fees and costs in elective share proceedings.—

(1) The court may award taxable costs as in chancery actions, including attorney fees, in any proceeding under this part in which there is an objection to or dispute over:

(a) The entitlement to or the amount of the elective share;

(b) The property interests included in the elective estate, or its value; or

(c) The satisfaction of the elective share.

(2) When awarding taxable costs or attorney fees, the court may do one or more of the following:

(a) Direct payment from the estate.

(b) Direct payment from a party's interest in the elective share or the elective estate.

(c) Enter a judgement that can be satisfied from other property of the party.

(3) In addition to any of the fees that may be awarded under subsections (1) and (2), if the personal representative does not file a petition to determine the amount of the elective share as required by the Florida Probate Rules, the electing spouse or the attorney-in-fact, guardian of the property, or

personal representative of the electing spouse may be awarded from the estate reasonable costs, including attorney fees, incurred in connection with the preparation and filing of the petition.

(4) This section applies to all proceedings commenced on or after July 1, 2017, without regard to the date of the decedent's death.

Section 12. Subsection (1) of section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deduction under the Internal Revenue Code or comparable law of any state is allowed for all or part of a trust, or if assets are transferred to a trust that satisfies the requirements of s. 732.2025(2)(a) and (c), and such assets have been used in whole or in part to satisfy an election by a surviving spouse under s. 732.2125 and ~~the income of which must be distributed to the grantor's spouse and the assets of which~~ consist ~~substantially~~ of property that, in the aggregate, does not provide the spouse with sufficient income from or use of the trust assets, and if ~~the~~ amounts the trustee transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, even though, in the case of an elective share trust, a marital deduction is not made

or is only partially made, the spouse may require the trustee of such marital trust or elective share trust to make property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The trustee may decide which action or combination of actions to take.

Section 13. Applicability.—Except as otherwise provided in this act, the amendments made by this act apply to decedents whose death occurred on or after July 1, 2017.

Section 14. This act shall take effect July 1, 2017.

PCS for HB 277

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 277 Electronic Wills
SPONSOR(S): Civil Justice & Claims Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice & Claims Subcommittee		MM MacNamara	Bond HB

SUMMARY ANALYSIS

A will is a legal document used to designate the distribution of a person's assets upon death. To be valid, a will must follow certain formalities with respect to its creation, execution, preservation, revocation, and filing. To be admitted to probate, a will must have been signed by the testator (the person making the will) in the presence of 2 witnesses, one of which must testify to the authenticity of the bill unless certain other conditions are met or unless the will is self-proved. A self-proved will is one executed in the presence of two witnesses and a notary where the witnesses sign an affidavit regarding validity. A will may be revoked by the testator at any time prior to the testator's death. There is no statutory requirement regarding storage of a will, but there is a requirement that anyone possessing a will must file it with the clerk of the court within 10 days of learning of the death of the testator. Current law appears to presume that a will is written in ink on paper.

The bill provides for the creation of an electronic will. An electronic will is executed, modified, and revoked similar as to how a paper will is under current law. The bill provides a means for self-proof of an electronic will, storage, filing, and venue and courts responsible for presiding over matters related to the electronic will. The bill creates a concept of a "qualified custodian" who is responsible for possessing and controlling the electronic will in addition to other various responsibilities outlined in the bill.

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

The bill has an effective date of July 1, 2017, and only applies to electronic wills executed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background and Current Law

A will, very generally, is a legal document that a person (a "testator") may use to determine who gets his or her property when he or she dies. As set forth in the Florida Probate Code, codified as ch. 731-735, F.S., the legal definition of a will is:

> an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.[1]

Wills do not dispose of all of a testator's property, but only his or her "estate"—i.e., those assets that are subject to probate administration.[2] Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries. Other assets are disposed of outside of probate.

Without a will, a decedent's estate will be distributed pursuant to the intestacy statutes, which devise a decedent's estate according to what might be described as default rules. With a will, however, a testator may, as a general matter, devise his or her estate to whomever he or she likes. Also, with a will, a testator may designate a person known as a personal representative to carry out the terms of the will. Otherwise, a court will choose the personal representative.

A will is an important tool for estate planning. A will is also by its nature a sensitive document, as it speaks for someone who can no longer speak about distributing his or her estate. Moreover, the assets of an estate may be substantial, and the beneficiaries might not be cooperative or trusting of each other. Current law provides for the methods of a will's creation, execution, preservation, revocation, filing, and other aspects to certain formalities.

Executing a Will

A will must be "in writing" and signed at its end by either the testator or by someone else for the testator. If someone else signs for the testator, the person must do so in the testator's presence and at the testator's direction.[3] At least two persons must witness the testator sign the will or must witness the testator's acknowledgement that he or she previously signed the will or that another person subscribed the testator's name to the will.[4] These witnesses must sign the will in the presence of each other and the testator.[5] For wills executed in other states, the requirements may be different. The consequence of failing to strictly comply with these requirements is that the will is not valid.[6]

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[1] s. 731.201(40), F.S.
[2] s. 731.201(14), F.S.
[3] s. 732.502(1)(a), F.S.
[4] s. 732.502(1)(b), F.S.
[5] s. 732.502(1)(c), F.S.
[6] *See*, s. 732.502(2), F.S. A will executed in another state is valid in Florida if the will is executed in accordance with the laws of this state, the laws of the state in which it was executed, or both. This does not apply to nuncupative wills (oral wills) or holographic wills (wills written in the hand of the testator, but not properly executed as set forth in section 732.502(1), F.S.), which are not valid in Florida regardless of whether they were executed according to the laws of the state in which they were executed.

Though s. 732.502(1), F.S., specifies that a will must be "in writing" and that certain persons must "sign" or attach their "signature," these terms are not defined in the statutes. Moreover, there is no explicit statement in the Florida Probate Code that an electronic will is invalid, that an electronic signature is invalid, or that a will must be executed on paper.

Section 668.004, F.S., states that, "[u]nless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."[7] An electronic signature, as defined in s. 668.003(4), F.S., is:

> any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.

The Florida Probate Code does not specify how a will must be stored. However, the custodian of a will must deposit the will with the court within 10 days after receiving information of the testator's death.[8] If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability.

Self-Proved Wills

The necessity of procuring an attesting witness as part of the estate administration process, before a will can be admitted to probate, is dispensed with when the will is self-proved. Section 733.201(1), F.S., provides that a will which is self-proved in accordance with the Code may be admitted to probate without further proof. In a will contest, when the proponent initially has the burden to establish prima facie the will's formal execution and attestation, a self-proving affidavit executed in accordance with s. 732.503, F.S., is admissible to meet and satisfy this burden. The affidavit must be evidenced by a certificate attached to or following the will. [9]

The will can be self-proved either at the time of its execution or at a subsequent date. Section 732.503(1), F.S., provides that when the will or codicil is self-proved at a subsequent date, the testator is required to acknowledge it. Other than dispensing with the requirement that a witness be brought forward so that the will can be admitted to probate, the self-proving provision has no other effect.

Proving a Will in Probate

To acquire a court order distributing the testator's estate assets in line with the terms of a will, the will must be probated.[10] For a will to be admitted to probate in Florida, it must be "proved." No statute describes what it means for a will to be proved or what it is about the will or purported will that is being proved. However, it is apparent that proving a will means proving that the will is what it purports to be—i.e., the last will and testament of the testator—and that it was validly executed. The venue for a probate proceeding is set forth in s. 731.101(1), F.S., which states:

> (1) The venue for probate of wills and granting letters shall be:
> (a) In the county in this state where the decedent was domiciled.
> (b) If the decedent had no domicile in this state, then in any county where the decedent's property is located.

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[7] The Uniform Electronic Transaction Act is set forth in s. 668.50, F.S. It includes a statement that the "section" does not govern, among other things, a transaction that is governed by a law governing the creation and execution of wills. Section 668.004, which provides broad permission to electronically sign a document, is of course a different section. But even if it were not, or even if it did not exist, section 668.50, F.S., would not appear to *prohibit* electronically signing a will.

[8] s. 732.901(1), F.S.

[9] The officer's certificate must be substantially in the form set forth at s. 732.503, F.S. The form requires that the witnesses state that they witnessed the testator *sign* the will. However, the statutory requirements for executing a will do not require witnesses to witness the testator sign the will. Section 732.502, F.S., provides that the witnesses may either witness the testator sign, or witness the testator acknowledge his or her prior signature.

[10] *See* s. 733.103(1), F.S.

(c) If the decedent had no domicile in this state and possessed no property in this state, then in the county where any debtor of the decedent resides.

A will may be proved by having one of the attesting witnesses swear or affirm an oath regarding the will before a circuit judge or any of the other persons set forth in s. 733.201(2), F.S. If it appears to the court that no attesting witness can be found, that no attesting witness still has capacity, or that the testimony of an attesting witness cannot be obtained within a reasonable time, the court must resort to another method of proving a will.

The other method is through an oath of the personal representative nominated by the will or a different person who has no interest in the estate under the will. This oath must include a statement that "the person believes the writing exhibited to be the last will and testament of the decedent."[11]

Revoking a Will

Under s. 732.506, F.S., a will may be revoked by the testator at any time prior to their death. In order to properly revoke a will, the testator, or some other person in the testator's presence and at the testator's direction, can burn, tear, cancel, deface, obliterate, or destroy it with the intent, "and for the purpose, of revocation."

Additionally, a testator may revoke his or her will pursuant to a writing signifying the testator's intent to revoke or by creating a new will inconsistent with the contents of the original will, so long as the signature requirements of s. 732.502, F.S., are met.

Effect of Proposed Changes

This bill creates the Florida Electronic Wills Act, which regulates and expressly allows the use of "electronic wills." The Act defines an electronic will as:

> an instrument, including a codicil, executed in accordance with s. 732.523 by a person in the manner prescribed by this act, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or revokes or revises another will or electronic will.

The Act does not replace the existing Florida Probate Code, either in whole or in part. Thus, the Act exists "within," and must be read together with, the rest of the Florida Probate Code. Indeed, several provisions of the Act expressly apply to documents other than electronic wills.

Executing an Electronic Will

In order for an electronic will to be valid under the bill, it must meet all of the following requirements:

- Exist in an electronic record;
- Be electronically signed by the testator in the presence of at least two witnesses; and
- Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other. However, if the will is electronically signed by a notary public, the notary's signature must be accompanied by a notary public seal that meets the requirements of s. 117.021(3), F.S.

For purposes of satisfying the presence requirements in executing an electronic will, the bill provides that an individual is deemed to be in the presence of another individual if the individuals are in the same physical location, or in different locations where they can communicate with each other by means of live video and audio conference, provided that the following requirements are met:

[11] s. 733.201(3), F.S.

- The signal transmission must be live and in real time;
- The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating;
- The persons communicating must simultaneously see and speak to one another;
- The persons communicating must establish the identity of the testator or principal by personal knowledge or through the presentation of documentation that provides reasonable proof of the identity of the testator or principal;
- The person communicating must demonstrate awareness of the events taking place; and
- The testator or principal must state that he or she is acting of his or her own free will.

The requirement that the document be signed is satisfied by an electronic signature. The defines "electronic signature" as an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record. Moreover, a document that is signed electronically is deemed to be executed in this state if any one of the following requirements is met:

- The document states that the person creating the document intends to execute and understands that he or she is executing the document in, and pursuant to the laws of this state;
- The person creating the document is, or attesting witnesses or Florida notary public whose electronic signatures are obtained in the execution of the document are, physically located within this sate at the time the document is executed; or
- In the case of a self-proved electronic will, the electronic will designates a qualified custodian who is domiciled in and a resident of this state or incorporated in this state.

With limited exceptions, as provided for in the bill, all questions as to the force, effect, validity, and interpretation of an electronic will that complies with the applicable sections must be determined in the same manner as a will executed in accordance with s. 732.502, F.S.

Self-Proved Electronic Will

The bill provides that an attested electronic will is self-proved if all of the following requirements are met:

- The will is executed in conformity with the Florida Electronic Wills Act;
- The acknowledgement of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503, F.S.;
- The same acknowledgement and affidavits are made a part of, or are attached to or logically associated with, the electronic record; and
- The electronic will designates a qualified custodian, who at all times is in control of the electronic will, who executes a certification that meets the requirements set forth in the bill.

The bill defines a qualified custodian of an electronic will as a person who meets all of the following requirements:

- Is not an heir or devisee of the testator;
- Is domiciled in and a resident of Florida or is incorporated or organized in Florida;
- Consistently employs a system for ensuring the safekeeping of electronic records and stores electronic records containing electronic wills under the system; and
- Furnishes for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's policies and procedures.

The bill includes several provisions designed to hold qualified custodians accountable. These include liability for the negligent loss or destruction of an electronic record and the inability to limit liability for

doing so, a prohibition on suspending or terminating a testator's access to electronic records, and a requirement to keep a testator's information confidential. Also, a testator may force the qualified custodian to "immediately" hand over to the testator the electronic record of an electronic will, the electronic will itself, and a paper copy of the will at any time. The requirement to hand over records does not, however, involve the qualified custodian stepping down or passing office to the testator.

Moreover, the bill provides that one may not serve as a qualified custodian unless the person agrees in writing to serve in this capacity. A person who at any time serves as the qualified custodian of a given electronic record or an electronic will is free to choose to stop serving in this capacity.

Proving an Electronic Will in Probate

The bill provides that venue for probate of an electronic will may be anywhere that venue would be proper for a traditional will.[12] While venue for probating an electronic will is the same as it is for a traditional will, the venue for a *nonresident's* electronic will is also proper in the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office.

The bill expressly grants the right to admit a will to probate in this state if the will was "executed or deemed executed in another state in accordance with the laws of that state or of" Florida. Florida courts are expressly granted jurisdiction over these electronic wills.

The bill permits the admission to probate of an electronic will or a "true and correct copy" of an electronic will. An electronic will that is not self-proved may be admitted to probate on the oath of the two attesting witnesses to the electronic will. These oaths must be sworn or affirmed before a circuit judge or the other persons set forth in the bill.

Under the bill, if it appears to the court that the two attesting witnesses cannot be found, have lost capacity, or cannot testify within a reasonable time, two "disinterested" witnesses must swear or affirm an oath as to the list of statements set forth in the bill.

Revoking an Electronic Will

An electronic will is revoked by the testator, some other person in the testator's presence and at the testator's direction, or by the qualified custodian of the electronic will pursuant to a writing signed in accordance with s. 732.502, F.S., by marking it revoked or cancelling, deleting, destroying, or obliterating it with the intent, and for the purpose of revocation.

Effective Date

This bill applies to electronic wills executed on or after July 1, 2017.

B. SECTION DIRECTORY:

Section 1 amends s. 731.201, F.S., relating to definitions.

Section 2 amends s. 732.506, F.S., relating to revocation by act.

Section 3 creates s. 732.521, F.S., relating to the short title.

Section 4 creates s. 732.522, F.S., relating to definitions.

Section 5 creates s. 732.523, F.S., relating to electronic wills.

[12] *See* s. 731.101(1), F.S.

Section 6 creates s. 732.524, F.S., relating to self-proof of electronic wills.

Section 7 creates s. 732.525, F.S., relating to method and place of execution.

Section 8 creates s. 732.526, F.S., relating to probate.

Section 9 creates s. 732.527, F.S., relating to qualified custodians.

Section 10 amends s. 733.201, F.S., relating to proof of wills.

Section 11 relates to application.

Section 12 provides an effective date of July 1, 2017

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 8 of the bill provides that the venue for probate of non-resident may be the county of the qualified custodian. However, that county may have no nexus to the Florida property subject to probate. The Florida Probate Code does not appear to contain a provision broadly granting Florida courts jurisdiction over validly executed wills of non-residents who do not have any property, creditors, or debtors in Florida.[13]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[13] Probate proceedings are *in rem*, *see* s. 731.105, F.S., therefore, Florida courts would not have jurisdiction over probate proceedings for out of state assets unless the court has obtained personal jurisdiction over a party. *See Ciungu v. Bulea*, 162 So.3d 290, 294 (It has long been established that a court which has obtained in personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title of the property while it remains in the foreign jurisdiction.") (internal citations omitted).

A bill to be entitled

An act relating to electronic wills; amending s. 731.201, F.S.; revising the definition of the term "will" to include electronic wills; amending s. 732.506, F.S.; specifying the manner in which an electronic will is revoked; creating s. 732.521, F.S.; providing a short title; creating s. 732.522, F.S.; defining terms; creating s. 732.523, F.S.; specifying requirements that must be satisfied in the execution of electronic wills; creating s. 732.524, F.S.; providing requirements for self-proof of electronic wills; creating s. 732.525, F.S.; specifying the circumstances under which a person is deemed to be in the presence of or appearing before another; providing that an electronic signature satisfies the requirement that a document be signed; providing requirements for certain documents to be deemed executed in this state; creating s. 732.526, F.S.; authorizing an electronic will that is properly executed in this or another state to be offered for and admitted to probate in this state; providing the venue for the probate of such electronic will; creating s. 732.527, F.S.; specifying requirements for service as a qualified custodian; requiring qualified custodians to provide access to or information concerning the electronic

will, or the electronic record containing the electronic will, only to specified persons; authorizing a qualified custodian to destroy the electronic record of an electronic will after a certain date; requiring a qualified custodian to cancel, delete, destroy, mark as revoked, or obliterate an electronic will under certain circumstances; providing conditions under which a qualified custodian may cease service as a qualified custodian; requiring a qualified custodian to cease serving in such capacity upon the written request of the testator; requiring that a successor qualified custodian agree in writing to serve in that capacity for an electronic will before succeeding to office; specifying what constitutes an affidavit of a qualified custodian; requiring a qualified custodian to deliver certain documents upon request from the testator; prohibiting a qualified custodian from charging the testator a fee for such documents under certain circumstances; providing that a qualified custodian is liable for certain damages under certain circumstances; prohibiting a qualified custodian from terminating or suspending access to, or downloads of, an electronic will by the testator; prohibiting a qualified custodian from charging a fee for certain

actions taken upon the death of the testator; requiring a qualified custodian to keep certain information confidential; amending s. 733.201, F.S.; providing for the proof of electronic wills; providing requirements for admitting an electronic will that is not self-proved into probate; providing that a paper copy of an electronic will constitutes an "original" of the electronic will subject to certain conditions; providing applicability; providing an effective date.

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

Section 1. Subsection (40) of section 731.201, Florida Statutes, is amended to read:

731.201 General definitions.—Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 736, 738, 739, and 744, the term:

(40) "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will. <u>The term "will" includes an electronic will as defined in s. 732.522.</u>

Section 2. Section 732.506, Florida Statutes, is amended to read:

732.506 Revocation by act.—

(1) A will or codicil, other than an electronic will, is revoked by the testator, or some other person in the testator's presence and at the testator's direction, by burning, tearing, canceling, defacing, obliterating, or destroying it with the intent, and for the purpose, of revocation.

(2) An electronic will is revoked by the testator, some other person in the testator's presence and at the testator's direction, or the qualified custodian of the electronic will pursuant to a writing signed in accordance with s. 732.502, by marking it as revoked or canceling, deleting, destroying, or obliterating it with the intent, and for the purpose, of revocation.

Section 3. Section 732.521, Florida Statutes, is created to read:

732.521 Short title.—Sections 732.521-732.527 may be cited as the "Florida Electronic Wills Act."

Section 4. Section 732.522, Florida Statutes, is created to read:

732.522 Definitions.—As used in ss. 732.521-732.527, the term:

(1) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(2) "Electronic signature" means an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record.

(3) "Electronic will" means a will, including a codicil, executed in accordance with s. 732.523 by a person in the manner prescribed by this act, which disposes of the person's property on or after his or her death and includes an instrument that appoints a personal representative or revokes or revises another will or electronic will.

(4) "Qualified custodian" means a person who meets the requirements of s. 732.527(1).

Section 5. Section 732.523, Florida Statutes, is created to read:

732.523 Electronic wills.—Notwithstanding s. 732.502:

(1) An electronic will must meet all of the following requirements:

(a) Exist in an electronic record.

(b) Be electronically signed by the testator in the presence of at least two attesting witnesses.

(c) Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other. If it is electronically signed by a notary public, the notary public's signature must be accompanied by a notary public seal that meets the requirements of s. 117.021(3).

(2) Except as otherwise provided in this act, all questions as to the force, effect, validity, and interpretation of an electronic will that complies with this section must be determined in the same manner as in the case of a will executed in accordance with s. 732.502.

Section 6. Section 732.524, Florida Statutes, is created to read:

732.524 Self-proof of electronic will.—An electronic will is self-proved if all of the following requirements are met:

(1) The electronic will is executed in conformity with this act.

(2) The acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in accordance with s. 732.503 and are part of the electronic record containing the electronic will, or are attached to, or are logically associated with, the electronic will.

(3)(a) The electronic will designates a qualified custodian; and

(b) The qualified custodian certifies under oath that to its best knowledge the electronic will was at all times under the control of the qualified custodian before being offered to the court and that the electronic will has not be altered in any way since the date of its execution.

Section 7. Section 732.525, Florida Statutes, is created to read:

732.525 Method and place of execution.—For purposes of this act, the execution and filing of a document with the court as provided in this act or the Florida Probate Rules, the execution of a durable power of attorney under s. 709.2105, and the execution of a living will under s. 765.302:

(1) An individual is deemed to be in the presence of or appearing before another individual if the individuals are either:

(a) In the same physical location; or

(b) In different physical locations, but can communicate with each other by means of live video and audio conference, provided that the following requirements are met:

1. The signal transmission must be live and real time.

2. The signal transmission must be secure from interception through lawful means by anyone other than the persons communicating.

3. The persons communicating must simultaneously see and speak to one another.

4. The persons communicating must establish the identity of the testator or principal by:

a. Personal knowledge, provided that a person asserting personal knowledge must explain how the identity of the testator or principal has come to be known to, and the length of time for which it has been known by, such person; or

b. Presentation of documentation that provides reasonable proof of the identity of the testator or principal, including, but not limited to, any of the forms of identification set forth in s. 117.05(5)(b)2.a.-i.

5. The persons communicating must demonstrate awareness of the events taking place, which may be achieved, without limitation, by identification of themselves and any document they intend to sign.

6. The testator or principal must state that he or she is acting of his or her own free will.

7. A recording of the entire video and audio conference must be stored in the electronic record containing the document being signed.

(2) Any requirement that a document be signed may be satisfied by an electronic signature.

(3) A document that is signed electronically is deemed to be executed in this state if any one of the following requirements is met:

(a) The document states that the person creating the document intends to execute and understands that he or she is executing the document in, and pursuant to the laws of, this state.

(b) The person creating the document is, or the attesting witnesses or Florida notary public whose electronic signatures

are obtained in the execution of the document are, physically located within this state at the time the document is executed.

(c) In the case of a self-proved electronic will, the electronic will designates a qualified custodian who is domiciled in and a resident of this state or incorporated or organized in this state.

Section 8. Section 732.526, Florida Statutes, is created to read:

732.526 Probate.—An electronic will that is executed or deemed executed in another state in accordance with the laws of that state or of this state may be offered for and admitted to original probate in this state and is subject to the jurisdiction of the courts of this state. The venue for the probate of electronic wills is as provided in s. 733.101(1) or, in the case of the electronic will of a nonresident, may be the county in which the qualified custodian or attorney for the petitioner or personal representative has his or her domicile or registered office.

Section 9. Section 732.527, Florida Statutes, is created to read:

732.527 Qualified custodians.—

(1) To serve as a qualified custodian of an electronic will, a person or entity must:

(a) Not be an heir or devisee, as defined in s. 731.201, of the testator;

(b) Be domiciled in and a resident of this state or be incorporated or organized in this state;

(c) In the course of its business, regularly employ, and store electronic records containing electronic wills in, a system that:

1. Protects electronic records from destruction, alteration, or unauthorized access; and

2. Detects any change to an electronic record; and

(d) Furnish for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's qualifications, policies, and practices related to the creation, sending, communication, receipt, maintenance, storage, and production of electronic wills.

(2) The qualified custodian of an electronic will shall provide access to or information concerning the electronic will, or the electronic record containing the electronic will, only:

(a) To the testator;

(b) To persons authorized by the testator in the electronic will or in written instructions signed by the testator in accordance with s. 732.502;

(c) After the death of the testator, to the testator's personal representative; or

(d) At any time, as directed by a court of competent jurisdiction.

(3) The qualified custodian of the electronic record of an electronic will may elect to destroy such record, including any of the documentation required to be created and stored under paragraph (1)(d), at any time after the earlier of the 5th anniversary of the admission of a will of the testator to probate or 20 years after the death of the testator.

(4) The qualified custodian of an electronic will shall mark as revoked or cancel, delete, destroy, or obliterate the electronic will at the direction of the testator given in the presence of the qualified custodian, or upon receipt by the qualified custodian of instructions signed by the testator in accordance with s. 732.502.

(5) A qualified custodian who at any time controls the electronic record of an electronic will may elect to cease serving in such capacity by:

(a) Delivering the electronic will or the electronic record containing the electronic will to the testator, if then living, or, after the death of the testator, to the nominated testator's personal representative; and

(b) Doing the following if the outgoing qualified custodian intends to designate a successor qualified custodian:

1. Providing written notice to the testator or, after the testator's death, the nominated testator's personal

representative of the name, address, and qualifications of the proposed successor qualified custodian. The testator or a testator's nominated personal representative must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian;

2. Delivering the electronic record containing the electronic will to the successor qualified custodian; and

3. Delivering to the successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

a. The outgoing qualified custodian is eligible to act as a qualified custodian in this state;

b. The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity under this paragraph;

c. The electronic will has been in the control of one or more qualified custodians since the time the electronic record was created, and identifying such qualified custodians; and

d. To the best of the outgoing qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

For purposes of making this affidavit, the outgoing qualified custodian may rely conclusively on any affidavits delivered by a predecessor qualified custodian in connection with its

designation or appointment as qualified custodian; however, all such affidavits must be delivered to the successor qualified custodian.

(6) Upon the written request of the testator, a qualified custodian who at any time controls the electronic record of the testator's electronic will must cease serving in such capacity and must deliver to a successor qualified custodian designated in writing by the testator the electronic will and the affidavit required in subparagraph (5)(b)3.

(7) A qualified custodian may not succeed to office as a qualified custodian of an electronic will unless he or she agrees in writing to serve in such capacity.

(8) If a qualified custodian is an entity, an affidavit, or an appearance by the testator in the presence of a duly authorized officer or agent of such entity, acting in his or her own capacity as such, shall constitute an affidavit, or an appearance by the testator in the presence of the qualified custodian.

(9) A qualified custodian must provide a paper copy of an electronic will and the electronic record containing the electronic will to the testator immediately upon request. For the first such request in any 365-day period, the testator may not be charged a fee for being provided with these documents.

(10) The qualified custodian shall be liable for any damages caused by the negligent loss or destruction of the

electronic record, including the electronic will, while it is in the possession of the qualified custodian. A qualified custodian may not limit liability for such damages.

(11) A qualified custodian may not terminate or suspend access to, or downloads of, the electronic will by the testator.

(12) Upon the death of a testator, a qualified custodian may not charge a fee for depositing the electronic will with the clerk, providing the affidavits made in accordance with s. 732.503, or furnishing in writing any information requested by a court under paragraph (1)(d).

(13) Except as provided herein, a qualified custodian must at all times keep information provided by the testator confidential and may not disclose such information to any third party.

Section 10. Section 733.201, Florida Statutes is amended to read:

733.201 Proof of wills.—

(1) Self-proved wills executed in accordance with this code may be admitted to probate without further proof.

(2) A will, other than an electronic will, may be admitted to probate upon the oath of any attesting witness taken before any circuit judge, commissioner appointed by the court, or clerk.

(3) If it appears to the court that the attesting witnesses cannot be found or that they have become incapacitated

after the execution of the will or their testimony cannot be obtained within a reasonable time, a will, other than an electronic will, may be admitted to probate upon the oath of the personal representative nominated by the will as provided in subsection (2), whether or not the nominated personal representative is interested in the estate, or upon the oath of any person having no interest in the estate under the will stating that the person believes the writing exhibited to be the true last will of the decedent.

(4) If an electronic will is not self-proved, an electronic will may be admitted to probate upon the oath of the two attesting witnesses for the electronic will taken before any circuit judge, commissioner appointed by the court, or the clerk. If it appears to the court that the attesting witnesses cannot be found, that they have become incapacitated after the execution of the electronic will, or that their testimony cannot be obtained within a reasonable time, an electronic will may be admitted to probate upon the oath of two disinterested witnesses providing all of the following information:

(a) The date on which the electronic will was created, if the date is not indicated in the electronic will itself.

(b) When and how the electronic will was discovered, and by whom.

(c) All of the people who had access to the electronic will.

(d) The method by which the electronic will was stored and the safeguards that were in place to prevent alterations to the electronic will.

(e) A statement as to whether the electronic will has been altered since its creation.

(f) A statement that the electronic will is a true, correct, and complete tangible manifestation of the testator's will.

(5) A paper copy of an electronic will which is a true and correct copy of the electronic will may be offered for and admitted to probate and shall constitute an "original" of the electronic will.

Section 11. This act applies to electronic wills executed on or after July 1, 2017.

Section 12. This act shall take effect July 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 357 Self-Service Storage Facilities
SPONSOR(S): Careers & Competition Subcommittee; Moraitis, Jr.
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 264

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Careers & Competition Subcommittee	12 Y, 0 N, As CS	Willson	Anstead
2) Civil Justice & Claims Subcommittee		MM MacNamara	Bond NB
3) Commerce Committee			

SUMMARY ANALYSIS

The Self-storage Facility Act (the Act) governs the relationship between the owner of a self-service storage facility and a tenant with whom the owner has entered into an agreement. The owner has a statutory lien upon all personal property located at the self-service storage facility for failure to pay rent. A self-service storage facility owner may sell such personal property in a tenant's storage unit if the tenant fails to pay rent. The facility owner is required to give notice to the tenant of the intent to sell the property before the sale.

The bill provides that a lien sale may be conducted on a public website that typically conducts personal property auctions, and that the facility owner does not have to be licensed as an auctioneer to post property on such a website.

The bill limits the value of property contained in a storage unit if the value was limited by the rental agreement.

The bill provides that, when a lien is claimed on property that is a motor vehicle or watercraft and charges are 60 days or more past due, a facility owner may sell the motor vehicle or watercraft pursuant to the Act or have the motor vehicle or watercraft towed. If towing is elected, the facility owner is no longer liable for the property after the wrecker takes possession. The wrecker operator that takes possession of a motor vehicle or watercraft must comply with notification and sale requirements in current law regarding towing from private property.

The bill allows a storage facility to charge a reasonable late fee for the nonpayment of rent, and for any expenses incurred as a result of rent collection or lien enforcement. The late fee and conditions must be stated in the rental agreement, and the bill provides that a reasonable late fee is the greater of $20 or 20 percent of the monthly rent.

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

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Sections 83.801-83.809, F.S., comprise Florida's "Self-storage Facility Act" (the Act). The Act provides remedies for the owner of a self-service storage facility in the event that a tenant does not pay rent.[1] The Act gives the facility owner the ability to deny a tenant access to his or her property if the tenant is more than five days delinquent in paying rent.[2]

The Act provides that the owner of a self-service storage facility has a lien upon all personal property located at a self-service storage facility for rent, labor charges, or other charges in relation to the personal property and for the expenses necessary to preserve or dispose of the property.[3] The facility owner is required to take certain steps before satisfying the lien.

First, the tenant must be provided written notice prior to the sale of the property. The notice must be delivered in person or by certified mail to the tenant's last known address and conspicuously posted at the self-service storage facility. The notice must contain a statement showing the amount due, the date it became due, a description of the property, a demand for payment within 14 days, and a conspicuous statement that, unless the claim is paid within the time stated in the notice, the personal property will be advertised for sale or other disposition and will be sold or otherwise disposed of at a specified time and place.

If the tenant has not satisfied the payments after the expiration of the time provided by the notice, the facility owner may advertise for a sale of the property. An advertisement of the sale must be published once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the self-service storage facility is located. If there is no such newspaper of general circulation, the advertisement must be posted at least 10 days before the sale in at least three conspicuous places in the neighborhood where the self-service storage facility is located.[4] The advertisement must include a brief and general description of the property believed to be contained in the storage unit, the address of the facility, the name of the tenant, and the time, place, and manner of the sale or other disposition, which may not be sooner than 15 days after the first publication.[5]

The facility owner may then satisfy the lien from the proceeds of the sale. The balance, if any, is held by the facility owner for delivery on demand to the tenant. A notice of any balance must be delivered by the facility owner to the tenant in person or by certified mail. The balance is considered abandoned if the tenant does not claim it within two years.[6]

Current law also requires the facility owner to hold the sale proceeds for holders of liens against the property whose liens have priority over the facility owner's lien. The facility owner must provide notice of the amount of sale proceeds to such lienholders by either personal delivery or certified mail.[7]

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[1] "Self-service storage facility" is defined by s. 83.803(1), F.S, as any real property designed and used for the purpose of renting or leasing individual storage space to tenants who have access to such space for the purpose of storing and removing personal property.
[2] s. 83.8055, F.S.
[3] s. 83.805, F.S.
[4] s. 83.806, F.S.
[5] s. 83.806(4)(a), F.S.
[6] s. 83.806(8), F.S.
[7] *Id.*

Effect of the Bill

The bill provides that a lien sale may be conducted on a public website that typically conducts personal property auctions and provides that the facility owner does not have to be licensed as an auctioneer to post property on such a website.

The bill creates s. 83.806(9), F.S., to limit the value of property that may be stored in a storage unit if the value is limited in the rental agreement. This limits the liability of the facility to the amount stated in the contract if the contents of the unit are damaged or stolen or if the facility owner wrongfully sells the tenant's property. This provision appears to be a codification of current case law.[8]

In addition to selling the motor vehicle or watercraft pursuant to s. 83.806, F.S., the bill provides that, when a lien is claimed on property that is a motor vehicle or watercraft and charges are 60 days past due, a facility owner may have the motor vehicle or watercraft towed. If towed, the facility owner is no longer liable for the property after the wrecker takes possession. The bill requires a wrecker that takes possession of a motor vehicle or watercraft to comply with notification and sale requirements pursuant to s. 713.78, F.S.[9]

The bill also allows a storage facility to charge a reasonable late fee for each rental period that a tenant does not pay rent. However, this fee may be imposed and collected only if its amount is set forth in the contract with the tenant. Also, the fee may not exceed the greater of $20 or 20 percent of the monthly rent. In addition to the late fee, any reasonable expense incurred by an owner as a result of rent collection or lien enforcement may be charged to the tenant.

B. SECTION DIRECTORY:

Section 1: Amends s. 83.806, F.S., revising requirements for the advertisement of the sale or disposition of property held in a self-service storage facility, limiting the maximum value of certain property under certain circumstances, and providing options and notice requirements for the disposition of motor vehicles or watercraft claimed to be subject to a lien.

Section 2: Amends s. 83.808, F.S., authorizing a facility or unit owner to charge a tenant certain fees under certain conditions

Section 3: Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

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[8] *Muns v. Shurgard Income Properties Fund 16-Limited Partnership*, 682 So.2d 166 (Fla. 4th DCA 1996).

[9] s. 713.78, F.S., relates to liens for recovering, towing, or storing vehicles and vessels. The statute requires owners to pay towing fees and provides responsibilities to obtain possession of the vehicle or vessel.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could increase the use of Internet-based sales by storage facilities, and these sales would likely benefit the website hosting the sales. Additionally, the use of Internet-based sales may increase the number of bidders on items from a delinquent tenant's storage unit and result in higher prices for items sold. As a result, there may be additional funds to pay the storage facility's lien and perhaps additional surplus fund for the tenant.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

There appears to be no rulemaking authority added or amended.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 22, 2017, the Careers & Competition Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment allows facility owners to sell motor vehicles and watercraft in the same manner as other property under s. 83.806, F.S. This analysis is drafted to the committee substitute as passed by the Careers & Competition Subcommittee.

A bill to be entitled

An act relating to self-service storage facilities; amending s. 83.806, F.S.; providing that a lien sale may be conducted on certain websites; providing that a facility or unit owner is not required to hold a license to post property for online sale; limiting the maximum value of certain property under certain circumstances; providing options for the disposition of motor vehicles or watercraft claimed to be subject to a lien; amending s. 83.808, F.S.; authorizing a facility or unit owner to charge a tenant certain fees under certain conditions; providing an effective date.

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

Section 1. Subsection (4) of section 83.806, Florida Statutes, is amended, and subsections (9) and (10) are added to that section, to read:

83.806 Enforcement of lien.—An owner's lien as provided in s. 83.805 may be satisfied as follows:

(4) After the expiration of the time given in the notice, an advertisement of the sale or other disposition shall be published once a week for 2 consecutive weeks in a newspaper of general circulation in the area where the self-service storage facility or self-contained storage unit is located.

(a) A lien sale may be conducted on a public website that customarily conducts personal property auctions. The facility or unit owner is not required to hold a license to post property for online sale. Inasmuch as any sale may involve property of more than one tenant, a single advertisement may be used to dispose of property at any one sale.

(b) ~~(a)~~ The advertisement shall include:

1. A brief and general description of what is believed to constitute the personal property contained in the storage unit, as provided in paragraph (2)(b).

2. The address of the self-service storage facility or the address where the self-contained storage unit is located and the name of the tenant.

3. The time, place, and manner of the sale or other disposition. The sale or other disposition shall take place at least ~~not sooner than~~ 15 days after the first publication.

(c) ~~(b)~~ If there is no newspaper of general circulation in the area where the self-service storage facility or self-contained storage unit is located, the advertisement shall be posted at least 10 days before the date of the sale or other disposition in at least ~~not fewer than~~ three conspicuous places in the neighborhood where the self-service storage facility or self-contained storage unit is located.

(9) If the rental agreement contains a limit on the value of property stored in the tenant's storage space, the limit is

deemed to be the maximum value of the property stored in such space.

(10) If a lien is claimed on property that is a motor vehicle or a watercraft and rent and other charges related to the property remain unpaid or unsatisfied for 60 days after the maturity of the obligation to pay the rent and other charges, the facility or unit owner may sell the property pursuant to this section or have the property towed. If a motor vehicle or watercraft is towed, the facility or unit owner is not liable for the motor vehicle or watercraft or any damages to the motor vehicle or watercraft once a wrecker takes possession of the property. The wrecker taking possession of the property must comply with all notification and sale requirements provided in s. 713.78.

Section 2. Subsection (3) is added to section 83.808, Florida Statutes, to read:

83.808 Contracts.—

(3) A facility or unit owner may charge a tenant a reasonable late fee for each period that he or she does not pay rent due under the rental agreement. The amount of the late fee and the conditions for imposing such fee must be stated in the rental agreement or in an addendum to such agreement. For purposes of this subsection, a late fee of $20, or 20 percent of the monthly rent, whichever is greater, is reasonable and does not constitute a penalty. In addition to late fees, a facility

or unit owner may also charge a tenant a reasonable fee for any expenses incurred as a result of rent collection or lien enforcement.

Section 3. This act shall take effect July 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 441 Court Records
SPONSOR(S): Diamond
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/SB 202

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		MM MacNamara	Bond NB
2) Oversight, Transparency & Administration Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Florida Rules of Judicial Administration require a clerk of court to designate and maintain records containing confidential information. The rules also require the filer of any document containing confidential information to file a "Notice of Confidential Information within Court Filing" along with the document. This notice must indicate that either the entire document is confidential or identify the location of the confidential information within the document being filed.

The bill provides immunity from liability for clerks of court for the inadvertent release of information that is made confidential by the Florida Rules of Judicial Administration where the filer fails to disclose the existence of the confidential information to the clerk as required by court rule. The bill also amends current law to remove outdated language.

The bill may have a positive fiscal impact on state government expenditures.

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.[1] This right to access public records includes records made or received by legislative, executive, and judicial branches of government.[2]

A clerk of court is a custodian of public records. As custodian, clerks are required to provide access and copies of public records, if the requesting party is entitled by law to view a given record. Certain records are confidential or exempt from disclosure under public records laws, including personal information of certain individuals such as law enforcement personnel, firefighters, justices and judges, state attorneys, magistrates, and others as specified by statute.[3] A clerk of court, as the custodian of public records, is responsible for maintaining official records and court records that may be confidential and exempt.

Official Records

An official record is recorded by the clerk as part of a general series called "Official Records" and includes such documents as court orders, mortgages, deeds, notices of levy, tax warrants, and liens.[4]

A person who prepares or files an official record is generally not supposed to include social security, bank account, debit, charge, or credit card numbers in the document. However, if a person's social security number or financial account number is included in an official record, the person or his or her attorney or legal guardian may request that the information be redacted. If the clerk does not receive a redaction request, the sensitive information may be included in the records available to the public.[5]

If the record containing a social security number or financial account number is in an electronic format, the clerk as county recorder[6] must use his or her best efforts to keep the information confidential and exempt without a request for redaction. However, the clerk is immune from liability for an inadvertent release of this sensitive information.[7]

Court Records and Confidential Information

Florida Rule of Judicial Administration 2.420(d) sets out procedures for determining confidentiality of court records. It requires filers and allows parties and affected non-parties to file a "Notice of Confidential Information within Court Filing," which triggers a review by the clerk of the court and a process to temporarily or permanently maintain the information as confidential. Once the form notice is filed, the clerk court must review filings identified as containing confidential information to determine whether the information is facially subject to confidentiality.[8]

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[1] Fla. Const. art. I, s. 24(a).
[2] *Id.*
[3] s. 119.071(4)(d), F.S.
[4] s. 28.222(2) and (3), F.S.
[5] s. 119.0714(3)(a), F.S.
[6] s. 28.22(1), F.S., provides that the clerk is the county recorder. "The clerk of the circuit court shall be the recorder of all instruments that he or she may be required or authorized by law to record in the county where he or she is clerk."
[7] s. 119.0714(3)(e), F.S.
[8] Fla. R. Jud. Admin. 2.420(d)(2)(B).

For court records filed with the clerk of court on and after January 1, 2012, the clerk must maintain any social security numbers and financial account numbers in those records as confidential and exempt from disclosure under public records law. Clerks are not liable for inadvertently releasing social security, bank account, charge, debit, and credit card numbers found in court records that were filed before January 1, 2012.[9] However, a person whose social security number or financial account number is contained in an older record, or his or her attorney or legal guardian, may request that the clerk redact the numbers from the record.[10]

Rule 2.420(d)(1)(B) of the Florida Rules of Judicial Administration requires the clerk of the court to designate and maintain the confidentiality of the following records or information, which are exempt from disclosure under existing law:

- Chapter 39, F.S., records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment (ss. 39.0132(3) and (4)(a), F.S).
- Adoption records (s. 63.162, F.S).
- Social Security, bank account, charge, debit, and credit card numbers (s. 119.0714(1)(i)-(j) and (2)(a)-(e), F.S.).
- HIV test results and the identity of any person upon whom an HIV test has been performed (s. 381.004(2)(e), F.S.).
- Records, including test results, held by the Department of Health or its authorized representatives relating to sexually transmissible diseases (s. 384.29, F.S.).
- Birth records and portions of death and fetal death records (ss. 382.008(6) and 382.025(1), F.S.).
- Information that can be used to identify a minor petitioning for a waiver of parental notice when seeking to terminate pregnancy (s. 390.01116, F.S.).
- Clinical records under the Baker Act (s. 394.4615(7), F.S.).
- Records of substance abuse service providers which pertain to the identity, diagnosis, and prognosis of and service provision to individuals (s. 397.501(8), F.S.).
- Clinical records of criminal defendants found incompetent to proceed or acquitted by reason of insanity (s. 916.107(8), F.S.).
- Estate inventories and accountings (s. 733.604(1), F.S.).
- The victim's address in a domestic violence action on petitioner's request (s. 741.30(3)(b), F.S.).
- Protected information regarding victims of child abuse or sexual offenses (ss. 119.071(2)(h) and 119.0714(1)(h), F.S.).
- Gestational surrogacy records (s. 742.16(9), F.S.).
- Guardianship reports, orders appointing court monitors, and orders relating to findings of no probable cause in guardianship cases (ss. 744.1076 and 744.3701, F.S.).
- Grand jury records (ss. 905.17 and 905.28(1), F.S.).
- Records acquired by courts and law enforcement regarding family services for children (s. 984.06(3)-(4), F.S.).
- Juvenile delinquency records (ss. 985.04(1) and 985.045(2), F.S.).
- Records disclosing the identity of persons subject to tuberculosis proceedings and records held by the Department of Health or its authorized representatives relating to known or suspected cases of tuberculosis or exposure to tuberculosis (ss. 392.545 and 392.65, F.S.).
- Complete presentence investigation reports (Fla. R. Crim. P. 3.712).
- Forensic behavioral health evaluations under ch. 916, F.S. (s. 916.1065, F.S.).
- Eligibility screening, substance abuse screening, behavioral health evaluations, and treatment status reports for defendants referred to or considered for referral to a drug court program (s. 397.334(10)(a), F.S.).

[9] s. 119.0714(2)(d), F.S.
[10] *See* s. 119.0714(2), F.S.

Similarly, Rule 2.425, Fla. R. Jud. Admin., relates to the minimization of filing sensitive information. Under this rule, designated sensitive information is formatted to limit the amount of confidential information filed with a court. In relevant part, the rule, unless authorized by statute, rule of court, or court order provides that court filings should not contain any portion of an individual's:

- Social security number,
- Bank account number,
- Credit card account number,
- Charge account number, or
- Debit account number.[11]

Rule 2.515 of the Florida Rules of Judicial Administration requires that every document of a party represented by an attorney must be signed by at least one attorney of record. The attorney's signature constitutes a certificate by the attorney that, among other things, the document contains no confidential or sensitive information or that any such information has been protected by identifying the confidential or sensitive information in accordance with the requirements of rules 2.420 and 2.425 of the Florida Rules of Judicial Administration.

Clerks of Court Liability

In addition to the immunity provided to clerks of court under s. 119.0714(2)(d), F.S., for certain information provided before January 1, 2012, and s. 119.0714(3)(e), F.S., for clerks as county recorders, clerks enjoy immunity from liability under common law. This may be in the form of either judicial immunity or qualified immunity.

The doctrine of judicial immunity insures that judges are immune from liability for damages for acts committed within their judicial jurisdiction and is essential to the preservation of an independent judiciary. Judges enjoy absolute immunity for acts performed in the course of their judicial capacities unless they clearly act without jurisdiction. This doctrine has been extended to quasi-judicial officials, such as a clerk of court, performing judicial acts.[12] In Florida, judicial immunity applies to all forms of suits against judicial officials, not just suits for money damages.

Acts or omissions by a government official that are not protected by absolute immunity, such as judicial immunity, may be protected by qualified immunity. The central purpose of qualified immunity is to protect public officials from undue interferences with their duties and from potentially disabling threats of liability. The doctrine insulates government officials from personal liability for money damages for actions taken pursuant to their discretionary authority.

Qualified immunity is both an immunity from liability and an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial. Under the doctrine, officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Qualified immunity applies to all except the plainly incompetent or those who knowingly violate the law and turns upon the objective legal reasonableness of the official's action assessed in light of the legal rules that were clearly established at the time when the action was taken. To abrogate or limit a government official's immunity, a statute must be clear.[13]

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[11] Fla. R. Jud. Admin. 2.425(a)(3).
[12] *See Zoba v. City of Coral Springs*, 189 So.3d 888 (Fla. 4th DCA 2016); *see also Fong v. Forman*, 105 So.3d 650 (Fla. 4th DCA 2013).
[13] *Bates v. St. Lucie County Sheriff's Office*, 31 So.3d 210, 213 (Fla. 4th DCA 2010).

Effect of Proposed Changes

The bill creates paragraph (2)(g) in s. 119.0714, F.S., to provide that a clerk of court is not liable clerks where confidential information is inadvertently disclosed because the filer failed to disclose the existence of the confidential information to the clerk as required by Fla. R. Jud. Admin. 2.420(d)(2). This immunity applies to information that is made confidential by the Florida Rules of Judicial Administration.

The bill also amends s. 119.0714(2)(e), F.S., to remove outdated language.

B. SECTION DIRECTORY:

Section 1 amends s. 119.0714, F.S., related to court files; court records; official records.

Section 2 provides and effective date of July 1, 2017.

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 has the potential to result in an indeterminate positive impact for clerks through savings on legal fees.[14]

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.

[14] 2017 CCOC Bill Analysis, p. 3.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to court records; amending s. 119.0714, F.S.; providing an exemption from liability for the inadvertent release of certain information by the clerk of court; deleting obsolete language; providing an effective date.

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

Section 1. Paragraph (e) of subsection (2) of section 119.0714, Florida Statutes, is amended, and paragraph (g) is added to that subsection, to read:

119.0714 Court files; court records; official records.—

(2) COURT RECORDS.—

(e)1. ~~On January 1, 2012, and thereafter,~~ The clerk of the court must keep social security numbers confidential and exempt as provided for in s. 119.071(5)(a), and bank account, debit, charge, and credit card numbers exempt as provided for in s. 119.071(5)(b), without any person having to request redaction.

2. Section 119.071(5)(a)7. and 8. does not apply to the clerks of the court with respect to court records.

(g) The clerk of the court is not liable for the inadvertent release of information made confidential by the Florida Rules of Judicial Administration if the filer fails to disclose the existence of the confidential information to the

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

clerk of the court as required by court rule.

Section 2. This act shall take effect July 1, 2017.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 441 (2017)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Diamond offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Paragraph (e) of subsection (2) of section 119.0714, Florida Statutes, is amended, and paragraph (g) is added to that subsection, to read:

119.0714 Court files; court records; official records.-

(2) COURT RECORDS.—

(e)1. ~~On January 1, 2012, and thereafter~~, The clerk of the court must keep social security numbers confidential and exempt as provided for in s. 119.071(5)(a), and bank account, debit, charge, and credit card numbers exempt as provided for in s. 119.071(5)(b), without any person having to request redaction.

2. Section 119.071(5)(a)7. and 8. does not apply to the clerks of the court with respect to court records.

(g) The clerk of the court is not liable for the ~~inadvertent~~ release of information which is required by the Florida Rules of Judicial Administration to be identified by the filer as ~~made~~ confidential ~~by the Florida Rules of Judicial Administration~~ if the filer fails to make the required identification ~~disclose the existence~~ of the confidential information to the clerk of the court~~. as required by court rule~~.

Section 2. This act shall take effect July 1, 2017.

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act relating to court records; amending s. 119.0714, F.S.; providing an exemption from liability for the release of certain information by the clerk of court; deleting obsolete language; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 483 Estoppel Certificates
SPONSOR(S): Civil Justice & Claims Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 398

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

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. 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. 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.

The bill amends the law governing homeowners', cooperative and condominium associations (collectively referred to herein as "association") by:

- Reducing the time that an association has to respond to a request for an estoppel certificate from 15 days to 10 business days.
- Providing standards for the issuance, form, and delivery of an estoppel certificate.
- Providing that an estoppel certificate is effective for 30 or 35 days depending upon the method of delivery.
- Providing that an association waives the right to collect moneys owed in excess of those stated in the estoppel certificate.
- Establishing the maximum fee that an association may charge for the issuance of an estoppel certificate and authorizing additional fees in limited circumstances. The base fee is $200.
- Standardizing the provisions over condominium, cooperative, and homeowners' association laws.

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

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Condominium[1] and cooperative[2] 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' association made up of parcel owners.[3] 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 parcel 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 or unit.[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 usually insist that all assessments be brought current through the date of sale, and an owner's title insurance company insures the buyer should the closing agent not properly see to payment of assessments through 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. 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. The association is legally bound 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.[6]

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.[7] A cooperative association may also charge a fee, but there is currently no similar condition in ch. 719, F.S., for cooperative associations to establish such fee by written resolution. Current law also provides no limitation on the amount of the fee that may be charged by a condominium or cooperative association other than that such amount must be "reasonable."[8] There is no reasonableness requirement for the fee charged by a homeowners' association. 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.[9] The time for payment of the fee to a cooperative

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[1] s. 718.103(2), F.S.
[2] s. 719.103(2), F.S.
[3] s. 720.301(9), F.S.
[4] ss. 718.116(1), 719.108(1), and 720.3085(2)(b), F.S.
[5] ss. 718.116(5), 719.108(4), and 720.3085, F.S.
[6] ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.
[7] ss. 718.116(8)(d) and 720.30851(3), F.S.
[8] ss. 718.116(8)(c) and 719.108(6), F.S.
[9] ss. 718.116(8)(d) and 720.30851(3), F.S.

association is not provided in current law. 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.[10] 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.[11] 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.

An association is required to provide an estoppel certificate within 15 days after receiving a written request[12] from a unit or parcel owner, unit or parcel mortgagee, or the designee of the owner or mortgagee.[13] The cooperative law does not currently require that a cooperative association provide an estoppel certificate to the designee of the owner or mortgagee.[14] 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.[15] An estoppel certificate issued by a cooperative association must only set forth the amount of assessments or other moneys owed.[16] 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.

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.[17] 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.

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.[18] The prevailing party is entitled to recover reasonable attorney's fees and costs.[19]

Effect of Proposed Changes

The bill amends ss. 718.116(8), 719.108(6), and 720.30851, F.S., relating to estoppel certificates for condominiums, cooperatives, and homeowners' associations, respectively. These amendments make

[10] *Id.*
[11] *Id.*
[12] s. 718.116(8), F.S.
[13] ss. 718.116(8) and 720.30851, F.S.
[14] s. 719.108(6), F.S.
[15] *Id.*
[16] s. 719.108(6), F.S.
[17] ss. 718.116(8)(a), 719.108(6), and 720.30851(1), F.S.
[18] ss. 718.116(8)(b) and 720.30851(2), F.S.
[19] *Id.*

the effect of all three provisions identical. The bill provides that the association must issue an estoppel certificate within 10 business days of receiving a request from a unit or parcel owner, a unit or parcel mortgagee, or an owner's or mortgagee's designee. Requests may be made in either written or electronic format. The certificate must be provided by hand delivery, regular mail, or electronic transmission to the requestor on the date the certificate is issued.

The bill provides that an estoppel certificate must include the following information:

- Date of issuance;
- Name of the unit or parcel owner reflected in the books and records of the association;
- Unit or parcel designation and address;
- Parking or garage space number, if any;
- Storage locker number, if any;
- Attorney's name and contact information if the account is delinquent and has been turned over to the attorney for collection;
- Fee for the preparation and delivery of the estoppel certificate;
- Name of the requestor;
- Assessment amount, frequency of payment, the date through which the assessment is paid, and the date upon which the next installment of the assessment is due;
- An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance of the certificate;
- If there are capital contribution, resale, transfer, association application or other fees due and the amount;
- Any open violations of the governing documents or rules and regulations noticed to the unit or parcel owner in the association official records;
- Whether approval by the board of directors is required for transfer of the unit or parcel;
- A list of utilities provided to the unit or parcel which are included in the assessment paid to the association;
- A list of all recreational or land leases to the association affecting the unit or parcel;
- A list of, and contact information for, all other associations of which the unit or parcel is a member;
- A description of any pending or threatened litigation or administrative proceedings in which the association is party or which otherwise affect the association;
- Contact information for all insurance maintained by the association; and
- The signature of an officer or authorized agent of the association.

The bill provides an effective period for an estoppel certificate. Certificates that are hand delivered or sent by electronic means have a 30-day effective period. Certificates delivered by regular mail have a 35-day effective period. If additional information becomes available or a mistake is discovered regarding the certificate, an amended certificate may be delivered. The amended certificate becomes effective if the sale or mortgage has not been completed. A fee may not be charged for the amended certificate and the amended certificate restarts the effective period upon delivery.

The bill provides that an association waives the right to collect any moneys owed in excess of the amount specified in the estoppel certificate from any person, which would include any owner, who in good faith relies upon the certificate and from that person's successors and assigns.

The bill provides that the fee for the preparation and delivery of an estoppel certificate may not exceed $200 if there are no delinquent fees owed by the applicable unit or parcel to the association on the date the certificate is issued. If a certificate is requested on an expedited basis and delivered within 3 business days, the association may charge an additional fee of $100. If a delinquent fee is owed to the association, an additional fee not to exceed $200 may be added to the estoppel certificate.

The bill provides that if an association does not provide the certificate within 10 business days of a proper request, a fee may not be charged for the preparation or delivery of the estoppel certificate. If an

association fails to deliver the certificate within 15 days, it waives any claim, including for a lien against the unit or parcel, against a purchaser and mortgagee who would have relied on the estoppel certificate for any amount that is owed to the association through the date of closing and that should have been shown on the estoppel certificate.

The bill provides a schedule of maximum aggregate fees if an owner of multiple units or parcels asks for estoppel certificates. The schedule only applies if there are no past due monetary obligations on any of the units or parcels and the certificates are requested simultaneously. In the aggregate, the fees may not exceed:

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

The bill provides that a written resolution by the board or provided by a written management, bookkeeping, or maintenance contract is required to charge a fee for the preparation and delivery of the certificate. The fee is payable upon preparation of the estoppel certificate. If the fee is to be paid in conjunction with the sale or mortgage of a unit but closing does not occur, the fee shall be refunded to a payor other than the unit owner. The payor must make the request within 30 days after the closing date for which the certificate was sought and must be in written format accompanied by reasonable documentation that the closing sale did not occur. The fee must be refunded within 30 days of receiving the request for refund. The refund is the obligation of the unit owner and the association may collect the fee from the unit owner in the same manner as an assessment against the unit.

The bill make numerous changes to the laws over cooperative associations to bring it in line with the laws over condominium and homeowners' associations.

B. SECTION DIRECTORY:

Section 1 amends s. 718.116(8), F.S., relating to estoppel certificates for condominiums.

Section 2 amends s. 719.108(6), F.S., relating to estoppel certificates for cooperatives.

Section 3 amends s. 720.30851, F.S., relating to estoppel certificates for homeowners' associations.

Section 4 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides limits on the amount associations may charge for preparation and delivery of the estoppel certificate. To the extent that this limit differs from the current "reasonable" charges, associations and unit or parcel owners may realize benefits or detriments.

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.

In *Allied Structural Steel Co. v. Spannaus*,[20] the United States Supreme Court 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.

Referring to the *Allied* opinion, the Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.*[21] 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?

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[20] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).
[21] *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774, 779 (Fla. 1979).

(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?

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to estoppel certificates; amending ss. 718.116, 719.108, and 720.30851, F.S.; revising requirements relating to the issuance of an estoppel certificate to specified persons; requiring a condominium, cooperative, or homeowners' association to designate a street or e-mail address on its website for estoppel certificate requests; specifying delivery requirements for an estoppel certificate; requiring that an estoppel certificate contain certain information; providing an effective period for an estoppel certificate based upon the date of issuance and form of delivery; providing that an association waives a specified claim against a person or such person's successors or assigns who in good faith rely on the estoppel certificate; prohibiting an association from charging a preparation and delivery fee or making certain claims if it fails to deliver an estoppel certificate within certain timeframes; revising fee requirements for preparing and delivering an estoppel certificate under various circumstances; authorizing the statement of moneys due to be delivered in one or more estoppel certificates under certain circumstances; providing limits on a total fee charged for the preparation and delivery of estoppel

certificates; requiring that the authority to charge a fee for the estoppel certificate be established by a specified written resolution or provided by a written management, bookkeeping, or maintenance contract; deleting obsolete provisions; conforming provisions to changes made by the act; providing an effective date.

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

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

718.116 Assessments; liability; lien and priority; interest; collection.—

(8) Within 10 business ~~15~~ days after receiving a written or electronic request therefor from a unit owner or the unit owner's ~~his or her~~ designee, or a unit mortgagee or the unit mortgagee's ~~his or her~~ designee, the association shall issue the estoppel ~~provide a~~ certificate. Each association shall designate on its website a person or entity with a street or e-mail address for receipt of a request for an estoppel certificate issued pursuant to this section. The estoppel certificate must be provided by hand delivery, regular mail, or e-mail to the requestor on the date of issuance of the estoppel certificate ~~signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit~~

~~owner with respect to the condominium parcel~~.

(a) The estoppel certificate must contain all of the following information and must be substantially in the following form:

1. Date of issuance:....

2. Name of the unit owner:....

3. Unit designation and address:....

4. Parking or garage space number, if any:....

5. Storage locker number, if any:....

6. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection. No fee may be charged for this information.

7. Fee for the preparation and delivery of the estoppel certificate:....

8. Name of the requestor:....

9. Assessment information and other information:

ASSESSMENT INFORMATION:

a. The regular periodic assessment levied against the unit is $.... per ...(insert frequency of payment)....

b. The regular periodic assessment is paid through ...(insert date paid through)....

c. The next installment of the regular periodic assessment is due ...(insert due date)... in the amount of $.....

d. An itemized list of all assessments, special

assessments, and other moneys owed on the date of issuance to the association by the unit owner for a specific unit is provided.

e. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.

OTHER INFORMATION:

f. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? ...(Yes)... ...(No).... If yes, specify the type and the amount of the fee.

g. What is the amount, if any, of an association application fee?

h. Is there a credit balance on the current account? ...(Yes)... ...(No).... If yes, provide the following information:

Yes, a balance of $.... will be transferred to the new owner account.

Yes, a balance of $.... will be transferred to the seller by the association.

i. Is there any violation of rule or regulation noticed to

the unit owner in the association official records? ...(Yes)... ...(No)....

j. Is approval by the board of directors of the association required for the transfer of the unit? ...(Yes)... ...(No)....

k. Do rules or regulations applicable to the unit provide for a right of first refusal in favor of the members or association? ...(Yes)... ...(No).... If yes, include applicable rules or regulations.

l. Provide a list of utilities provided to the unit which are included in the assessments paid to the association.

m. Provide a list of all recreational or land leases to the association affecting the unit.

n. Provide a list of, and contact information for, all other associations of which the unit is a member.

o. Provide a description of any pending or threatened litigation or administrative proceedings in which the association is a party or which otherwise affect the association.

p. Provide contact information for all insurance maintained by the association.

q. Provide the signature of an officer or authorized agent of the association.

The association, at its option, may include additional

information in the estoppel certificate ~~Any person other than the owner who relies upon such certificate shall be protected thereby~~.

(b) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the unit has not been completed during the effective period. A fee may not be charged for an amended estoppel certificate. An amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(c) An association waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns.

(d) If an association receives a request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, and fails to deliver the estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that

estoppel certificate. If the association fails to deliver the estoppel certificate within 15 business days, the association waives any claim, including a claim for a lien against the unit, against a purchaser and mortgagee of the unit who would have relied on the estoppel certificate, and the purchaser's and mortgagee's successors and assigns, for any amount that is owed to the association through the date of closing and that should have been shown on the estoppel certificate.

(e) ~~(b)~~ A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney ~~attorney's~~ fees.

(f) ~~(c)~~ Notwithstanding any limitation on transfer fees contained in s. 718.112(2)(i), an ~~the~~ association or its authorized agent may charge a reasonable fee for the preparation and delivery of an estoppel certificate, which may not exceed $200 if, on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable unit. If an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional fee of $100. If a delinquent amount is owed to the association for the applicable unit, an additional fee for the estoppel certificate may not exceed $200 ~~for the preparation of the certificate. The amount of the fee must be included on the certificate~~.

(g) If estoppel certificates for multiple units owned by the same owner are simultaneously requested from the same association and there are no past due monetary obligations owed to the association, the statement of moneys due for those units may be delivered in one or more estoppel certificates, and, even though the fee for each unit shall be computed as set forth in paragraph (f), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

1. For 25 or fewer units, $750.

2. For 26 to 50 units, $1,000.

3. For 51 to 100 units, $1,500.

4. For more than 100 units, $2,500.

(h) ~~(d)~~ The authority to charge a fee for the preparation and delivery of the estoppel certificate must ~~shall~~ be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate. If the certificate is requested in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the unit owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The

refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as an assessment as provided in this section.

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

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

(6) Within 10 business ~~15~~ days after receiving a written or electronic request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, the association shall issue the estoppel certificate. Each association shall designate on its website a person or entity with a street or e-mail address for receipt of a request for an estoppel certificate issued pursuant to this section. The estoppel certificate must be provided by hand delivery, regular mail, or e-mail to the requestor on the date of issuance of the estoppel certificate.

(a) The estoppel certificate must contain all of the following information and must be substantially in the following form:

1. Date of issuance:....

2. Name of the unit owner:....

3. Unit designation and address:....

4. Parking or garage space number, if any:....

5. Storage locker number, if any:....

6. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection. No fee may be charged for this information.

7. Fee for the preparation and delivery of the estoppel certificate:....

8. Name of the requestor:....

9. Assessment information and other information:

ASSESSMENT INFORMATION:

a. The regular periodic assessment levied against the unit is $.... per ...(insert frequency of payment)....

b. The regular periodic assessment is paid through ...(insert date paid through)....

c. The next installment of the regular periodic assessment is due...(insert due date)... in the amount of $.....

d. An itemized list of all assessments, special assessments, and other moneys owed by the unit owner on the date of issuance to the association for a specific unit is provided.

e. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.

OTHER INFORMATION:

f. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? ...(Yes)... ...(No).... If yes, specify the type and amount of the fee.

g. What is the amount, if any, of an association application fee?

h. Is there a credit balance on the current account? ...(Yes)... ...(No).... If yes, provide the following information:

Yes, a balance of $.... will be transferred to the new owner account.

Yes, a balance of $.... will be transferred to the seller by the association.

i. Is there any violation of rule or regulation noticed to the unit owner in the association official records? ...(Yes)... ...(No)....

j. Is approval by the board of directors of the association required for the transfer of the unit? ...Yes... ...(No)....

k. Do rules or regulations applicable to the unit provide for a right of first refusal in favor of the members or association? ...(Yes)... ...(No).... If yes, include applicable rules or regulations.

l. Provide a list of utilities provided to the unit which

are included in the assessments paid to the association.

m. Provide a list of all recreational or land leases to the association affecting the unit.

n. Provide a list of, and contact information for, all other associations of which the unit is a member.

o. Provide a description of any pending or threatened litigation or administrative proceedings in which the association is a party or which otherwise affect the association.

p. Provide contact information for all insurance maintained by the association.

q. Provide the signature of an officer or authorized agent of the association.

The association, at its option, may include additional information in the estoppel certificate.

(b) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the unit has not been completed during the effective period. A fee may not be charged for an amended estoppel certificate. An

amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(c) An association waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns.

(d) If an association receives a request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, and fails to deliver the estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that estoppel certificate. If the association fails to deliver the estoppel certificate within 15 business days, the association waives any claim, including a claim for a lien against the unit, against a purchaser and mortgagee of the unit who would have relied on the estoppel certificate, and the purchaser's and mortgagee's successors and assigns, for any amount that is owed to the association through the date of closing and that should have been shown on the estoppel certificate.

(e) A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney fees.

(f) Notwithstanding any limitation on transfer fees contained in s. 719.106(1)(i), an association or its authorized agent may charge a reasonable fee for the preparation and delivery of an estoppel certificate, which may not exceed $200 if, on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable unit. If an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional fee of $100. If a delinquent amount is owed to the association for the applicable unit, an additional fee for the estoppel certificate may not exceed $200.

(g) If estoppel certificates for multiple units owned by the same owner are simultaneously requested from the same association and there are no past due monetary obligations owed to the association, the statement of moneys due for those units may be delivered in one or more estoppel certificates, and, even though the fee for each unit shall be computed as set forth in paragraph (f), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

1. For 25 or fewer units, $750.

2. For 26 to 50 units, $1,000.

3. For 51 to 100 units, $1,500.

4. For more than 100 units, $2,500.

(h) The authority to charge a fee for the preparation and delivery of the estoppel certificate must be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate. If the certificate is requested in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the unit owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as an assessment as provided in this section ~~by a unit owner or mortgagee, the association shall provide a certificate stating all assessments and other moneys owed to the association by the unit owner with respect to the cooperative parcel~~. ~~Any person other than the unit owner who relies upon such certificate shall be protected thereby. Notwithstanding any limitation on transfer fees contained in s. 719.106(1)(i), the association or its authorized agent may charge a reasonable fee for the preparation of the certificate.~~

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

720.30851 Estoppel certificates.—Within 10 business ~~15~~

days after receiving a written or electronic ~~the date on which a~~ request for an estoppel certificate from a parcel owner or the parcel owner's designee, or a parcel mortgagee or the parcel mortgagee's designee, the association shall issue the estoppel certificate. Each association shall designate on its website a person or entity with a street or e-mail address for receipt of a request for an estoppel certificate issued pursuant to this section. The estoppel certificate must be provided by hand delivery, regular mail, or e-mail to the requestor on the date of issuance of the estoppel certificate.

(1) The estoppel certificate must contain all of the following information and must be substantially in the following form:

(a) Date of issuance:....

(b) Name of the parcel owner:....

(c) Parcel designation and address:....

(d) Parking or garage space number, if any:....

(e) Storage locker number, if any:....

(f) Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection. No fee may be charged for this information.

(g) Fee for the preparation and delivery of the estoppel certificate:....

(h) Name of the requestor:....

(i) Assessment information and other information:

ASSESSMENT INFORMATION:

1. The regular periodic assessment levied against the parcel is $.... per ...(insert frequency of payment)....

2. The regular periodic assessment is paid through ...(insert date paid through)....

3. The next installment of the regular periodic assessment is due ...(insert due date)... in the amount of $.....

4. An itemized list of all assessments, special assessments, and other moneys owed on the date of issuance to the association by the parcel owner for a specific parcel is provided.

5. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the estoppel certificate is provided. In calculating the amounts that are scheduled to become due, the association may assume that any delinquent amounts will remain delinquent during the effective period of the estoppel certificate.

OTHER INFORMATION:

6. Is there a capital contribution fee, resale fee, transfer fee, or other fee due? ...(Yes)... ...(No).... If yes, specify the type and amount of the fee.

7. What is the amount, if any, of an association

application fee?

8. Is there a credit balance on the current account? ...(Yes)... ...(No).... If yes, provide the following information:

Yes, a balance of $.... will be transferred to the new owner account.

Yes, a balance of $.... will be transferred to the seller by the association.

9. Is there any violation of rule or regulation noticed to the parcel owner in the association official records? ...(Yes)... ...(No)....

10. Is approval by the board of directors of the association required for the transfer of the parcel? ...(Yes)... ...(No)....

11. Do rules or regulations applicable to the parcel provide for a right of first refusal in favor of the members or association? ...(Yes)... ...(No).... If yes, include applicable rules or regulations.

12. Provide a list of utilities provided to the parcel which are included in the assessments paid to the association.

13. Provide a list of all recreational or land leases to the association affecting the parcel.

14. Provide a list of, and contact information for, all other associations of which the parcel is a member.

15. Provide a description of any pending or threatened

litigation or administrative proceedings in which the association is a party or which otherwise affect the association.

16. Provide contact information for all insurance maintained by the association.

17. Provide the signature of an officer or authorized agent of the association.

The association, at its option, may include additional information in the estoppel certificate.

(2) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the parcel has not been completed during the effective period. A fee may not be charged for an amended estoppel certificate. An amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(3) An association waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the

estoppel certificate and from the person's successors and assigns.

(4) If an association receives a request for an estoppel certificate from a parcel owner or the parcel owner's designee, or a parcel mortgagee or the parcel mortgagee's designee, and fails to deliver an estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that estoppel certificate. If the association fails to deliver the estoppel certificate within 15 business days, the association waives any claim, including a claim for a lien against the parcel, against a purchaser and mortgagee of the parcel who would have relied on the estoppel certificate, and the purchaser's and mortgagee's successors and assigns, for any amount that is owed to the association through the date of closing and that should have been shown on the estoppel certificate ~~for an estoppel certificate is received from a parcel owner or mortgagee, or his or her designee, the association shall provide a certificate signed by an officer or authorized agent of the association stating all assessments and other moneys owed to the association by the parcel owner or mortgagee with respect to the parcel. An association may charge a fee for the preparation of such certificate, and the amount of such fee must be stated on the certificate~~.

~~(1) Any person other than a parcel owner who relies upon a certificate receives the benefits and protection thereof.~~

(5)~~(2)~~ A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this section, and the prevailing party is entitled to recover reasonable attorney ~~attorney's~~ fees.

(6) An association or its authorized agent may charge a reasonable fee for the preparation and delivery of an estoppel certificate, which may not exceed $200 if on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable parcel. If an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional fee of $100. If a delinquent amount is owed to the association for the applicable parcel, an additional fee for the estoppel certificate may not exceed $200.

(7) If estoppel certificates for multiple parcels owned by the same owner are simultaneously requested from the same association and there are no past due monetary obligations owed to the association, the statement of moneys due for those parcels may be delivered in one or more estoppel certificates, and, even though the fee for each parcel shall be computed as set forth in subsection (6), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

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

(b) For 26 to 50 parcels, $1,000.

(c) For 51 to 100 parcels, $1,500.

(d) For more than 100 parcels, $2,500.

(8)~~(3)~~ The authority to charge a fee for the preparation and delivery of the estoppel certificate must ~~shall~~ be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable upon the preparation of the certificate. If the certificate is requested in conjunction with the sale or mortgage of a parcel but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the parcel owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the parcel owner, and the association may collect it from that owner in the same manner as an assessment as provided in this section.

Section 4. This act shall take effect July 1, 2017.

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Donalds offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

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

718.116 Assessments; liability; lien and priority; interest; collection.—

(8) An association shall designate, and provide when requested, the name and physical or electronic address of a person or entity to be responsible for receiving requests for issuance of an estoppel certificate. In addition, associations having a website shall make such information available thereon. Upon receiving a written or electronic request for an estoppel

certificate from a unit owner, a unit owner's designee, a unit mortgagee, or a unit mortgagee's designee, an association shall issue such certificate to the requesting party within 10 business days. The estoppel certificate shall be delivered by United States mail, by hand delivery, or by electronic transmission, to the requesting party on the date of issuance. For purposes of this section, deposit of the certificate in the United States mail or the electronic delivery of a downloadable link to the certificate, shall constitute delivery. ~~Within 15 days after receiving a written request therefor from a unit owner or his or her designee, or a unit mortgagee or his or her designee, the association shall provide a certificate signed by an officer or agent of the association stating all assessments and other moneys owed to the association by the unit owner with respect to the condominium parcel.~~

(a) The estoppel certificate must contain all of the following information as set forth in the official records of the association and may include additional information as determined by the association:

1. Date of issuance;

2. Name of unit owner reflected in the books and records of the association;

3. Unit designation and address;

4. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for

collection;

5. Fee for the preparation and delivery of the estoppel certificate;

6. Name of the requestor;

7. The amount and frequency of the regular periodic assessment against the unit;

8. The date through which the regular periodic assessment is paid;

9. The date upon which the next installment of the regular periodic assessment is due;

10. An itemized list of all assessments , special assessments, and other moneys owed by the unit owner to the association on the date of issuance;

11. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due during the estoppel certificate's effective period that are known on the date of issuance;

12. Whether there is a capital contribution fee, resale fee, transfer fee, association application fee or other fee due and, if so, the type and amount of the fee due;

13. Whether there are any open violations of the governing documents or rules and regulations of the association noticed to the unit owner in the association's official records;

14. The contact information for all insurance maintained by the association; and

15. The signature of an officer or authorized agent of the association. ~~Any person other than the owner who relies upon such certificate shall be protected thereby.~~

(b) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the unit has not been completed during the effective period. A fee may not be charged for such an amended estoppel certificate. An amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(c) An association waives the right to collect any moneys owed prior to the date of issuance in excess of the amounts specified in the estoppel certificate from any person who, or on whose behalf the certificate was requested, and from such person's successors and assigns.

(d) ~~(b)~~ A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney ~~attorney's~~ fees.

(e) ~~(c)~~ Notwithstanding any limitation on transfer fees

contained in s. 718.112(2)(i), an ~~the~~ association or its authorized agent may charge a reasonable fee for the preparation and delivery of an estoppel certificate, which may not exceed $250 if, on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable unit. If an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional fee of $100. If an estoppel certificate is requested and delivered on a more expedited basis which is less than 3 business days, the association may charge such additional fee as the association and the party requesting the estoppel certificate may mutually agree. If a delinquent amount is owed to the association for the applicable unit, an additional fee for the estoppel certificate may not exceed $200 ~~for the preparation of the certificate. The amount of the fee must be included on the certificate~~.

(f) If an association receives a request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, and fails to deliver the estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that estoppel certificate.

(g) If estoppel certificates for multiple units owned by the same owner are simultaneously requested from the same association and there are no past due monetary obligations owed

to the association, the statement of moneys due for those units may be delivered in one or more estoppel certificates, and, even though the fee for each unit shall be computed as set forth in paragraph (e), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

1. For 25 or fewer units, $750.

2. For 26 to 50 units, $1,000.

3. For 51 to 100 units, $1,500.

4. For more than 100 units, $2,500.

(h) ~~(d)~~ The authority to charge a fee for the preparation and delivery of the estoppel certificate must ~~shall~~ be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable at the time ~~upon the preparation of~~ the certificate is ordered. If a fee for an estoppel certificate is paid in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation that the closing sale did not occur from a payor that is not the unit owner, then the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as an

assessment against the unit as provided in this chapter ~~the certificate is requested in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the unit owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as an assessment as provided in this section.~~

(i) In the event the association fails to issue a refund within the 30 day time period set forth in subparagraph (h), and after all conditions precedent to the issuance of such refund have been satisfied, the payor shall so notify the association in writing. If the association fails to issue the refund within 5 days from the date of such notice, the payor shall be entitled to, and the association shall be required to refund to the payor, a sum equal to 3 times the original refund amount.

(j) The right to a refund as set forth in this section may not be abrogated or abridged by the association or its agent, and any language to the contrary contained within the estoppel certificate shall be a nullity and be given no force or effect. A payor receiving an estoppel certificate containing language indicating that the fee for an estoppel is non-refundable in

full or in part shall be entitled to recover actual damages or minimum damages for the association's failure to comply with this subsection. The minimum damages shall be equal to 3 times the original refund amount.

(k) The fees set forth in this section shall be adjusted every 3 years in an amount equal to the annual increases for that 3-year period in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items. The Department of Business and Professional Regulation shall periodically calculate the fees, rounded to the nearest dollar, and publish the amounts, as adjusted, on its website.

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

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

(6) An association shall designate, and provide when requested, the name and physical or electronic address of a person or entity to be responsible for receiving requests for issuance of an estoppel certificate. In addition, associations having a website shall make such information available thereon. Upon receiving a written or electronic request for an estoppel certificate from a unit owner, a unit owner's designee, a unit mortgagee, or a unit mortgagee's designee, an association shall issue such certificate to the requesting party within 10 business days. The estoppel certificate shall be delivered by

United States mail, by hand delivery, or by electronic transmission, to the requesting party on the date of issuance. For purposes of this section, deposit of the certificate in the United States mail or the electronic delivery of a downloadable link to the certificate, shall constitute delivery. ~~Within 15 days after request by a unit owner or mortgagee, the association shall provide a certificate stating all assessments and other moneys owed to the association by the unit owner with respect to the cooperative parcel. Any person other than the unit owner who relies upon such certificate shall be protected thereby.~~

(a) The estoppel certificate must contain all of the following information as set forth in the official records of the association and may include additional information as determined by the association:

1. Date of issuance;

2. Name of unit owner reflected in the books and records of the association;

3. Unit designation and address;

4. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection;

5. Fee for the preparation and delivery of the estoppel certificate;

6. Name of the requestor;

7. The amount and frequency of the regular periodic

assessment against the unit;

8. The date through which the regular periodic assessment is paid;

9. The date upon which the next installment of the regular periodic assessment is due;

10. An itemized list of all assessments , special assessments, and other moneys owed by the unit owner to the association on the date of issuance;

11. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due during the estoppel certificate's effective period that are known on the date of issuance;

12. Whether there is a capital contribution fee, resale fee, transfer fee, association application fee or other fee due and, if so, the type and amount of the fee due;

13. Whether there are any open violations of the governing documents or rules and regulations of the association noticed to the unit owner in the association's official records;

14. The contact information for all insurance maintained by the association; and

15. The signature of an officer or authorized agent of the association.

(b) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective

period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the unit has not been completed during the effective period. A fee may not be charged for such an amended estoppel certificate. An amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(c) An association waives the right to collect any moneys owed prior to the date of issuance in excess of the amounts specified in the estoppel certificate from any person who, or on whose behalf the certificate was requested, and from such person's successors and assigns.

(d) A summary proceeding pursuant to s. 51.011 may be brought to compel compliance with this subsection, and in any such action the prevailing party is entitled to recover reasonable attorney fees.

(e) Notwithstanding any limitation on transfer fees contained in s. 719.106(1)(i), an ~~the~~ association or its ~~authorized~~ agent may charge a reasonable fee for the preparation and delivery of the estoppel certificate, which may not exceed $250 if, on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable unit. If an estoppel certificate is requested on an expedited basis and

delivered within 3 business days after the request, the association may charge an additional fee of $100. If an estoppel certificate is requested and delivered on a more expedited basis which is less than 3 business days, the association may charge such additional fee as the association and the party requesting the estoppel certificate may mutually agree. If a delinquent amount is owed to the association for the applicable unit, an additional fee for the estoppel certificate may not exceed $200.

(f) If an association receives a request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, and fails to deliver the estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that estoppel certificate.

(g) If estoppel certificates for multiple units owned by the same owner are simultaneously requested from the same association and there are no past due monetary obligations owed to the association, the statement of moneys due for those units may be delivered in one or more estoppel certificates, and, even though the fee for each unit shall be computed as set forth in paragraph (e), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

1. For 25 or fewer units, $750.

2. For 26 to 50 units, $1,000.

3. For 51 to 100 units, $1,500.

4. For more than 100 units, $2,500.

(h) The authority to charge a fee for the preparation and delivery of the estoppel certificate must be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable at the time the certificate is ordered. If a fee for an estoppel certificate is paid in conjunction with the sale or mortgage of a unit but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation that the closing sale did not occur from a payor that is not the unit owner, then the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the unit owner, and the association may collect it from that owner in the same manner as an assessment against the unit as provided in this chapter.

(i) In the event the association fails to issue a refund within the 30 day time period set forth in subparagraph (h), and after all conditions precedent to the issuance of such refund have been satisfied, the payor shall so notify the association in writing. If the association fails to issue the refund within 5 days from the date of such notice, the payor shall be entitled to, and the association shall be required to refund to the payor, a sum equal to 3 times the original refund amount.

(j) The right to a refund as set forth in this section may not be abrogated or abridged by the association or its agent, and any language to the contrary contained within the estoppel certificate shall be a nullity and be given no force or effect. A payor receiving an estoppel certificate containing language indicating that the fee for an estoppel is non-refundable in full or in part shall be entitled to recover actual damages or minimum damages for the association's failure to comply with this subsection. The minimum damages shall be equal to 3 times the original refund amount.

(k) The fees set forth in this section shall be adjusted every 3 years in an amount equal to the annual increases for that 3-year period in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items. The Department of Business and Professional Regulation shall periodically calculate the fees, rounded to the nearest dollar, and publish the amounts, as adjusted, on its website.

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

720.30851 Estoppel certificates.—

(1) An association shall designate, and provide when requested, the name and physical or electronic address of a person or entity to be responsible for receiving requests for issuance of an estoppel certificate. In addition, associations having a website shall make such information available thereon.

Upon receiving a written or electronic request for an estoppel certificate from a unit owner, a unit owner's designee, a unit mortgagee, or a unit mortgagee's designee, an association shall issue such certificate to the requesting party within 10 business days. The estoppel certificate shall be delivered by United States mail, by hand delivery, or by electronic transmission, to the requesting party on the date of issuance. For purposes of this section, deposit of the certificate in the United States mail or the electronic delivery of a downloadable link to the certificate, shall constitute delivery.

(a) The estoppel certificate must contain all of the following information as set forth in the official records of the association and may include additional information as determined by the association:

1. Date of issuance;

2. Name of unit owner reflected in the books and records of the association;

3. Unit designation and address;

4. Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection;

5. Fee for the preparation and delivery of the estoppel certificate;

6. Name of the requestor;

7. The amount and frequency of the regular periodic

assessment against the unit;

8. The date through which the regular periodic assessment is paid;

9. The date upon which the next installment of the regular periodic assessment is due;

10. An itemized list of all assessments , special assessments, and other moneys owed by the unit owner to the association on the date of issuance;

11. An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due during the estoppel certificate's effective period that are known on the date of issuance;

12. Whether there is a capital contribution fee, resale fee, transfer fee, association application fee or other fee due and, if so, the type and amount of the fee due;

13. Whether there are any open violations of the governing documents or rules and regulations of the association noticed to the unit owner in the association's official records;

14. The contact information for all insurance maintained by the association; and

15. The signature of an officer or authorized agent of the association.

(b) An estoppel certificate that is hand delivered or sent by electronic means has a 30-day effective period. An estoppel certificate that is sent by regular mail has a 35-day effective

period. If additional information or a mistake related to the estoppel certificate becomes known to the association within the effective period, an amended estoppel certificate may be delivered and becomes effective if a sale or refinancing of the unit has not been completed during the effective period. A fee may not be charged for such an amended estoppel certificate. An amended estoppel certificate must be delivered on the date of issuance, and a new 30-day or 35-day effective period begins on such date.

(c) An association waives the right to collect any moneys owed prior to the date of issuance in excess of the amounts specified in the estoppel certificate from any person who, or on whose behalf the certificate was requested, and from such person's successors and assigns. ~~Within 15 days after the date on which a request for an estoppel certificate is received from a parcel owner or mortgagee, or his or her designee, the association shall provide a certificate signed by an officer or authorized agent of the association stating all assessments and other moneys owed to the association by the parcel owner or mortgagee with respect to the parcel. An association may charge a fee for the preparation of such certificate, and the amount of such fee must be stated on the certificate.~~

~~(1) Any person other than a parcel owner who relies upon a certificate receives the benefits and protection thereof.~~

(d) ~~(2)~~ A summary proceeding pursuant to s. 51.011 may be

brought to compel compliance with this section, and the prevailing party is entitled to recover reasonable attorney ~~attorney's~~ fees.

(e) An association or its authorized agent may charge a reasonable fee for the preparation and delivery of an estoppel certificate, which may not exceed $250 if, on the date the certificate is issued, no delinquent amounts are owed to the association for the applicable unit. If an estoppel certificate is requested on an expedited basis and delivered within 3 business days after the request, the association may charge an additional fee of $100. If an estoppel certificate is requested and delivered on a more expedited basis which is less than 3 business days, the association may charge such additional fee as the association and the party requesting the estoppel certificate may mutually agree. If a delinquent amount is owed to the association for the applicable unit, an additional fee for the estoppel certificate may not exceed $200.

(f) If an association receives a request for an estoppel certificate from a unit owner or the unit owner's designee, or a unit mortgagee or the unit mortgagee's designee, and fails to deliver the estoppel certificate within 10 business days, a fee may not be charged for the preparation and delivery of that estoppel certificate.

(g) If estoppel certificates for multiple units owned by the same owner are simultaneously requested from the same

association and there are no past due monetary obligations owed to the association, the statement of moneys due for those units may be delivered in one or more estoppel certificates, and, even though the fee for each unit shall be computed as set forth in paragraph (e), the total fee that the association may charge for the preparation and delivery of the estoppel certificates may not exceed, in the aggregate:

1. For 25 or fewer units, $750.

2. For 26 to 50 units, $1,000.

3. For 51 to 100 units, $1,500.

4. For more than 100 units, $2,500.

(h) ~~(3)~~ The authority to charge a fee for the preparation and delivery of the estoppel certificate must ~~shall~~ be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract and is payable at the time ~~upon the preparation of~~ the certificate is ordered. If a fee for an estoppel ~~the~~ certificate is paid ~~requested~~ in conjunction with the sale or mortgage of a parcel but the closing does not occur and no later than 30 days after the closing date for which the certificate was sought the preparer receives a written request, accompanied by reasonable documentation, that the sale did not occur from a payor that is not the parcel owner, the fee shall be refunded to that payor within 30 days after receipt of the request. The refund is the obligation of the parcel owner, and the association may collect

it from that owner in the same manner as an assessment as provided in this chapter ~~section~~.

(i) In the event the association fails to issue a refund within the 30 day time period set forth in subparagraph (h), and after all conditions precedent to the issuance of such refund have been satisfied, the payor shall so notify the association in writing. If the association fails to issue the refund within 5 days from the date of such notice, the payor shall be entitled to, and the association shall be required to refund to the payor, a sum equal to 3 times the original refund amount.

(j) The right to a refund as set forth in this section may not be abrogated or abridged by the association or its agent, and any language to the contrary contained within the estoppel certificate shall be a nullity and be given no force or effect. A payor receiving an estoppel certificate containing language indicating that the fee for an estoppel is non-refundable in full or in part shall be entitled to recover actual damages or minimum damages for the association's failure to comply with this subsection. The minimum damages shall be equal to 3 times the original refund amount.

(2) The fees set forth in this section shall be adjusted every 3 years in an amount equal to the annual increases for that 3-year period in the Consumer Price Index for All Urban Consumers, U.S. City Average, All Items. The Department of Business and Professional Regulation shall periodically

calculate the fees, rounded to the nearest dollar, and publish the amounts, as adjusted, on its website.

Section 4. This act shall take effect July 1, 2017.

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

Remove everything before the enacting clause and insert: An act relating to estoppel certificates; amending ss. 718.116, 719.108, and 720.30851, F.S.; revising requirements relating to the issuance of an estoppel certificate to specified persons; requiring a condominium, cooperative, or homeowners' association to designate a street or e-mail address when requested and on its website for estoppel certificate requests; specifying delivery requirements for an estoppel certificate; requiring that an estoppel certificate contain certain information; providing an effective period for an estoppel certificate based upon the date of issuance and form of delivery; providing that an association waives a specified claim against a person or such person's successors or assigns who rely on the estoppel certificate; prohibiting an association from charging a preparation and delivery fee or making certain claims if it fails to deliver an estoppel certificate within certain timeframes; revising fee requirements for preparing and delivering an estoppel certificate under various circumstances; authorizing the statement of moneys due to be delivered in one

or more estoppel certificates under certain circumstances; providing limits on a total fee charged for the preparation and delivery of estoppel certificates; requiring the fee for an estoppel certificate to be paid from specified proceeds under certain circumstances; requiring that the authority to charge a fee for the estoppel certificate be established by a specified written resolution or provided by a written management, bookkeeping, or maintenance contract; providing penalties for not issuing a refund in a timely manner; providing that the right to a refund may not be abrogated or abridged; providing penalties for an association indicating the right to a refund is abrogated or abridged; deleting obsolete provisions; conforming provisions to changes made by the act; providing an effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 697 Federal Immigration Enforcement
SPONSOR(S): Metz and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 786

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee		Stranburg CCS	Bond MB
2) Local, Federal & Veterans Affairs Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Although the federal government has broad powers over immigration enforcement, federal immigration agencies rely on state and local law enforcement agencies to assist and cooperate in the enforcement of federal immigration laws. The bill creates the "Rule of Law Adherence Act" (Act) to require state and local governments and law enforcement agencies, including their officials and employees, to support and cooperate with federal immigration enforcement. Specifically, the bill:

- prohibits a state or local governmental entity or law enforcement agency from having a law, policy, practice, procedure, or custom which impedes a law enforcement agency from communicating or cooperating with a federal immigration agency on immigration enforcement;
- prohibits any restriction on a state or local governmental entity or law enforcement agency's ability to use, maintain, or exchange immigration information for certain enumerated purposes;
- requires a state or local governmental entity and law enforcement agency to comply with and support the enforcement of federal immigration law;
- provides procedures for a law enforcement agency and judge to follow when an arrested person cannot provide proof of lawful presence in the United States or is subject to an immigration detainer;
- requires any sanctuary policies currently in effect be repealed within 90 days of the effective date of the Act;
- authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer;
- requires an official or employee of a state or local governmental entity or law enforcement agency to report a violation of the Act to the Attorney General or state attorney, failure to report a violation may result in suspension or removal from office;
- authorizes the Attorney General or a state attorney to seek an injunction against a state or local governmental entity or law enforcement agency that violates the Act;
- requires a state or local governmental entity or law enforcement agency that violates the Act to pay a civil penalty of at least $1,000 but no more than $5,000 for each day the policy was in effect;
- creates a civil cause of action for a person injured by the conduct of an alien unlawfully present in the United States against a state or local governmental entity or law enforcement agency whose violation of the Act contributed to the person's injury;
- prohibits the expenditure of public funds to reimburse or defend a public official or employee who violates the Act; and
- suspends state grant funding eligibility for 5 years for a state government or local government entity or law enforcement agency that violates the Act.

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

The bill has an effective date of October 1, 2017, for provisions creating penalties. All other provisions of the bill have an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens," and thus has established an "extensive and complex" set of rules governing the admission and removal of aliens, along with conditions for aliens' continued presence within the United States.[1] While the federal government's authority over immigration is well established, the Supreme Court has recognized that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted" by the federal government.[2] The Tenth Amendment's reservation of powers to the states includes traditional "police powers" concerning the promotion and regulation of safety, health, and welfare within the state.[3] Pursuant to the exercise of these police powers, states and municipalities have frequently enacted measures which address aliens residing in their communities.[4] The federal government's power to preempt activity in the area of immigration may be further limited by the constitutional bar against directly "commandeering" state or local governments into the service of federal immigration agencies.[5]

Information-Sharing

United States Immigration and Customs Enforcement (ICE) relies heavily on local law enforcement sharing information regarding an arrestee or inmate to identify and apprehend aliens who are unlawfully present in the United States. Over the years, some states and localities have restricted government agencies or employees from sharing information with federal immigration agencies.[6]

In 1996, Congress sought to end these restrictions on information-sharing through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[7] and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[8] Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities. Instead, they bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status.[9]

Immigration Detainers

An immigration detainer is a document by which ICE advises state and local law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations.[10] ICE issues a detainer in three situations:

- To notify a law enforcement agency that ICE intends to assume custody of an alien in the agency's custody once the alien is no longer detained by the agency;
- To request information from a law enforcement agency about an alien's impending release so ICE may assume custody before the alien is released from the agency's custody; and

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[1] *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).
[2] *De Canas v. Bica*, 424 U.S. 351, 355 (1976); *see Arizona*, 132 S. Ct. 2492.
[3] *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).
[4] Congressional Research Service, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, 3 (July 20, 2015).
[5] *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).
[6] Congressional Research Service, *supra* note 4, at 9.
[7] 8 U.S.C. §1644.
[8] 8 U.S.C. §1373.
[9] 8 U.S.C. §§ 1373, 1644.
[10] *See* 8 U.S.C. ss. 1226 and 1357;Congressional Research Service, *supra* note 4, at 13.

- To request that a law enforcement agency maintain custody of an otherwise releasable alien for no longer than 48 hours to allow ICE to assume custody.[11]

The federal courts and the federal government have characterized an ICE detainer as a request that does not require the receiving local law enforcement agency to comply with the detainer.[12] The federal courts have held any purported requirement that states hold aliens for ICE may run afoul of the anti-commandeering principles of the Tenth Amendment. For example, in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit noted that if states and localities were required to detain aliens for ICE pursuant to a detainer, they would have to "expend funds and resources to effectuate a federal regulatory scheme," something found to be impermissible in prior Supreme Court decisions regarding commandeering.[13]

Additionally, a number of recent federal courts have held that ICE detainers requesting that local law enforcement detain (as opposed to notify) an otherwise releasable individual must specify that there is sufficient probable cause to detain that individual.[14]

"Sanctuary cities"

A number of states and municipalities have adopted formal or informal policies which prohibit or limit police cooperation with federal immigration enforcement efforts.[15] Municipalities that have adopted such policies are sometimes referred to as "sanctuary cities," though there is no consensus as to the meaning of this term. The term "sanctuary" jurisdiction is not defined by federal law, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference "jurisdictions that may have [laws, ordinances, or policies] limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws."[16] Examples of such polices include: not asking an arrested or incarcerated person his or her immigration status, not informing ICE about an alien in custody, not alerting ICE before releasing an alien from custody, not transporting an undocumented criminal alien to the nearest ICE location, and declining to honor an immigration detainer.[17]

It appears that there are six local government entities in Florida that have adopted policies limiting cooperation with ICE specifically by placing conditions on honoring immigration detainers: Hernando, Pasco, Hillsborough, Pinellas, Palm Beach, and Broward.[18] In each of these counties, the policy was

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[11] Law Enforcement Systems and Analysis, Department of Homeland Security, *Declined Detainer Outcome Report*, October 8, 2014 (redacted public version), at 3.

[12] *See, e.g., Garza v. Szalczyk,* 745 F. 3d 634, 640-44 (3d Cir. 2014) (noting that all Courts of Appeals that have commented on the character of ICE detainers refer to them as "requests" or as part of an "informal procedure."); *Ortega v. U.S. Immigration & Customs Enforcement,* 737 F. 3d 435, 438 (6th Cir. 2013); *Miranda-Olivares v. Clackamas County,* 2014 WL 1414305, slip op. (D. Oregon April 11, 2014); Memorandum from R. A. Cuevas, Jr. to Board of County Commissioners of Miami-Dade County, RE: Resolution directing the Mayor to implement policy on responding to detainer requests from the United States Department of Homeland Security Immigration Enforcement, Resolution R-1008-13, p 14 (Dec. 3, 2013) (containing correspondence from David Ventura, Assistant Director, U.S. Immigration and Customs Enforcement to Miguel Marquez, County Counsel, County of Santa Clara re: U.S. Immigration and Customs Enforcement Secure Communities Initiative).

[13] 745 F. 3d at 644.

[14] *Morales v. Chadburn*, 793 F. 3d 208, 214-217 (1st Cir. 2015); *Miranda-Olivares*, slip op. at 9-11; *Mendoza v. Osterberg*, 2014 WL 3784141 (D. Neb. 2014); *Uroza v. Salt Lake County*, 2013 WL 653968 (D. Utah 2013); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D.Pa. Mar.30, 2012) *rev'd on other grounds*, 745 F.3d 634 (3d Cir.2014).

[15] *See* Congressional Research Service, *supra* note 4, at 7-20 (providing examples of various types of "sanctuary" policies used across the country).

[16] U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States*, January 2007 (redacted public version), at vii, n.44 (defining "sanctuary" policies for purposes of study).

[17] *Id.* at 11-17.

[18] Law Enforcement Systems and Analysis, *supra* note 11, at 10, 13-14, 26; Frank Cerabino, *PBSO quietly changes policy on fed detainee requests*, PALM BEACH POST, July 15, 2015, http://www.mypalmbeachpost.com/news/news/crime-law/cerabino-pbso-quietly-changes-policy-on-fed-detain/nmzTT/ (last accessed March 4, 2017); Center for Immigration

enacted by the Sheriff's Office.

In these six counties, an ICE detainer will not be honored unless it is supported by probable cause, such as a warrant from a federal judge or an order of deportation.[19] These policies appear to have been enacted after a Florida Sheriffs Association bulletin highlighted recent federal court decisions[20] relating to ICE detainers and explained that "sheriffs should be aware that any detention of an ICE detainee without probable cause may subject the sheriff's office to liability for an unlawful seizure."[21]

The county commission in Miami-Dade adopted a policy in 2010 that provided that an ICE detainer would only be honored if the federal government agrees to reimburse the county for costs incurred in complying with the detainer and the inmate subject to the detainer has a previous conviction for a forcible felony or the inmate has pending charges for a non-bondable offense.[22] In January 2017, the mayor of Miami-Dade County reversed this policy and the county now accepts immigration detainers from ICE.[23]

Effect of Proposed Changes

The bill creates ch. 908, F.S., consisting of ss. 908.101-908.402, F.S., to create the "Rule of Law Adherence Act." The Act requires state and local governments and law enforcement agencies to support and cooperate with federal immigration enforcement.

Legislative Findings and Intent

The bill creates s. 908.101, F.S., to provide legislative findings regarding immigration enforcement. The bill states it is an important state interest that state entities, local government entities, and their officials owe an affirmative duty to assist the Federal Government with enforcement of federal immigration laws within this state, including complying with federal immigration detainers. It is also an important state interest that in the interest of public safety and adherence to federal law, this state must ensure that efforts to enforce immigration laws are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs. Accordingly, state agencies, local governments, and their officials who encourage persons unlawfully present in the United States to locate within this state or who shield such persons from responsibility for their actions breach this duty and should be held accountable.

Prohibition against Sanctuary Policies

The bill creates s. 908.201, F.S., to prohibit a state or local governmental entity, or a law enforcement agency[24] from adopting or having in effect a sanctuary policy. A "sanctuary policy" is defined in the bill as a law, policy, practice, procedure, or custom adopted or permitted by a state entity, law enforcement

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Studies, Map: Sanctuary Cities, Counties and State (February 2017), http://www.cis.org/Sanctuary-Cities-Map (last accessed March 4, 2017).

[19] Julie B. Maglio, *HCSO Policy on Illegal Immigrant Detainment*, HERNANDO SUN, 2015, http://hernandosun.com/illegal_immigrant (last accessed March 4, 2017); Elizabeth Behrman, *Fla. sheriffs deny claims of 'sanctuary' cities in state*, The Tampa Tribune, July 19, 2015, http://www.tbo.com/news/crime/fla-sheriffs-deny-claims-of-sanctuary-cities-in-state-20150718/ (last accessed March 4, 2017); Broward County Sheriff's Office, *Legal Bulletin, Updated Immigration Detainers: Probable Cause Required*, July 17, 2014; Cerabino, *supra* note 18.

[20] *Galarza* 745 F. 3d 634; *Miranda-Olivares*, 2014 WL 1414305.

[21] Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Civil Justice Subcommittee).

[22] Resolution No. R-1008-13, Board of County Commissioners, Miami-Dade County, Florida (Dec. 3, 2010).

[23] Douglas Hanks, *Miami-Dade turned over 11 people to immigration authorities in week under new policy*, Miami Herald, February 3, 2017, http://www.miamiherald.com/news/local/community/miami-dade/article130688064.html (last accessed March 4, 2017).

[24] The definitions of "state entity," "local governmental entity," and "law enforcement agency" in the bill include officials, persons holding public office, representatives, agents, and employees of those entities or agencies.

agency, or local governmental entity which contravenes 8 U.S.C. s. 1373(a) or (b)[25], or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with respect to immigration enforcement . . . ." Examples of prohibited sanctuary polices include limiting or preventing a state or local governmental entity or law enforcement agency from:

- complying with an immigration detainer[26];
- complying with a request from a federal immigration agency to notify it prior to the release of an inmate in the state or local governmental entity or law enforcement agency's custody;
- providing a federal immigration agency access to an inmate for interview;
- initiating an immigration status investigation; or
- providing a federal immigration agency with the incarceration status or release date of an inmate.

Cooperation with Federal Immigration Authorities

The bill creates s. 908.202, F.S., to prohibit any restriction on a state or local governmental entity or law enforcement agency's ability to:

- send information regarding a person's immigration status to, or requesting or receiving such information from, a federal immigration agency.
- record and maintain immigration information for purposes of the Act.
- exchange immigration information with a federal immigration agency, state or local governmental entity, or law enforcement agency.
- use immigration information to determine eligibility for a public benefit, service, or license.
- use immigration information to verify a claim of residence or domicile if such a determination of is required under federal or state law, local government ordinance or regulation, or pursuant to a court order.
- use immigration information to comply with an immigration detainer.
- use immigration information to confirm the identity of an individual who is detained by a law enforcement agency.

The bill requires a state or local governmental entity and a law enforcement agency to fully comply with and support the enforcement of federal immigration law. This requirement only applies with regard to an official, representative, agent, or employee of such entity or agency when he or she is acting within the scope of his or her official duties or employment.

Additionally, the bill provides that a law enforcement agency that has received verification from a federal immigration official that an alien in the agency's custody is unlawfully present in the United States, the agency may transport the alien to a federal facility in this state or to a point of transfer to federal custody outside the jurisdiction of the agency. However, the law enforcement agency must obtain judicial authorization before transporting the alien to a point of transfer outside of this state.

The bill requires a judge in a criminal case to order a secure correctional facility[27] to reduce a defendant's sentence by not more than 7 days to facilitate transfer to federal custody if the defendant is

[25] 8 U.S.C. s. 1373(a) and (b) generally bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status. *See also Congressional Research Service*, *supra* note 4, at 10.

[26] "Immigration detainer" is defined in the bill as "a facially sufficient written or electronic request issued by a federal immigration agency using that agency's official form to request another law enforcement agency detain a person based on an inquiry into the person's immigration status or an alleged violation of a civil immigration law, including detainers issued pursuant to 8 U.S.C. ss. 1226 and 1357." A detainer is considered facially sufficient when it is complete and indicates on its face, or is supported by an accompanying affidavit or order that indicates, the federal immigration official has reason to believe that the person to be detained may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States.

subject to an immigration detainer. The judge must indicate on the record that the defendant is subject to an immigration detainer or otherwise indicate that the defendant is subject to transfer into federal custody when making the order to the secure correctional facility. If a judge does not have this information at the time of sentencing, he or she must issue the order to the secure correctional facility as soon as such information becomes available.

The cooperation and support requirements in newly-created s. 908.202, F.S., do not require a state or local governmental entity or law enforcement agency to provide a federal immigration agency with information related to a victim or witness to a criminal offense, if the victim or witness cooperates in the investigation or prosecution of the crime. A victim or witness's cooperation pursuant to this exemption must be documented in the entity or agency's investigative records, and the entity or agency must retain the records for at least 10 years for the purposes of audit, verification, or inspection by the Auditor General.

Duties Related to Arrested Persons and Immigration Detainers

The bill creates s. 908.203, F.S., detailing procedures for a law enforcement agency when a person is arrested and cannot provide proof of lawful presence in the United States. Within 48 hours of the arrest, the agency must review any information available from a federal immigration agency, including the Priority Enforcement Program or a successor program. If such information reveals that the person is unlawfully present in the United States, the agency must inform the judge authorized to grant or deny the person's release on bail of that fact and record that fact in the person's case file. An agency is not required to perform this duty on a person who is transferred to them from another agency if the previous agency performed the duty before the transferring of custody. A judge who receives notice of a person's immigration status pursuant to this duty must record that person's status in the court record.

The bill also creates s. 908.204, F.S., to provide duties of a law enforcement agency related to an immigration detainer. If an agency has custody of a person subject to an immigration detainer, the agency must inform the judge authorized to grant or deny bail that the person is subject to an immigration detainer. The judge must record the fact that the person is subject to a detainer in the court record, regardless of whether the notice is received before or after judgment in the case.

The agency must record that the person is subject to an immigration detainer in the person's case file and must comply with, honor, and fulfill the requests made in the detainer. An agency is not required to fulfill this duty on a person who is transferred to them from another agency if the previous agency performed the duty before the transferring of custody.

Reimbursement of Costs for Complying with an Immigration Detainer

The bill creates s. 908.205, F.S., to authorize a board of county commissioners to adopt an ordinance requiring any individual detained pursuant to a lawful and valid immigration detainer to reimburse the county for any expenses incurred in detaining the individual. However, an individual is not liable under an ordinance enacted pursuant to this provision if a federal immigration agency determines that the immigration detainer was improperly issued.

The bill also authorizes a local government or law enforcement agency to petition the federal government to reimbursement of costs. The petition may be made for a local government or law enforcements agency's detention costs and the costs of compliance with federal requests when those costs are incurred in support of federal immigration law.

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[27] The term "secure correctional facility" is defined as a state correctional institution in s. 944.02, F.S., or a county detention facility or municipal detention facility in s. 951.23, F.S.

Duty to Report

The bill creates s. 908.206, F.S., to require an official or employee of a state or local governmental entity or law enforcement agency to promptly report a known or probable violation of the Act to the Attorney General or the state attorney. An official or employee's willful and knowing failure to report a violation may result in his or her suspension or removal from office pursuant to general law and the Florida Constitution.[28]

The bill provides protections under the Whistle-blower's Act[29] to any official or employee of a state or local governmental entity or law enforcement agency who is retaliated against by the entity or agency or denied employment because he or she complied with the duty to report in s. 908.206, F.S.

Enforcement of Violations of the Act

The bill creates s. 908.301, F.S., to require that the Attorney General provide a form on the Department of Legal Affairs' website for a person to submit a complaint alleging a violation of the Act. A person may still file an anonymous complaint or a complaint different than the prescribed format. Any person has standing to submit a complaint.

The bill creates s. 908.302, F.S., to provide for the enforcement of violations of the Act and establish penalties for such violations. The state attorney for the county in which a state entity is headquartered, or a local governmental entity or law enforcement agency is located, has primary responsibility for investigating complaints of violations of the Act. The results of any investigation must be provided to the Attorney General in a timely manner.

A state or local government entity or law enforcement agency for which the state attorney has received a complaint must comply with a document request by the state attorney related to the complaint. If the state attorney determines that the complaint is valid, within 10 days of the determination, the state attorney must provide written notification to the entity that the complaint has been filed, that the state attorney has found the complaint valid, and that the state attorney is authorized to file an action to enjoin the violation if the entity does not come into compliance with ch. 908, F.S., on or before the 60th day after notification is provided.

Within 30 days of receiving written notification of a valid complaint, a state or local government entity or law enforcement agency must provide the state attorney with a copy of:

- the entity's written policies and procedures with respect to federal immigration agency enforcement action, including policies with respect to immigration detainers;
- each immigration detainer received by the entity from a federal immigration agency in the current calendar year-to-date and the two prior calendar years; and
- each response sent by the entity for an immigration detainer for the current year and two prior calendar years.

The Attorney General, the state attorney that conducted the investigation, or a state attorney ordered by the Governor pursuant to s. 27.14, F.S.,[30] may institute proceedings in circuit court to enjoin a state or local governmental entity or law enforcement agency that violates the Act. The court must expedite the action, including setting a hearing at the earliest practicable date.

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[28] Section 7, Art. IV of the Florida Constitution provides that the governor may suspend "any state officer not subject to impeachment . . . or any county officer for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor." The senate then "may. . . remove from office or reinstate the suspended official . . ."

[29] s. 112.3187, F.S.

[30] s. 27.14, F.S., authorizes the Governor to issue an executive order requiring a state attorney from another circuit to replace another state attorney in an investigation or case in which the latter state attorney is disqualified or "for any other good and sufficient reason [when] the Governor determines that the ends of justice would be best served . . . ."

Upon adjudication by the court or as provided in a consent decree declaring that a state or local governmental entity or law enforcement agency has violated the Act, the court must enjoin the unlawful policy or practice and order that the entity or agency pay a civil penalty of at least $1,000 but not more than $5,000 for each day the policy or practice was in effect commencing on October 1, 2017, or the date the sanctuary policy was first enacted, whichever is later.

A "sanctuary policymaker" is defined in the bill as "a state or local elected official, or an appointed official of a local governmental entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy." The bill requires a consent decree, injunction, or order granting civil penalties to identify each sanctuary policymaker. The court must provide a copy of the final order to the Governor within 30 days after the date of rendition. A sanctuary policymaker identified in a final order is subject to suspension or removal from office by the Governor pursuant to general law and the Florida Constitution.[31]

A state or local governmental entity or law enforcement agency ordered to pay a civil penalty must remit payment to the Chief Financial Officer. The Chief Financial Officer must deposit such payments into the General Revenue Fund.

The bill also prohibits the expenditure of public funds to defend or reimburse any sanctuary policy maker or any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who knowingly and willfully violates the Act.

Cause of Action against State or Local Governmental Entity, Law Enforcement Agency

The bill creates s. 908.303, F.S., to provide a civil cause of action for a person injured by (or the personal representative of a person killed by) the tortious conduct of an alien unlawfully present in the United States against any state or local governmental entity or law enforcement agency in violation of newly-created ss. 908.201 and 908.202, F.S. To prevail in the new cause of action, the plaintiff must prove by the greater weight of the evidence:

- The existence of a sanctuary policy; and
- Failure to comply with any provision of newly-created s. 908.202, F.S., resulting in the alien having access to the person injured or killed when the tortious conduct occurred.

The bill requires a final judgment in favor of a plaintiff to identify each sanctuary policymaker. The court must provide a copy of the final judgment to the Governor within 30 days after the date of rendition. A sanctuary policymaker identified in a final judgment is subject to suspension or removal from office by the Governor pursuant to general law and the Florida Constitution.[32]

A cause of action pursuant to this section may not be brought against a public official or employee of a state or local government or law enforcement agency, including a sanctuary policymaker.

Lastly, the bill provides that the Act does not create a private cause of action against a state entity, local governmental entity, or law enforcement agency that complies with the Act.

Ineligibility for State Grant Funding

The bill creates s. 908.304, F.S., to prohibit a state or local government entity or law enforcement agency that had a sanctuary policy in violation of ch. 908, F.S., from receiving funding for non-federal grant programs administered by state agencies. This prohibition runs for 5 years from the date of adjudication that the entity had a sanctuary policy in violation of ch. 908, F.S.

[31] See note 28, *supra*.
[32] See note 28, *supra*.

The state attorney must notify the state CFO of an adjudicated violation by an entity and provide the CFO with a copy of the final court injunction, order, or judgment. Upon receiving the notice, the CFO must timely inform all state agencies that administer non-federal grant funding of the violation by the entity. The CFO must then direct such agencies to cancel all pending grant applications and enforce the ineligibility of the entity for the 5-year period.

The bill provides that the prohibition on grant funding does not apply to:

- funding that is received as a result of an appropriation to a specifically named state entity, local government entity, or law enforcement agency in the General Appropriations Act or other law; and
- grants awarded prior to the date of an adjudication of violation of ch. 908, F.S.

Additional Provisions

The bill provides that any sanctuary policy in effect on the effective date of the Act must be repealed within 90 days of the effective date of the Act.

The bill creates s. 908.401, F.S., providing that ch. 908, F.S., does not apply to the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. s. 1232g.

The bill creates s. 908.402, F.S., to prohibit a state or local government entity or law enforcement agency, or a person employed by or otherwise under the direction of such an entity, to base its actions pursuant to ch. 908, F.S., on the gender, race, religion, national origin, or physical disability of a person except to the extent allowed by the United States Constitution or the state constitution.

The bill also creates s. 908.207, F.S., to provide that the Act be implemented to the fullest extent permitted by federal immigration law and the legislative findings and intent declared in s. 908.101, F.S.

The bill provides that ss. 908.302 and 908.303, F.S., relating to enforcement and penalties for violations of the act and creating a civil cause of action for personal injury or wrongful death attributed to a sanctuary policy, respectively, will take effect on October 1, 2017. The bill provides an effective date of July 1, 2017, to all other portions of the bill.

B. SECTION DIRECTORY:

Section 1 creates a short title.

Section 2 creates ch. 908, F.S., consisting of ss. 908.101-908.402, F.S., entitled "Federal Immigration Enforcement."

Section 3 creates an unnumbered section that requires any sanctuary policy in effect on the effective date of the act must be repealed within 90 days after that effective date.

Section 4 provides an effective date October 1, 2017, for ss. 908.302 and 908.303, F.S., and an effective date of July 1, 2017, for all other provisions in the bill.

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:

See "Expenditures" section below.

2. Expenditures:

The bill requires a local government or law enforcement agency to honor an ICE immigration detainer. Any costs incurred by a local government or law enforcement agency in holding an individual pursuant to an immigration detainer are not reimbursed by ICE.[33] However, the bill authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.[34] The bill also authorizes a local government entity or law enforcement agency to petition the federal government to recover costs of detention and complying with a federal request in support of federal immigration law.[35] Accordingly, the bill may have an indeterminate negative impact on local 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:

It is unknown how much it costs local governments to comply with immigration detainers. According to the Board of County Commissioners in Miami-Dade County, compliance with immigration detainers in 2011 and 2012 cost the county $1,002,700 and $667,076, respectively.[36]

As noted above, recent federal courts have determined that a local law enforcement agency is not required to honor an ICE detainer because such detainers are simply requests to detain.[37] Federal courts have also held that an ICE detainer must be supported by probable cause.[38] Based on these two lines of federal cases, it appears that a law enforcement agency that voluntarily complies with an ICE detainer that is not supported by probable cause may be subject to a federal civil rights action.[39]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to require a county or municipality to spend funds or take an action requiring the expenditure of funds as described in article VII, section 18 of the Florida Constitution, specifically by requiring the county or municipality to comply with an immigration detainer. However, the bill contains legislative findings that state and local government assistance and cooperation with federal immigration enforcement fulfills an important state interest, and it authorizes a board of county

[33] Resolution No. R-1008-13, *supra* note 22.
[34] *See* "Reimbursement of Costs for Complying with an Immigration Detainer" section above.
[35] *Id.*
[36] Resolution No. R-1008-13, *supra* note 22.
[37] *See* "Immigration Detainers" section above.
[38] *Id.*
[39] *See Legal Alert*, *supra* note 21.

commissioners to enact an ordinance to recover costs for complying with an immigration detainer.[40] Moreover, it appears that any expenditure that may be required by the bill applies to "all persons similarly situated" because the bill applies to all state and local governmental entities and all law enforcement agencies.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Newly-created s. 908.301, F.S., in the bill requires the Attorney General to prescribe and provide through the Department of Legal Affairs' website a form for a person to submit a complaint alleging a violation of the Act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[40] *See* "Legislative Findings and Intent" and "Reimbursement of Costs for Complying with an Immigration Detainer" sections above.

A bill to be entitled

An act relating to federal immigration enforcement; providing a short title; creating chapter 908, F.S., relating to federal immigration enforcement; providing legislative findings and intent; providing definitions; prohibiting sanctuary policies; requiring state entities, local governmental entities, and law enforcement agencies to comply with and support the enforcement of federal immigration law; specifying duties concerning certain arrested persons; specifying duties concerning immigration detainers; prohibiting restrictions by such entities and agencies on taking certain actions with respect to information regarding a person's immigration status; providing requirements concerning certain criminal defendants subject to immigration detainers or otherwise subject to transfer to federal custody; authorizing a law enforcement agency to transport an unauthorized alien under certain circumstances; providing an exception to reporting requirements for crime victims or witnesses; requiring recordkeeping relating to crime victim and witness cooperation in certain investigations; authorizing a board of county commissioners to adopt an ordinance to recover costs for complying with an immigration detainer; authorizing local governmental entities and law enforcement agencies to petition the

Federal Government for reimbursement of certain costs; requiring report of violations; providing penalties for failure to report a violation; providing whistle-blower protections for persons who report violations; requiring the Attorney General to prescribe the format for submitting complaints; providing requirements for entities to comply with document requests from state attorneys concerning violations; providing for investigation of possible violations; providing for injunctive relief and civil penalties; requiring written findings; prohibiting the expenditure of public funds for specified purposes; providing a cause of action for personal injury or wrongful death attributed to a sanctuary policy; providing that a trial by jury is a matter of right; requiring written findings; providing for applicability to certain education records; prohibiting discrimination on specified grounds; providing for implementation; requiring repeal of existing sanctuary policies within a specified period; providing effective dates.

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

Section 1. Short title.—This act may be cited as the "Rule of Law Adherence Act."

Section 2. Chapter 908, Florida Statutes, consisting of

sections 908.101-908.402, is created to read:

CHAPTER 908

FEDERAL IMMIGRATION ENFORCEMENT

PART I

FINDINGS AND DEFINITIONS

908.101 Legislative findings and intent.—The Legislature finds that it is an important state interest that state entities, local governmental entities, and their officials owe an affirmative duty to all citizens and other persons lawfully present in the United States to assist the Federal Government with enforcement of federal immigration laws within this state, including complying with federal immigration detainers. The Legislature further finds that it is an important state interest that, in the interest of public safety and adherence to federal law, this state support federal immigration enforcement efforts and ensure that such efforts are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs. State entities, local governmental entities, and their officials who encourage persons unlawfully present in the United States to locate within this state or who shield such persons from personal responsibility for their unlawful actions breach this duty and should be held accountable.

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

(1) "Federal immigration agency" means the United States Department of Justice, the United States Department of Homeland Security, or any successor agency and any division of such

agency, including United States Immigration and Customs Enforcement, United States Customs and Border Protection, or any other federal agency charged with the enforcement of immigration law. The term includes an official or employee of such agency.

(2) "Immigration detainer" means a facially sufficient written or electronic request issued by a federal immigration agency using that agency's official form to request that another law enforcement agency detain a person based on an inquiry into the person's immigration status or an alleged violation of a civil immigration law, including detainers issued pursuant to 8 U.S.C. ss. 1226 and 1357. For purposes of this subsection, an immigration detainer is deemed facially sufficient if:

(a) The federal immigration agency's official form is complete and indicates on its face that the federal immigration official has reason to believe that the person to be detained may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States; or

(b) The federal immigration agency's official form is incomplete and fails to indicate on its face that the federal immigration official has reason to believe that the person to be detained may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States, but is supported by an accompanying affidavit or order that indicates that the federal immigration agency has reason to believe that the person to be detained may not have been lawfully admitted to the United States or otherwise is not

lawfully present in the United States.

(3) "Inmate" means a person in the custody of a law enforcement agency.

(4) "Law enforcement agency" means an agency in this state charged with enforcement of state, county, municipal, or federal laws or with managing custody of detained persons in the state and includes municipal police departments, sheriff's offices, state police departments, state university and college police departments, and the Department of Corrections. The term includes an official or employee of such agency.

(5) "Local governmental entity" means any county, municipality, or other political subdivision of this state. The term includes a person holding public office or having official duties as a representative, agent, or employee of such entity.

(6) "Sanctuary policy" means a law, policy, practice, procedure, or custom adopted or permitted by a state entity, local governmental entity, or law enforcement agency which contravenes 8 U.S.C. s. 1373(a) or (b), or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with respect to federal immigration enforcement, including, but not limited to, limiting or preventing a state entity, local governmental entity, or law enforcement agency from:

(a) Complying with an immigration detainer;

(b) Complying with a request from a federal immigration agency to notify the agency before the release of an inmate or

detainee in the custody of the state entity, local governmental entity, or law enforcement agency;

(c) Providing a federal immigration agency access to an inmate for interview;

(d) Initiating an immigration status investigation; or

(e) Providing a federal immigration agency with an inmate's incarceration status or release date.

(7) "Sanctuary policymaker" means a state or local elected official, or an appointed official of a local governmental entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy.

(8) "State entity" means the state or any office, board, bureau, commission, department, branch, division, or institution thereof, including institutions within the State University System and the Florida College System. The term includes a person holding public office or having official duties as a representative, agent, or employee of such entity.

PART II

DUTIES

908.201 Sanctuary policies prohibited.—A state entity, law enforcement agency, or local governmental entity may not adopt or have in effect a sanctuary policy.

908.202 Cooperation with federal immigration authorities.—

(1) A state entity, local governmental entity, or law enforcement agency shall fully comply with and, to the full

extent permitted by law, support the enforcement of federal immigration law. This subsection is only applicable to an official, representative, agent, or employee of such entity or agency when he or she is acting within the scope of his or her official duties or within the scope of his or her employment.

(2) Except as otherwise expressly prohibited by federal law, a state entity, local governmental entity, or law enforcement agency may not prohibit or in any way restrict another state entity, local governmental entity, or law enforcement agency from taking any of the following actions with respect to information regarding a person's immigration status:

(a) Sending such information to or requesting, receiving, or reviewing such information from a federal immigration agency for purposes of this chapter.

(b) Recording and maintaining such information for purposes of this chapter.

(c) Exchanging such information with a federal immigration agency or another state entity, local governmental entity, or law enforcement agency for purposes of this chapter.

(d) Using such information to determine eligibility for a public benefit, service, or license pursuant to federal or state law or an ordinance or regulation of a local governmental entity.

(e) Using such information to verify a claim of residence or domicile if a determination of residence or domicile is required under federal or state law, an ordinance or regulation

of a local governmental entity, or a judicial order issued pursuant to a civil or criminal proceeding in this state.

(f) Using such information to comply with an immigration detainer.

(g) Using such information to confirm the identity of a person who is detained by a law enforcement agency.

(3)(a) This subsection only applies in a criminal case in which:

1. The judgment requires the defendant to be confined in a secure correctional facility; and

2. The judge:

a. Indicates in the record under s. 908.204 that the defendant is subject to an immigration detainer; or

b. Otherwise indicates in the record that the defendant is subject to a transfer into federal custody.

(b) In a criminal case described by paragraph (a), the judge shall, at the time of pronouncement of a sentence of confinement, issue an order requiring the secure correctional facility in which the defendant is to be confined to reduce the defendant's sentence by a period of not more than 7 days on the facility's determination that the reduction in sentence will facilitate the seamless transfer of the defendant into federal custody. For purposes of this paragraph, the term "secure correctional facility" means a state correctional institution, as defined in s. 944.02, or a county detention facility or a municipal detention facility, as defined in s. 951.23.

(c) If the applicable information described by subparagraph (a)2. is not available at the time the sentence is pronounced in the case, the judge shall issue the order described by paragraph (b) as soon as the information becomes available.

(4) Notwithstanding any other provision of law, if a law enforcement agency has received verification from a federal immigration agency that an alien in the law enforcement agency's custody is unlawfully present in the United States, the law enforcement agency may securely transport such alien to a federal facility in this state or to another point of transfer to federal custody outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting such alien to a point of transfer outside of this state.

(5) This section does not require a state entity, local governmental entity, or law enforcement agency to provide a federal immigration agency with information related to a victim of or a witness to a criminal offense if such victim or witness timely and in good faith responds to the entity's or agency's request for information and cooperation in the investigation or prosecution of such offense.

(6) A state entity, local governmental entity, or law enforcement agency that, pursuant to subsection (5), withholds information regarding the immigration information of a victim of or witness to a criminal offense shall document such victim's or

witness's cooperation in the entity's or agency's investigative records related to the offense and shall retain such records for at least 10 years for the purpose of audit, verification, or inspection by the Auditor General.

908.203 Duties related to certain arrested persons.—

(1) If a person is arrested and is unable to provide proof of his or her lawful presence in the United States, not later than 48 hours after the person is arrested and before the person is released on bond, a law enforcement agency performing the booking process shall:

(a) Review any information available from a federal immigration agency, including under the federal Priority Enforcement Program operated by United States Immigration and Customs Enforcement or a successor program.

(b) If information obtained under paragraph (a) reveals that the person is not a citizen of the United States and is unlawfully present in the United States according to the terms of the federal Immigration and Nationality Act, 8 U.S.C. ss. 1101 et seq., the law enforcement agency shall:

1. Provide notice of that fact to the judge authorized to grant or deny the person's release on bail under chapter 903.

2. Record that fact in the person's case file.

(2) A law enforcement agency is not required to perform a duty imposed by subsection (1) with respect to a person who is transferred to the custody of the agency by another law enforcement agency if the transferring agency performed that

duty before transferring custody of the person.

(3) A judge who receives notice of a person's immigration status under this section shall ensure that such status is recorded in the court record.

908.204 Duties related to immigration detainer.—

(1) A law enforcement agency that has custody of a person subject to an immigration detainer issued by a federal immigration agency shall:

(a) Provide to the judge authorized to grant or deny the person's release on bail under chapter 903 notice that the person is subject to an immigration detainer.

(b) Record in the person's case file that the person is subject to an immigration detainer.

(c) Comply with, honor, and fulfill the requests made in the detainer.

(2) A law enforcement agency is not required to perform a duty imposed by paragraph (1)(a) or paragraph (1)(b) with respect to a person who is transferred to the custody of the agency by another law enforcement agency if the transferring agency performed that duty before transferring custody of the person.

(3) A judge who receives notice that a person is subject to a detainer shall ensure that such fact is recorded in the court record, regardless of whether the notice is received before or after a judgment in the case.

908.205 Reimbursement of costs.—

(1) A board of county commissioners may adopt an ordinance requiring a person detained pursuant to an immigration detainer to reimburse the county for any expenses incurred in detaining the person pursuant to the immigration detainer. A person detained pursuant to an immigration detainer is not liable under this section if a federal immigration agency determines that the immigration detainer was improperly issued.

(2) A local governmental entity or law enforcement agency may petition the Federal Government for reimbursement of the entity's or agency's detention costs and the costs of compliance with federal requests when such costs are incurred in support of the enforcement of federal immigration law.

908.206 Duty to report.—

(1) An official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency shall promptly report a known or probable violation of this chapter to the Attorney General or the state attorney having jurisdiction over the entity or agency.

(2) An official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who willfully and knowingly fails to report a known or probable violation of this chapter may be suspended or removed from office pursuant to general law and s. 7, Art. IV of the State Constitution.

(3) A state entity, local governmental entity, or law enforcement agency may not dismiss, discipline, take any adverse

personnel action as defined in s. 112.3187(3) against, or take any adverse action described in s. 112.3187(4)(b) against, an official, representative, agent, or employee for complying with subsection (1).

(4) Section 112.3187 of the Whistle-blower's Act applies to an official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who is dismissed, disciplined, subject to any adverse personnel action as defined in s. 112.3187(3) or any adverse action described in s. 112.3187(4)(b), or denied employment because he or she complied with subsection (1).

908.207 Implementation.—This chapter shall be implemented to the fullest extent permitted by federal law regulating immigration and the legislative findings and intent declared in s. 908.101.

PART III

ENFORCEMENT

908.301 Complaints.—The Attorney General shall prescribe and provide through the Department of Legal Affairs' website the format for a person to submit a complaint alleging a violation of this chapter. This section does not prohibit the filing of an anonymous complaint or a complaint not submitted in the prescribed format. Any person has standing to submit a complaint under this chapter.

908.302 Enforcement; penalties.—

(1) The state attorney for the county in which a state

entity is headquartered or in which a local governmental entity or law enforcement agency is located has primary responsibility and authority for investigating credible complaints of a violation of this chapter. The results of an investigation by a state attorney shall be provided to the Attorney General in a timely manner.

(2)(a) A state entity, local governmental entity, or law enforcement agency for which the state attorney has received a complaint shall comply with a document request from the state attorney related to the complaint.

(b) If the state attorney determines that a complaint filed against a state entity, local governmental entity, or law enforcement agency is valid, the state attorney shall, not later than the 10th day after the date of the determination, provide written notification to the entity that:

1. The complaint has been filed.

2. The state attorney has determined that the complaint is valid.

3. The state attorney is authorized to file an action to enjoin the violation if the entity does not come into compliance with the requirements of this chapter on or before the 60th day after the notification is provided.

(c) No later than the 30th day after the day a state entity or local governmental entity receives written notification under paragraph (b), the state entity or local governmental entity shall provide the state attorney with a copy

of:

1. The entity's written policies and procedures with respect to federal immigration agency enforcement actions, including the entity's policies and procedures with respect to immigration detainers.

2. Each immigration detainer received by the entity from a federal immigration agency in the current calendar year-to-date and the two prior calendar years.

3. Each response sent by the entity for an immigration detainer described by subparagraph 2.

(3) The Attorney General, the state attorney who conducted the investigation, or a state attorney ordered by the Governor pursuant to s. 27.14 may institute proceedings in circuit court to enjoin a state entity, local governmental entity, or law enforcement agency found to be in violation of this chapter. The court shall expedite an action under this section, including setting a hearing at the earliest practicable date.

(4) Upon adjudication by the court or as provided in a consent decree declaring that a state entity, local governmental entity, or law enforcement agency has violated this chapter, the court shall enjoin the unlawful sanctuary policy and order that such entity or agency pay a civil penalty to the state of at least $1,000 but not more than $5,000 for each day that the sanctuary policy was in effect commencing on October 1, 2017, or the date the sanctuary policy was first enacted, whichever is later, until the date the injunction was granted. The court

shall have continuing jurisdiction over the parties and subject matter and may enforce its orders with imposition of additional civil penalties as provided for in this section and contempt proceedings as provided by law.

(5) An order approving a consent decree or granting an injunction or civil penalties pursuant to subsection (4) must include written findings of fact that describe with specificity the existence and nature of the sanctuary policy in violation of s. 908.201 and that identify each sanctuary policymaker who voted for, allowed to be implemented, or voted against repeal or prohibition of the sanctuary policy. The court shall provide a copy of the consent decree or order granting an injunction or civil penalties that contains the written findings required by this subsection to the Governor within 30 days after the date of rendition. A sanctuary policymaker identified in an order approving a consent decree or granting an injunction or civil penalties may be suspended or removed from office pursuant to general law and s. 7, Art. IV of the State Constitution.

(6) A state entity, local governmental entity, or law enforcement agency ordered to pay a civil penalty pursuant to subsection (4) shall remit payment to the Chief Financial Officer, who shall deposit such payment into the General Revenue Fund.

(7) Except as required by law, public funds may not be used to defend or reimburse a sanctuary policymaker or an official, representative, agent, or employee of a state entity,

local governmental entity, or law enforcement agency who knowingly and willfully violates this chapter.

908.303 Civil cause of action for personal injury or wrongful death attributed to a sanctuary policy; trial by jury; required written findings.—

(1) A person injured by the tortious acts or omissions of an alien unlawfully present in the United States, or the personal representative of a person killed by the tortious acts or omissions of an alien unlawfully present in the United States, has a cause of action for damages against a state entity, local governmental entity, or law enforcement agency in violation of ss. 908.201 and 908.202 upon proof by the greater weight of the evidence of:

(a) The existence of a sanctuary policy in violation of s. 908.201; and

(b) A failure to comply with a provision of s. 908.202 resulting in such alien's having access to the person injured or killed when the tortious acts or omissions occurred.

(2) A cause of action brought pursuant to subsection (1) may not be brought against a person who holds public office or who has official duties as a representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency, including a sanctuary policymaker.

(3) Trial by jury is a matter of right in an action brought under this section.

(4) A final judgment entered in favor of a plaintiff in a

cause of action brought pursuant to this section must include written findings of fact that describe with specificity the existence and nature of the sanctuary policy in violation of s. 908.201 and that identify each sanctuary policymaker who voted for, allowed to be implemented, or voted against repeal or prohibition of the sanctuary policy. The court shall provide a copy of the final judgment containing the written findings required by this subsection to the Governor within 30 days after the date of rendition. A sanctuary policymaker identified in a final judgment may be suspended or removed from office pursuant to general law and s. 7, Art. IV of the State Constitution.

(5) Except as provided in this section, this chapter does not create a private cause of action against a state entity, local governmental entity, or law enforcement agency that complies with this chapter.

908.304 Ineligibility for state grant funding.—

(1) Notwithstanding any other provision of law, a state entity, local governmental entity, or law enforcement agency shall be ineligible to receive funding from non-federal grant programs administered by state agencies that receive funding from the General Appropriations Act for a period of 5 years from the date of adjudication that such state entity, local governmental entity, or law enforcement agency had in effect a sanctuary policy in violation of this chapter.

(2) The Chief Financial Officer shall be notified by the state attorney of an adjudicated violation of this chapter by a

state entity, local governmental entity, or law enforcement agency and be provided with a copy of the final court injunction, order, or judgment. Upon receiving such notice, the Chief Financial Officer shall timely inform all state agencies that administer non-federal grant funding of the adjudicated violation by the state entity, local governmental entity, or law enforcement agency and direct such agencies to cancel all pending grant applications and enforce the ineligibility of such entity for the prescribed period.

(3) This subsection does not apply to:

(a) Funding that is received as a result of an appropriation to a specifically named state entity, local governmental entity, or law enforcement agency in the General Appropriations Act or other law.

(b) Grants awarded prior to the date of adjudication that such state entity, local governmental entity, or law enforcement agency had in effect a sanctuary policy in violation of this chapter.

PART IV

MISCELLANEOUS

908.401 Education records.—This chapter does not apply to the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. s. 1232g.

908.402 Discrimination prohibited.—A state entity, a local

495 governmental entity, or a law enforcement agency, or a person
496 employed by or otherwise under the direction or control of such
497 an entity, may not base its actions under this chapter on the
498 gender, race, religion, national origin, or physical disability
499 of a person except to the extent permitted by the United States
500 Constitution or the state constitution.
501 Section 3. A sanctuary policy, as defined in s. 908.102,
502 Florida Statutes, as created by this act, that is in effect on
503 the effective date of this act must be repealed within 90 days
504 after that date.
505 Section 4. Sections 908.302 and 908.303, Florida Statutes,
506 as created by this act, shall take effect October 1, 2017, and,
507 except as otherwise expressly provided in this act, this act
508 shall take effect July 1, 2017.

STORAGE NAME: h6507.CJC
DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6507 - Representative Beshears
Relief/Angela Sanford/Leon County

THIS IS A CONTESTED CLAIM FOR $1,150,000 BASED ON A MEDIATION AGREEMENT AGAINST LEON COUNTY, INVOLVING THE NEGLIGENT OPERATION OF LEON COUNTY AMBULANCE THAT INJURED ANGELA SANFORD ON SEPTEMBER 5, 2013.

FINDING OF FACT:

On September 5, 2013, at 11:28 PM, a Leon County ambulance violently collided with a dark SUV at the intersection of West Tharpe Street and North Martin Luther King Jr. Boulevard in Tallahassee. The ambulance, en route to a call, was traveling at 44 MPH and failed to stop at the red light when it entered the intersection, in direct violation of Leon County E.M.S. Standard Operating Guidelines. The occupants in the SUV, Patrick Sanford, Angela Sanford, and Daniel McNair were injured by the collision with Angela Sanford receiving the full force of the impact.

The Accident

The Sanford's and McNair were driving home from a concert. Patrick Sanford, a law enforcement officer, was driving the Sanford's black Buick Enclave with Angela Sanford in the passenger seat and McNair in the back seat. Patrick Sanford had recently worked a long shift and was operating on only

about three hours of sleep. While enjoying the concert, Patrick Sanford consumed three beers over approximately six hours. The Sanford's SUV was heading north on MLK Jr. Boulevard, a four lane road, in the right, northbound lane. Patrick Sanford's view of traffic heading west on Tharpe Street was obscured due to trees, fencing, and a large Publix grocery store. While the speed limit for MLK Jr. Boulevard was 30 MPH, Patrick Sanford was traveling at 43 MPH.

At the same time, Benjamin Hunter was driving a Leon County Med 24 ambulance and traveling west on Tharpe Street en route to an accident. As Benjamin Hunter approached the intersection of Tharpe Street and MLK Jr. Boulevard, the light was red. After the collision, Benjamin Hunter would tell investigators that the light was yellow; however the video footage from Hunter's ambulance clearly shows the light was red. Approximately four seconds before entering the intersection, Benjamin Hunter initiated the ambulance's emergency lights and sirens. Hunter did not stop or slow down as he entered the intersection traveling at 44 MPH.

The Sanford vehicle entered the intersection first, as Patrick Sanford had the green light and did not hear[1] the ambulance or see it due to a Publix grocery store, trees and a fence obscuring his vision of traffic on Tharpe Street. When the SUV was almost midway through the intersection, the ambulance collided into its passenger side. Belted into the front passenger seat, Angela Sanford's body took the brunt of the impact.

After the collision, Hunter and his coworker exited the ambulance and rendered aid to the occupants of the Sanford's SUV. Hunter and his coworker were not injured in the collision.

Injuries
All of the occupants of the Sanford's SUV sustained injuries.

For two weeks, Angela Sanford was kept on a ventilator and in a medically induced coma. Her injuries were severe and included:

- A brain injury,
- A collapsed lung,
- A ruptured bladder,
- A lacerated liver,
- 13 fractured ribs,
- 6 spinal fractures, and
- A fractured clavicle, sternum, fibula, knee, scapula, pelvis, hip sockets, sacroiliac joints, and femur.

She spent 25 days in the intensive care unit and another 31 days in rehab. After persevering through rehabilitation, Angela

[1] Claimant's argue that their Buick Enclave was equipped with QuietTuning, an exclusive engineering process that reduces and blocks unwanted noise from entering the SUV's cabin.

Sanford is no longer confined to a wheel chair but still suffers from drop foot, double vision, permanent hip pain and will require a total hip replacement in the future. She has no memory of the accident or the immediate months preceding and following it.

Patrick Sanford suffered a bulging disc in his back due to the collision and Daniel McNair broke two bones in his left hand.

Benjamin Hunter provided a blood sample for a toxicology report and the report found no drugs or alcohol present. Patrick Sanford was approached by police at the hospital and was offered a chance to submit a blood sample for testing. According to Sanford, the police requested the sample as he received news that his wife may not survive and, due to his emotional state, he refused to offer a sample.

The Leon County's Sheriff's Office found Hunter at fault for the crash; however the State Attorney's Office recommended that no citations should be issued.

Leon County EMS disciplined Hunter and he was suspended without pay for three 12-hour shifts.

LITIGATION HISTORY:

Rather than go through a trial, both Leon County and the Sanford's (Claimants) agreed to go to mediation where a settlement agreement was reached in the amount of $1,450,000. The settlement agreement breaks down the amounts in two payments. The first payment allowed under the statutory cap is divided by the following:

Kevin McNair	$50,000
Patrick Sanford	$100,000
Mason Sanford	$15,000
Hudson Sanford	$15,000
Chase Sanford[2]	$15,000
Angela Sanford	$105,000
Total	$300,000

However, the agreement also provides that Leon County and its insurer "agree to the entry of Judgment in this action, in the total amount of $1,150,000.00 in favor of Angela Sanford." On April 13, 2015, a final judgment in the amount of $1,150,000 was entered by the trial court for Angela Sanford against Leon County.[3]

Leon County retained the right to contest the claim bill in the

[2] Mason, Hudson, and Chase Sanford are the three children of Patrick and Angela Sanford.
[3] Typical claims against the state or municipalities will enter a final judgment for either the settlement amount or jury verdict and then pay the statutory caps out of that final judgment. Therefore, the claim bill presented before the Legislature is the sum left undisbursed from the final judgment.

mediation settlement agreement.

CLAIMANT'S POSITION: Benjamin Hunter, while acting as an employee of Leon County, negligently operated a county ambulance by not coming to a complete stop at a traffic light in accordance with Leon County EMS's Standard Operating Guidelines. The result of his negligence caused Angela Sanford's injuries.

RESPONDENT'S POSITION: The County disputes the cause of the accident and the degree of damages. While admitting Benjamin Hunter misidentified the traffic signal, Leon County argues Patrick Sanford's driving was at greater fault by driving tired, intoxicated, and failing to yield to an ambulance with its emergency lights and sirens activated. Furthermore, Leon County argues Angela Sanford's damages are overestimated.

CONCLUSION OF LAW: Benjamin Hunter's failure to slow down and to stop at the red light was negligent and his negligence resulted in Angela Sanford's injuries.

Duty
A driver of a motor vehicle has a duty to use reasonable care, in light of the circumstances, to prevent injuring persons within the vehicle's path.[4] Both drivers, Patrick Sanford and Benjamin Hunter, had a duty of reasonable care to other drivers on the road. However, Hunter's role as an ambulance driver elevated his duty of reasonable care given the dangers and urgency of his job. Florida statutes allow the driver of an ambulance, when responding to an emergency call, to drive through a red light or stop sign but only after "slowing down as may be necessary for safe operation."[5] A driver responding to the emergency call is not relieved "from the duty to drive with due regard for the safety of all persons."[6]

Benjamin Hunter, driving a Leon County ambulance, in route to an emergency call, owed the Sanford's a duty to use reasonable care and to drive with regard for the safety of all persons.

Breach
Leon County E.M.S. Standard Operating Guidelines provide that "when driving to an emergency all drivers of emergency vehicles will come to a full and complete stop at all red lights and stop signs." Benjamin Hunter initially told investigators from Leon County Sheriff's office that he believed the light was yellow. After reviewing his own dash camera's recording, Hunter admitted the light was in fact red and acknowledges if a light is red, the driver of the ambulance is to come to a stop and

[4] *Gowdy v. Bell*, 993 So. 2d 585, 586 (Fla. 1st DCA 2008).
[5] Section 316.072(5), F.S.
[6] Section 316.072(5)(c), F.S.

clear the intersection. Benjamin Hunter's failure to come to a complete stop at the red traffic signal was in violation of Leon County E.M.S. Standard Operating Guidelines and a breach of his duty to drive with reasonable care.

Causation
In order for a driver to be held liable for his or her negligence, it must be shown that failure to act as a reasonable person would result in an injury.[7] Brian Hunter's failure to notice the red light, slow down and arrive at a complete stop to ensure traffic with the right of way heeded the ambulance's siren, was a direct and proximate cause of the collision. If Benjamin Hunter would have stopped at the red light, Patrick Sanford's SUV would have safely passed through the intersection.

Contributory Negligence
The County argues that Patrick Sanford's failure to notice the ambulance, failure to take evasive actions and his speed contributed to the collision. Certainly, if this claim had been tried before a jury, Patrick Sanford's actions would be found to be contributory negligent in the collision. However, Patrick Sanford's negligence does not bar recovery.[8] This Special Master finds Patrick Sanford's speed contributed to the collision but after reviewing the video and the scene, there also existed natural barriers that obscured Patrick Sanford's ability to see the lights of the ambulance as it approached the intersection. Furthermore, this claim is before the Legislature because *both* parties agreed to a mediated settlement agreement that this Special Master finds contemplated the actions of Patrick Sanford and arrives at a reasonable amount which takes into account the contributory negligence of Patrick Sanford.

Damages
Angela Sanford suffered severe injuries in the collision. She has amassed medical bills in the amount of $744,128.53. Additionally, Claimant's expert assesses Angela Sanford's loss of future earning capacity at $765,944 and future medical costs at $3,304,516.

Leon County, while recognizing the great strides Angela Sanford has made in her recovery, objects to the amount of the claim. Specifically, in calculating the loss of future earning capacity, the County argues Claimant's expert considered income Angela Sanford would have earned as a school teacher, despite the fact that she is not licensed to teach in Florida nor has she taught school in several years. The County also objects to the amount of future medical costs as excessive since several medications and treatments prescribed in the analysis are, according to the County, not needed. At the special master hearing, counsel for Leon County assessed

[7] *Ry. Exp. Agency v. Brabham*, 62 So. 2d 713, 714-15 (Fla. 1952).
[8] Section 768.81(2), F.S.

future medical costs at $350,000 to $400,000.

After considering the severe damages suffered by Angela Sanford and arguments from both parties, this Special Master finds the amount of $1,150,000 to be a fair and just amount.

ATTORNEY'S/ LOBBYING FEES: Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 25% fee. Outstanding costs total $30,000.

LEGISLATIVE HISTORY: In the 2016 Legislative Session, this claim was introduced as House Bill 3511 by Representative Beshears and Senate Bill 22 by Senator Montford. The House Bill died in Civil Justice Subcommittee while the Senate Bill was heard and voted out of three Senate Committees (Judiciary/Community Affairs/Fiscal Policy) but ultimately died on the Senate Calendar.

COLLATERAL SOURCES: Angela Sanford received $50,000 pursuant to an uninsured motorist policy. Attorney's fees were not taken out of that payment.

RESPONDENT'S ABILITY TO PAY: Leon County is insured up to $3,000,000 and has received no indication from its insurer that the entire amount of the claim bill, if passed, will not be paid.

RECOMMENDATIONS: I respectfully recommend that House Bill 6507 be reported FAVORABLY.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Beshears, House Sponsor
Senator Montford, Senate Sponsor
Lauren Jones, Senate Special Master

A bill to be entitled

An act for the relief of Angela Sanford by Leon County; providing for an appropriation to compensate her for injuries and damages sustained as a result of the negligence of an employee of Leon County; providing that certain payments and the appropriation satisfy all present and future claims related to the negligent act; providing a limitation on the payment of compensation, fees, and costs; providing an effective date.

WHEREAS, on September 5, 2013, Angela Sanford was a belted, front-seat passenger in a car that was traveling on a green light through the intersection of West Tharpe Street and North Martin Luther King, Jr., Boulevard in Tallahassee, and

WHEREAS, at the same time, a Leon County ambulance operated by Leon County employee Benjamin Hunter entered the intersection despite a red light displayed on the traffic signal, which was clearly visible the entire time Mr. Hunter approached the intersection, and

WHEREAS, the ambulance collided with the car in which Angela Sanford was traveling and struck the passenger side door at a speed in excess of 40 miles per hour, and

WHEREAS, Mr. Hunter failed to operate his ambulance in a reasonably safe manner and conducted himself in direct violation

of the Leon County Emergency Medical Services Standard Operating Guidelines, which specifically require all emergency vehicles to come to a full and complete stop at a red light, and

WHEREAS, although Mr. Hunter later claimed that the light was yellow, the video from the ambulance's onboard camera clearly showed that the light was red for the entire 8 seconds of the video, and

WHEREAS, the investigation conducted by the Leon County Sheriff's Office concluded that Mr. Hunter was solely at fault in the accident, and

WHEREAS, Mr. Hunter also admitted, and the evidence showed, that fences, trees, and buildings at the corner of the intersection blocked the other driver's view of the ambulance as it approached the intersection, and

WHEREAS, as a result of the crash, which left her in a coma, Angela Sanford sustained life-threatening injuries, including a traumatic brain bleed that resulted in permanent cognitive and depressive disorders, a lacerated liver, a ruptured bladder, a cranial nerve injury resulting in permanent double vision, a fractured pelvis requiring hardware insertion, a fractured clavicle requiring hardware insertion, bilateral hip socket fractures requiring hardware insertion, a fractured knee, a fractured shoulder blade, 13 fractured ribs, permanent peroneal nerve palsy known as foot drop, and numerous other injuries which have now left her totally disabled and

permanently unable to return to her career as an elementary school teacher, and

WHEREAS, following mediation, on April 13, 2015, a final judgment in the amount of $1.15 million was entered by the trial court in favor of Angela Sanford against Leon County, and

WHEREAS, Angela Sanford's medical expenses exceeded $744,000 at the time of the judgment, and

WHEREAS, Leon County carried liability insurance with OneBeacon Insurance Group, Ltd., a Bermuda-domiciled company, which will pay 100 percent of any appropriation up to the policy limit of $3 million, and

WHEREAS, Leon County has already paid $300,000 to other persons injured in this accident in satisfaction of sovereign immunity limits set forth in s. 768.28, Florida Statutes, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. Leon County is authorized and directed to appropriate from funds of the county not otherwise appropriated, or from the county's liability insurance coverage, and to draw a warrant in the sum of $1.15 million, payable to Angela Sanford as compensation for injuries and damages sustained.

Section 3. The amount paid by Leon County pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in injuries and damages to Angela Sanford. The total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under this act.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 6507 (2017)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Beshears offered the following:

Amendment

Remove lines 81-83 and insert:

Sanford. Of the amount awarded under this act, the total amount paid for attorney fees may not exceed $230,000, the total amount paid for lobbyist fees may not exceed $57,500, and the total amount paid for costs and other similar expenses relating to this claim may not exceed $30,000.

ANGELA SANFORD vs. LEON COUNTY
Attorney's Affidavit

STATE OF FLORIDA

COUNTY OF LEON

BEFORE ME, the undersigned authority, personally appeared Halley B. Lewis, III, and Chris Dudley, who after being duly sworn, depose and say that the following information is true and correct according to their best knowledge and belief:

1. The attorney's fees pursuant to contract and Florida Statutes are 25%. This equals $287,500.00 on the final judgment amount of $1,150,000, with that amount being broken down as 20% to Plaintiffs' counsel ($230,000.00) and 5% to the lobbyist ($57,500.00).

2. As shown above, the lobbying fees are *included* in the 25% attorney's fees.

3. The costs of litigation in the underlying case totaled $44,808.75. These were set forth in detail in the previous affidavit. They are extensive because this case was fully litigated.

4. No costs were paid by the statutory cap as those funds were used to compensate the other persons who were injured in this accident.

5. In the accounting of the $44,808.75 in costs, $9,554.32 of that was for in-house costs associated with overhead, copying, investigation, research, etc., and $35,254.43 was for

actual costs paid out to third parties such as accident reconstructionist, medical experts, treating physicians, court reporters, illustrations prepared as exhibits, video reenactment, etc.

6. However, in an effort to appease the legislature and to benefit the victim, Plaintiff's counsel has agreed to accept $30,000 as full reimbursement for *all* costs.

Halley B. Lewis, III
Attorney for Angela Sanford

Chris Dudley
Lobbyist for Angela Sanford

SWORN TO AND SUBSCRIBED BEFORE ME this 9 day of March, 2017, by Hal Lewis and Chris Dudley, who are personally known to me or produced his driver's license as identification.

WITNESS my hand and official seal in the County and State last aforesaid this 9 day of March, 2017.

Notary Signature:

Printed Name: Angela C. Scott

My Commission Expires:

ANGELA C. SCOTT
Commission # FF 124013
Expires June 26, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

STORAGE NAME: h6525.CJC
DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6525 - Representative Grant
Relief/C.M.H./Department of Children and Families

THIS IS AN EXCESS JUDGMENT CLAIM FOR $5,076,543.08, BASED ON A JURY VERDICT AWARDING DAMAGES TO C.M.H. FOR PHYSICAL AND SEXUAL ABUSE CAUSED BY THE NEGLIGENT FOSTER PLACEMENT OF A KNOWN SEXUALLY AGGRESSIVE CHILD BY THE DEPARTMENT OF CHILDREN AND FAMILIES ("DCF"). DCF HAS PAID $100,000 OF THE JUDGMENT PURSUANT TO SECTION 768.28, F.S.

DCF DOES NOT OPPOSE THIS CLAIM.

FINDING OF FACT:

Standard of Review
Findings of fact are supported by a preponderance of evidence. The Special Master collected, considered, and included in the record, any reasonably believable information that the Special Master found to be relevant or persuasive in the matter under inquiry. The claimant had the burden of proof on each required element of the claim.

On September 6, 2002, the Department of Children and Families ("DCF") placed J.W., a 10 year old foster child with a history of sexually aggressive behavior towards younger children, in the home of Christopher and Theresa Hann ("The

Hanns"). The Hanns were not licensed or trained foster parents and had no expertise in providing therapeutic services to a child with pervasive social, emotional, psychological, behavioral, and psychiatric problems. Further, despite a specific request, DCF failed to provide the Hanns', who shared the home with their own two young children, with any information regarding J.W.'s psychosocial and behavioral history.

DCF's placement of J.W. in the Hanns' home directly contradicted prior recommendations by DCF providers that J.W. not have access to young children and that his caregivers be able to provide adequate supervision in the home, be informed about his sexual issues, and receive training to deal with such issues. The placement also departed from DCF's own operating procedures and rules regarding the placement of foster children who have been sexually abused or who are sexually aggressive.

The negligent placement resulted in the physical, emotional, and sexual abuse of C.M.H., the Hanns' 8 year old son, by J.W.

Background of J.W. and History of DCF Involvement

J.W. was born in 1992 to a teenage single mother with a history of mental illness and homelessness. She did not receive prenatal care and attempted suicide during the third month of her pregnancy by inhaling butane. While in his mother's care and custody, J.W. was subjected to extreme neglect, cruelty, and physical and sexual abuse.

At an early age, J.W. began to exhibit symptoms of Post-Traumatic Stress Disorder related to his repeated abuse and neglect. His behaviors led to his dismissal from several pre-schools and ultimately, a mental health and medical intervention.

Due to the ongoing abuse, J.W. was removed from his mother's home by DCF and placed in foster care when he was 4 years old. Tragically, while in foster care, J.W. was sexually assaulted by another foster child and when J.W. returned to the care of his mother at age 5 ½, he was severely psychotic. He began setting fires, burning himself on at least one occasion, and intentionally running into the path of oncoming cars. J.W. was diagnosed with non-specified psychosis, major depression with psychotic features; adjustment disorder with mixed disorder of conduct and emotion; and attention deficit hyperactivity disorder and was treated with anti-psychotic medication.

After receiving additional reports of sexual abuse, DCF placed J.W. back into foster care where he resided on and off for approximately the next five years. He would go on to be involuntarily hospitalized at least twice more at the age of 9, due to psychotic behaviors.

Initial Exhibitions of Sexually Aggressive Behavior by J.W.

In 2002, while living with his mother, J.W. began to exhibit sexually aggressive behavior towards other neighborhood children. On June 14, a Family Services Counselor for DCF (the "DCF Counselor"), referred J.W. to Camelot Community Care, a DCF provider of child welfare and behavioral health services, for intensive therapeutic in-home services. However, realizing the severity of his behavioral and mental disturbances, in a communication to Camelot on June 24, the DCF Counselor noted that J.W. needed to be in a residential treatment center as soon as possible.

Camelot accepted the referral to provide in-home mental health services to J.W. as an "emergency temporary solution while DCF [sought] residential placement", concluding that J.W. was "a danger" in the home. However, the Camelot in-home counselor assigned to J.W.'s case did not have experience with sexual trauma and Camelot's initial treatment plan failed to include any specific goals or specialized treatment for sexual abuse.

On July 5, J.W.'s mother informed Camelot that J.W. was continuing to engage in inappropriate sexual behaviors with younger children. A child safety determination conducted by Camelot on July 12, found that based on J.W.'s history, a sibling was likely to be in immediate danger of moderate to severe harm if J.W. was not supervised. Camelot recommended that J.W.'s parents keep him separated from younger siblings at night to preclude inappropriate touching and provide eye contact during the day whenever J.W. interacted with younger children.

However, DCF would remove J.W. from his mother's custody in August of 2002 after she abandoned her children at a friend's home. J.W. was temporarily sheltered in the home of a family friend, a non-relative placement.

A subsequent Comprehensive Behavioral Health Assessment of J.W. conducted at the behest of DCF, found that, in terms of temporal consistency of problems, J.W.'s issues had begun more than two years earlier and remained generally consistent over time. The assessment therefore concluded that J.W. "should not have unsupervised access to . . . any younger, or smaller children wherever he resides." The CBHA goes on to state that, **"J.W.'s caregivers must be informed about these issues and must be able to demonstrate that that they can provide adequate levels of supervision in order to prevent further victimization. These issues should be strongly considered in terms of making decisions about both temporary and long term care and supervision of J.W."**

Inappropriate placement with Hanns

On September 6, 2002, the DCF Counselor removed J.W. from

his temporary placement with a family friend due to allegations that he had been sexually abused by a member of the household.[1] He was thereafter immediately placed with Christopher and Theresa Hann.

Christopher and Theresa Hann were former neighbors of J.W. and his natural family. The couple lived with their two children, a daughter, age 16, and a son, C.M.H., age 8. They were not licensed or trained foster parents but had developed a profound empathy for the neighborhood boy, who would often seek shelter in the Hann home when left alone by his mother. Observing the troubled and chaotic family dynamic in his natural home, Theresa Hann had offered to care for J.W. J.W.'s mother also lobbied to have J.W. placed with the Hann family.

Despite the willingness of the Hanns to care for J.W., his placement in the Hann home violated DCF rules. DCF is required to obtain prior court approval for all non-relative placements. This requirement eliminates the use of non-relative placements in lieu of emergency shelter care.[2] The DCF Counselor failed to obtain the required court approval prior to placing J.W. in the Hann home. She also failed to notify DCF's legal department of the allegation of sexual abuse of J.W. in the initial temporary placement or his subsequent placement in the Hann home until November 5, 2002, two months later. Prior to even seeking court approval, the DCF Counselor was required to refer the Hann's for foster home licensing, and inform the court if the non—relative placement did not become licensed as required.[3] The Hanns were never licensed or trained as foster parents.

Additionally, the placement directly contradicted previous recommendations by DCF providers regarding placement for J.W. due to his sexually aggressive behavior. The DCF Counselor placed J.W. in a home with an 8 year old child after receiving a warning from Camelot two months earlier that a sibling would be in danger in a home with J.W. The Comprehensive Behavioral Health Assessment completed just one week prior to the placement, also recommended that J.W. not have unsupervised access to younger children. Due to his troubling history of sexual abuse and such warnings by DCF providers, DCF was prohibited by its own operating procedures from placing J.W. in a home with a younger child.[4] Further, the Hanns, without knowledge of J.W.'s ongoing inappropriate sexual behavior with younger children, allowed J.W. to share a

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[1] The DCF Counselor failed to report the abuse allegation as required by s. 39.201, Florida Statutes. The incident was ultimately reported by Theresa Hann. The perpetrator would later confess to and be convicted of the offense of child molestation.
[2] Rule 65C-11.004(2).
[3] *Id.*
[4] DCF Operating Procedure 175-88 The Prevention and Placement of Child Victims and Aggressors Involved in Child-On-Child Sexual Abuse, Sexual Assault, Seduction Or Exploitation In Substitute Care; *See also* Rule 65C-13.015(2)(b); *See also* Rule 65C-30.001(24); s. 409.145(2)(d), F.S.

bedroom with their son, C.M.H. DCF rules explicitly prohibit placing a sexually aggressive child in a bedroom with another child.[5] The DCF Counselor knew of the planned sleeping arrangements prior to placing J.W. in the Hann home and did not convey the prohibition to the Hanns.

Moreover, DCF failed to provide any information regarding J.W.'s troubling history of child-on-child sexual abuse to the Hann family, or any information on his background generally, even after a specific request by Christopher Hann for such information. DCF is required by law to share with caregivers, psychological, psychiatric and behavioral histories; and comprehensive behavioral assessments and other social assessments – such information is often found in the child resource record[6]. DCF acknowledged during the litigation of this action that no evidence of a child resource record was found for J.W.[7] Additionally, for the purpose of preventing the reoccurrence of child-on-child sexual abuse, DCF must provide caregivers of sexual abuse victims and aggressors with written, complete, and detailed information and strategies related to such children including the date of the sexual abuse incident(s), type of abuse, narrative outlining the event, type of treatment received, and outcome of the treatment, in order to "provide a safe living environment for **all** of the children living in the home".[8]

Not only did DCF fail to comply with these requirements, the DCF Counselor erroneously informed Christopher Hann that she was not allowed to give them such information because they were only a temporary placement. However, J.W. would remain in the Hann home for approximately three years wherein his behavioral problems continued and quickly escalated.

Inappropriate behavior of J.W. in Hann Residence

Within a few weeks of J.W.'s placement with the Hann family, Theresa Hann would report to Camelot that J.W. was violently lashing out at members of the household, including C.M.H. Camelot recommended to the DCF Counselor that the Hanns place a one way monitor in the bedroom the boys shared. The DCF Counselor agreed and promised to pass the recommendation along to the Hanns. No evidence was presented that the Hanns were ever informed of the

[5] *Id.* at 6.
[6] A Child's Resource Record means a standardized record developed and maintained for every child entering out-of-home care that contains copies of the basic legal, demographic, available and accessible educational, and available and accessible medical and psychological information pertaining to a specific child. The CRR remains in the home where the child is placed and will accompany the child(ren) if there is a change in placement. This allows consistent and complete information to be available to those who are caring for the child(ren). Rule 65C-30.001(24).
[7] CF Operating Pamphlet 15-7 Records Retention Schedule.
[8] *Id.* at 6.

recommendation or obtained the monitor.

On October 24, 2002, J.W.'s troubling behavior further escalated when after a physical altercation with C.M.H., he pulled a knife on the younger child and was stopped from further assaulting C.M.H. by Christopher Hann. Christopher Hann immediately informed Camelot of the incident and J.W. was again made to undergo a mental health assessment. The DCF Counselor later acknowledged that at this point in time, she should have considered removing J.W. from the Hann residence because of the immediate danger he posed to himself, the Hanns, and their son.

However, the DCF Counselor did not remove J.W. and a week later he engaged in inappropriate sexual behavior with a younger child who was visiting the Hann home. Theresa Hann reported the incident to DCF. During the course of its investigation, DCF learned that the children were not under the direct supervision of any adult at the time of the incident – a failure that DCF providers had warned would lead to harm of other children when left alone with J.W. At this time, DCF was again required to give immediate consideration to the safety of C.M.H.[9] But, in spite of the inability of the Hanns, who both worked outside of the home, to adequately supervise J.W. and his continuing access to young children, DCF did not remove J.W. from the Hann home.

Camelot began pressuring the DCF Counselor to set up a psychosexual evaluation for J.W., something the DCF Counselor should have done months earlier pursuant to DCF operating procedures.[10] In fact, Camelot had requested such an evaluation upon J.W.'s placement with the Hanns, and again two days before his inappropriate sexual behavior with a child visiting the Hann home. Camelot notes indicate that they reiterated to the DCF Counselor that "[J.W.] needed specific sexual counseling by a specialist in this area." In the absence of any action by the DCF Counselor, Camelot advised Christopher Hann that a new safety plan would be implemented prohibiting the boys from sharing a room and requiring that J.W. be under close adult supervision when other children were present. Such recommendations had already been a demonstrable failure at preventing J.W. from perpetuating sexual abuse on other children. Further, Christopher Hann, still without knowledge of J.W.'s extensive history of sexual abuse as a victim and aggressor, informed Camelot that the family disagreed with and would not follow the safety plan.

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[9] CFOP 175-88: "If a . . . child-on-child sexual abuse incident occurred or is suspected to have occurred, immediate consideration will be given to the safety of all children residing in the placement."

[10] The family services counselor must initiate a referral for a clinical consultation with a professional trained in childhood sexual abuse within three working days for any child that has been identified as the victim of sexual abuse or as a sexual aggressor. Despite the allegations of sexual abuse in the initial non-relative placement, no referral was made for such a consultation until July 15, 2003, approximately one year after DCF first learned of J.W.'s sexual abuse and aggressive behavior.

By November 2002, C.M.H. began to exhibit behavioral problems which Camelot directly attributed to J.W. being in the home. His grades in school began to drop, and in one school year he went from being an "A", "B", or "C" student to failing grades.

The Hann family, overwhelmed with the number of providers involved in J.W.'s care and the disruption to the family, canceled the services of Camelot in December 2002. On its discharge form, signed by the DCF Counselor, Camelot recommended that J.W. be placed in residential treatment center. However, no change in placement was initiated by DCF.

In June of 2003, J.W. began expressing sexually inappropriate behavior towards C.M.H. Following escalation in J.W.'s behavior, now directed towards C.M.H., DCF finally secured the psychosexual evaluation for J.W. but still did not remove him from the Hann home. The evaluation found that J.W. "fit the profile of a sexually aggressive child due to the fact that he continues to engage in extensive sexual behaviors and with children younger than himself". Further they found that J.W. "[presented] a risk of potentially becoming increasingly more aggressive" and "continuing sexually inappropriate behaviors". They warned that J.W. "may potentially seek out victims who are children and coerce them to engage in sexual activity" and again recommended sexual specific counseling for J.W. and appropriate training for his caregivers.

In October 2003, the Hann family requested that J.W. be placed in a therapeutic treatment facility as they did not feel equipped to provide him with the services and interventions he needed. Therapeutic placement was authorized for J.W. and he was referred to a care facility. However, the Hanns were told that if J.W. was removed from their home, they may not be permitted visitation privileges with him at the facility in which he would be placed. This was the source of considerable angst on the part of the Hanns who did not want to be the next in a series of parental figures who "abandoned" J.W. Ultimately, the Hanns made the decision to maintain J.W. in their home and requested additional services to treat his ongoing issues. They also began training to become therapeutic foster parents.

C.M.H.'s problems due to J.W.'s presence in the home continued at school. From late 2003 to early 2004, C.M.H. began to act out and have more conflicts in school. In January he would receive a student discipline referral for ongoing behavioral problems in the classroom. He also began gaining weight in the first quarter of 2004 and would subsequently gain approximately 40 pounds over the next two years.

Closure of DCF Dependency Case

On March 3, 2004, Theresa Hann was diagnosed with terminal cancer. Christopher Hann contacted DCF within 48 hours of the diagnosis to stop the process of having J.W. placed with the family as long term non-relative caregivers and asked that he be placed elsewhere. The DCF Counselor visited the home within 24 hours and informed the family that "we'll get on it".

However, nothing was done, and contrary to the express wishes of the Hanns and without their knowledge, on April 12, 2004, DCF had the Hanns declared as "long term non-relative caregivers" of J.W. DCF subsequently closed J.W.'s dependency case, leaving him in the care and custody of the Hanns.

Because the Hanns were not a part of the foster care system, once DCF closed its dependency case, the Hann family lost approximately 50% of the services and counseling that had been provided to the family. The Hanns would later directly attribute the subsequent resurgence in J.W.'s inappropriate sexual behavior to the loss of counseling services.

J.W.'s sexual abuse of C.M.H.; Removal from Hann home

The Hanns, left with almost no support from DCF, grew desperate and more hopeless as they grappled with Theresa Hann's illness and J.W.'s continuing deviant behavior.

C.M.H.'s troubles also continued. An April 2005 treatment plan from a child development center noted that he had begun to have nightmares and became frustrated at the slightest inconvenience. He presented for treatment with avoidance of thoughts, feelings, or conversations about sexual trauma. The treatment plan also indicated that Theresa Hann's diagnosis of terminal cancer and intensive chemotherapy treatments were contributing to C.M.H.'s increasing separation anxiety (related to his mother) and grief issues. He was diagnosed with Posttraumatic Stress Disorder.

At that time, Christopher Hann wrote DCF and the juvenile judge requesting an emergency hearing to move J.W. to a residential placement. He explained that although they were doing all they could for the family and J.W., they could no longer cope. He described his wife's diagnosis of terminal cancer and J.W.'s escalating sexual behaviors. There was no response to his request and J.W. remained in the Hann home.

A June 16, 2005, report from Child & Family Connections, the lead agency for community based-care in Palm Beach County, described J.W.'s personality and behavior, the high risk of

sexual behavior problems and increasing aggression, his excessive masturbation, rubbing up against Theresa Hann, seeking out younger children, lies, and refusal to take responsibility for his actions. The report noted that the Hanns "[had] been told that it is not a matter of will J.W. perpetrate on their son again, but a matter of when.....[J.W. was] in need of a more restrictive setting with intensive services specializing in sexual specific treatment." Additionally, it was noted that J.W.'s previous therapist, current therapist, and a psychosexual evaluation all recommended a full-time group home facility specializing in sexual specific treatment. The report concluded that J.W.'s condition was "so severe and the situation so urgent that treatment [could not] be safely attempted in the community."

On July 29, 2005, after a physical altercation between J.W. and Theresa Hann, C.M.H., then ten years old, disclosed to his parents that approximately two years prior J.W. had forced him to engage in a sex act while the boys were at a sleep over. Chris Hann called Girls & Boys Town and demanded that J.W. be removed from the home immediately. Later that same day, DCF finally removed J.W. from the Hann home.

LITIGATION HISTORY:

On April 14, 2006, Christopher and Theresa Hann, individually, and as natural parents and legal guardians of C.M.H., filed a negligence action against the Department of Children and Families, Father Flanagan's Boys' Home, Camelot Care Centers, Inc., and Camelot Community Care, Inc. in the 15th Judicial Circuit Court, in and for Palm Beach County, based upon the physical, sexual, and psychological abuse sustained by C.M.H. from a foster child, J.W., who was placed with the family in 2002 by the Department of Children and Families.

The parties litigated the action for nearly eight years during which time Theresa Hann succumbed to cancer. On August 14, 2013, shortly before trial, Christopher Hann and C.M.H. settled with Father Flanagan's Boys' Home for $340,000.

After a four week jury trial in October of 2013, the jury found that the Department of Children and Families and Christopher and Theresa Hann were each negligent and that such negligence was a legal cause of injury to Christopher Hann and C.M.H. The jury assessed 50% of the fault to Christopher Hann and Theresa Hann and 50% of the fault to DCF.

The jury determined that total damages to Christopher Hann were $0 and that total damages to C.M.H. were as follows:

Future Medical Expenses	$	250,000.00
Lost Earning Ability	$	250,000.00

Past Pain & Suffering	$ 6,000,000.00
Future Pain & Suffering	$ 3,500,000.00
TOTAL DAMAGES	$ 10,000,000.00

Reduced to reflect the Department of Children and Families proportionate share of liability, a final judgment was entered against DCF in the amount of $5,000,000 (including post judgment interest at the rate of 4.75% per annum[11]) on November 8, 2013. On January 2, 2014, the court entered a final cost judgment in the amount $176,543.08.

The jury found no negligence on the part of Camelot Community Care, Inc. or Father Flanagan's Boys' Home.

On January 31, 2014, DCF appealed the Final Cost Judgment to the Fourth District Court of Appeal. The appeal was dismissed on March 10, 2014, due to a filing error. No further appeals have been taken and the time for review has expired.

DCF has paid $100,000.00 of the final judgment pursuant to the statutory cap on liability imposed by section 768.28, Florida Statutes.

CLAIMANT'S POSITION: Claimant asserts DCF was negligent and directly liable for the injuries suffered by C.M.H. as a result of the sexual abuse due to placing J.W., a known sexually aggressive child in the Hann home and failing to remove J.W. when DCF was aware placement was inappropriate and dangerous.

RESPONDENT'S POSITION: DCF agrees to not oppose the claim bill and request any amount awarded in the bill funded from the General Revenue Fund.

CONCLUSION OF LAW: Whether or not there is a jury verdict or a settlement agreement every claim bill against the State must be reviewed de novo against the four standard elements of negligence.

Duty

From a de novo review of the evidence, I find that DCF had a duty to maintain the safety of any child residing in a placement with J.W, a known sexually aggressive child.

Specifically, DCF had a duty to exercise reasonable care when placing child aggressors involved in child-on-child sexual abuse or sexual assault in substitute care; to provide caregivers of child sexual aggressors with written, detailed and complete information of the child's history to help prevent the reoccurrence of child-on-child sexual abuse; to establish

[11] Since the Department of Children and Families cannot pay this claim until the claim bill successfully becomes a law, it has been legislative polity not to award post-judgment interest.

appropriate safeguards and strategies to provide a safe living environment for all children living in the foster home with a child sexual aggressor; to ensure that the foster family of a child sexual aggressor is properly trained and equipped to meet the serious needs of the child; and to generally exercise reasonable care under the circumstances.

Breach

A preponderance of the evidence establishes that DCF breached its duty by:

- Placing J.W., a known sexually aggressive child in the Hann home without legal authority and in contravention of recommendations by DCF providers that J.W. not have access to young children;
- Failing to ensure the Hanns were duly licensed and trained as required by department rule, thus ensuring they were capable of safely caring for a child with J.W.'s needs;
- Failing to fully and completely inform the Hanns of J.W.'s history, risk, and the danger he posed to C.M.H. as required by department rule;
- Failing to ensure that adequate safety precautions were in place to prevent the reoccurrence of child-on-child sexual abuse as required by department rule; and
- Failing to remove J.W. from the Hann home when it became clear that the placement was inappropriate and dangerous to C.M.H.

Causation

The sexual, physical, and emotional abuse suffered by C.M.H. was the direct and proximate result of DCF's failure to fulfill its duties regarding the foster placement of a known sexually aggressive child.

Damages

Damages in the amount of $5,000,000 are reasonable under the circumstances and fully supported by the weight of the evidence.

C.M.H. was initially diagnosed with Post Traumatic Stress Disorder in 2005. Thomas N. Dikel, Ph.D. reaffirmed the diagnosis in 2010, and found that C.M.H.'s severe PTSD was caused by his "experiences of child-on-child sexual abuse, exacerbated and magnified by his mother's diagnosis of stage 4, metastatic colon cancer".

He was re-evaluated by Dr. Stephen Alexander in October 2014 who found that C.M.H. continued to suffer from PTSD and major depression, but had become more dysfunctional since his initial evaluation due to lack of services. Dr. Alexander attributed the majority of C.M.H.'s psychological trauma to the illness and death of his mother but noted that due to J.W.'s

presence in the home during this time, the two events have become inextricably intertwined in his psyche.

A life care continuum was formulated by Darlene M. Carruthers of Comprehensive Rehabilitation Consultants, Inc., to determine the funds necessary to provide for the counseling and support needed by C.M.H. as a direct consequence of the sexual abuse he experienced. It was determined that the cost for medical care, psycho-therapies, educational and support services, as well as transportation and housing, would be $2,237,399.72 over C.M.H.'s life.

ATTORNEY'S/ LOBBYING FEES: Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 25% fee. Outstanding costs total $731.47.

RECOMMENDATIONS: Accordingly, I recommend that House Bill 6525 be reported **FAVORABLY.**

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Grant, House Sponsor
Senator Braynon, Senate Sponsor
Barbara Crosier, Senate Special Master

A bill to be entitled

An act for the relief of C.M.H.; providing an appropriation to compensate C.M.H. for injuries and damages sustained as a result of the negligence of the Department of Children and Families, formerly known as the Department of Children and Family Services; requiring certain funds to be placed into an irrevocable trust; providing a limitation on attorney and lobbying fees; providing an effective date.

WHEREAS, beginning at a very young age, J.W. was subjected to incidents of physical and sexual abuse, which caused him to become sexually aggressive, and

WHEREAS, on September 5, 2002, J.W., then in the custody of the Department of Children and Families (DCF), formerly known as the Department of Children and Family Services, was placed into the home of C.M.H., whose parents volunteered to have J.W. live in their home, and

WHEREAS, prior to the placement of J.W. with the family, DCF obtained a comprehensive behavioral health assessment that stated that J.W. was sexually aggressive and that recommended specific precautions and training for potential foster parents, which C.M.H.'s parents did not receive, and

WHEREAS, the testimony of the DCF caseworker confirmed that DCF was aware that then-10-year-old J.W. and then-8-year-old

C.M.H. were sharing a bedroom, and

WHEREAS, on October 31, 2002, J.W. sexually assaulted a 4-year-old child who was visiting C.M.H.'s home, and

WHEREAS, although DCF knew that J.W. was sexually aggressive, the agency did not remove him from the home, and

WHEREAS, after November 2002, J.W.'s behavioral problems escalated, and he deliberately squeezed C.M.H.'s pet mouse to death in front of C.M.H. and made physical threats toward C.M.H., and

WHEREAS, C.M.H.'s parents began to discuss adopting J.W., whom they considered a part of their family, and

WHEREAS, in January 2004, the family began taking therapeutic parenting classes to better meet J.W.'s needs, and

WHEREAS, in March 2004, after C.M.H.'s mother was diagnosed with Stage 4, terminal, metastatic colon cancer, which had spread to her liver, C.M.H.'s father requested that DCF stop the process of having the family designated as "long-term nonrelative caregivers," and

WHEREAS, in April 2004, DCF closed out J.W.'s dependency file, leaving J.W. in the custody of the family, and

WHEREAS, in April 2005, C.M.H.'s father wrote DCF and the juvenile judge assigned to the case to request help in placing J.W. in a residential treatment facility, and

WHEREAS, on July 28, 2005, after a physical altercation between J.W. and C.M.H., C.M.H. disclosed to his parents that

J.W. had sexually assaulted him, and J.W. was immediately removed from the home, and

WHEREAS, C.M.H. sustained severe and permanent psychiatric injuries, including posttraumatic stress disorder, as a result of the sexual and emotional abuse perpetrated by J.W., and

WHEREAS, the sexual assault of C.M.H. by J.W. was predictable and preventable, and

WHEREAS, on April 14, 2006, a lawsuit, Case No. 2006 CA 003727, was filed in the 15th Judicial Circuit in and for Palm Beach County on behalf of C.M.H., by and through his parents, alleging negligence on the part of DCF and its providers which allowed the perpetration of sexual abuse against and the victimization of C.M.H. by J.W., and

WHEREAS, a mutually agreeable settlement could not be reached, and a jury trial was held in Palm Beach County, and

WHEREAS, on January 2, 2014, after a jury trial and verdict, the court entered a judgment against DCF for $5,176,543.08, including costs, and

WHEREAS, the Division of Risk Management of the Department of Financial Services paid the family of C.M.H. $100,000, the statutory limit at that time under s. 768.28, Florida Statutes, and

WHEREAS, C.M.H., now a young adult, is at a vulnerable stage in his life and urgently needs to recover the balance of the judgment awarded him so that his psychiatric injuries may be

addressed and he may lead a normal life, and

WHEREAS, the balance of the judgment is to be paid into an irrevocable trust through the passage of this claim bill in the amount of $5,076,543.08, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. There is appropriated from the General Revenue Fund to the Department of Children and Families the sum of $5,076,543.08 for the relief of C.M.H. for the personal injuries and damages he sustained. After payment of attorney fees and costs, lobbying fees, and other similar expenses relating to this claim, the remaining funds shall be placed into an irrevocable trust created for C.M.H. for his exclusive use and benefit.

Section 3. The Chief Financial Officer is directed to draw a warrant in favor of C.M.H. in the sum of $5,076,543.08 upon funds of the Department of Children and Families in the State Treasury, and the Chief Financial Officer is directed to pay the same out of such funds in the State Treasury not otherwise appropriated.

Section 4. The amount paid by the Department of Children and Families pursuant to s. 768.28, Florida Statutes, and the

amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in the preamble to this act which resulted in the personal injuries and damages to C.M.H. The total amount of attorney fees and lobbying fees relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 5. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 6525 (2017)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Grant, J. offered the following:

Amendment

Remove lines 105-107 and insert:

Of the amount awarded under this act, the total amount paid for attorney fees may not exceed $1,269,135.77, no amount awarded under this act may be paid for lobbyist fee, and the total amount paid for costs and other similar expenses relating to this claim may not exceed $731.47.

AFFIDAVIT OF FEES AND COSTS

BEFORE ME, the undersigned authority, duly authorized to take oaths and acknowledgments, personally appeared Howard M. Talenfeld ("Affiant"), who, being first duly sworn upon oath, deposes and states as follows:

1. My name is Howard M. Talenfeld, and this affidavit is based upon my personal knowledge.

2. I am now Managing Partner in the law firm of Talenfeld Law Group, PLLC d/b/a Talenfeld Law, and was previously a shareholder at Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., now Colodny Fass, P.A., from 1982 until October 31, 2014.

3. Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A. was co-counsel in the case of CHRISTOPHER HANN, individually and C.M.H., individually and in his own capacity, vs. CAMELOT COMMUNITY CARE, INC., AND FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Circuit Case No.: 502006CA003727XXXXMB AN, in Palm Beach County, Florida.

4. The total attorneys fees for representation of CMH in the Circuit Court proceedings as well as for lobbying was 25% of any recovery.

5. The Claimant and the counsel involved in the case have agreed that any attorneys fees shall be divided as follows:

   a. Forty percent (40%) - Babbitt, Johnson, Osborne & Leclainche, P.A.;

   b. Forty percent (40%) - Talenfeld Law Group, PLLC d/b/a Talenfeld Law; and

   c. Twenty percent (20%) - Colodny Fass, P.A.

6. Lobbying services have been and will be provided by the law firm of Corcoran and Johnston, Igniting Florida, LLC, and any other lobbyist who may become involved on a *pro bono* basis.

7. Lobbying services have been provided *pro bono* and are therefore not being billed or included in the attorneys fees listed above.

8. The only remaining outstanding costs total $731.47 and are payable to Comprehensive Rehabilitation Consultants, Inc., for updated evaluations. These costs will be paid from the funds remaining in claimant's trust.

9. The following are the costs which were paid from the statutory cap payment:

   a. A total amount of $54,234.30 was paid as follows:

      i. $9,739.52 to Babbitt, Johnson, Osborne & Leclainche, P.A.;

      ii. $44,494.78 to Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A. (The actual amount of costs totaled $46,891.66, however, the Claimant received a credit in the amount of $2,396.88)

   b. An additional amount of $20,765.70 was held in trust by Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., as a cost reserve for future expenses for the claimant. As of today, a total of $17,605.25 has been disbursed and the balance remaining is $3,160.45. (This balance will be further reduced by the payment of the outstanding costs listed above, $731.47 as well as by a payment of $606.87 as reimbursement to Talenfeld Law for advanced costs. The balance in the cost reserve after said payments will be $1,822.11.

10. Regarding the above accounting of costs, there was a total of $6,101.62 in internal costs and $65,737.93 in external costs, as follows:

   a. Of the $9,739.52 paid to Babbitt, Johnson, Osborne & Leclainche, P.A., $3,005.69 were internal costs and $6,733.83 were external costs, for court reporting fees, travel expenses, process servers, shipping, filing fees, photocopying by external vendors, and other payments to third-party vendors.

   b. Of the $44,494.78 paid to Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., $3,008.55 were internal costs and $41,486.23 ($46,891.66 actual costs paid minus the credit of $2,396.88) were external costs for expert fees, court reporting fees, travel expenses, audio/visual trial services, shipping, and other payments to third-party vendors.

   c. Of the $17,605.25 which were paid from the $20,765.70, held in trust by Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, P.A., $87.38 were internal costs and $17,517.87 were external costs for expert fees, travel expenses, lobbying costs, and other payments to third-party vendors.

FURTHER AFFIANT SAYETH NOT.

Howard M. Talenfeld

STATE OF FLORIDA)
)
COUNTY OF BROWARD)

The foregoing was subscribed and sworn to before me this 28 day of February 2017, by Howard M. Talenfeld, who is personally known to me.

My Commission Expires:

Signature of Acknowledger

Sharon Herman

Printed Name of Acknowledger

NOTARY PUBLIC, STATE OF FLORIDA

SHARON HERMAN
MY COMMISSION # FF232738
EXPIRES May 20, 2019
FloridaNotaryService.com

FURTHER AFFIANT SAYETH NOT.

Matthew Blair

STATE OF Florida)
)
COUNTY OF Pasco)

Paragraphs 4, 5, 6, and 7 of the foregoing were subscribed and sworn to before me this 2 day of March 2017, by Matthew Blair, who is personally known to me.

My Commission Expires:

MICHELLE A. KAZOURIS
MY COMMISSION # FF 038908
EXPIRES: August 7, 2017
Bonded Thru Budget Notary Services

Signature of Acknowledger

Michelle A. KAZOURIS
Printed Name of Acknowledger
NOTARY PUBLIC, STATE OF FLORIDA

FURTHER AFFIANT SAYETH NOT.

Nicole Fried

STATE OF Florida)
)
COUNTY OF Brevard)

Paragraphs 4, 5, 6, and 7 of the foregoing were subscribed and sworn to before me this 1 day of March 2017, by Nicole Fried, who personally known to me

My Commission Expires:

Signature of Acknowledger

SHARON HERMAN
MY COMMISSION # FF232733
EXPIRES May 20, 2019
FloridaNotaryService.com

Printed Name of Acknowledger
NOTARY PUBLIC, STATE OF FLORIDA

STORAGE NAME: h6527.CJC
DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6527 - Representative Harrison
Relief/Charles Pandrea/North Broward Hospital District

THIS IS AN EQUITABLE CLAIM BASED ON A JURY VERDICT, WHEREIN THE JURY FOUND THE NORTH BROWARD HOSPITAL DISTRICT D/B/A CORAL SPRINGS MEDICAL CENTER 10% LIABLE FOR THE DEATH OF JANET PANDREA BY AND THROUGH ITS PATHOLOGIST, DR. PETER TSIVIS, M.D. THE DISTRICT HAS PAID $200,000 PURSUANT TO THE STATUTORY CAP, LEAVING $608,554.78 TO BE PAID PURSUANT TO THIS CLAIM BILL.

FINDING OF FACT:

On January 14, 2002, a 65 year-old Janet Pandrea was presented to Dr. Martin S. Stone, M.D., complaining of a cough. Dr. Stone ordered a chest x-ray which revealed a mass. Mrs. Pandrea returned on January 17 for a CT of her chest which revealed a 6 x 4 centimeter mass.[1] Dr. Stone recommended a fine needle core biopsy be performed.

On January 24, Janet Pandrea was admitted to the North Broward Hospital District d/b/a Coral Springs Medical Center ("the District") under the care of Dr. Stone for a CT guided

[1] The Mayo Clinic defines a CT scan as "[c]omputerized tomography (CT scan) — also called CT — [that] combines a series of X-ray views taken from many different angles and computer processing to create cross-sectional images of the bones and soft tissues inside your body."

chest biopsy.

On January 25, Dr. Peter Tsivis, M.D., a pathologist for the District, interpreted the biopsy tissue as consistent with non-Hodgkin's lymphoma but did not provide any information on the type or classification of the non-Hodgkin's lymphoma in his report.[2] Dr. Tsivis submitted his surgical pathology report from the chest biopsy and stated that the specimen demonstrated malignant neoplasm consistent with malignant non-Hodgkin's lymphoma. However, in the microscopic description of Dr. Tsivis' report, he noted that the material in the biopsy was insufficient for confirmatory studies and that additional tissue would be necessary for further evaluation.

On January 30, Dr. Stone referred Mrs. Pandrea to Dr. Abraham Rosenberg, M.D., at Oncology and Hematology Associates of West Broward for an oncologic evaluation. On February 1, Dr. Rosenberg referred Mrs. Pandrea to have a PET scan performed.[3] The PET scan, when looked at in conjunction with the CT scan, supported that the mass was consistent with underlying lymphomatous process.

On February 6, 2002, Dr. Rosenberg referred Mrs. Pandrea for a bone marrow biopsy (which revealed no evidence of malignancy) and called Dr. Tsivis to request additional stains of the biopsy tissue which would help in determining the type of non-Hodgkin's lymphoma Mrs. Pandrea might have had.

On February 7, Dr. Rosenberg started Mrs. Pandrea on chemotherapy using Rituzan, Cytoxan, Oncovin and Prednisone before receiving the results of the stains he had requested the day before.[4] During the day on February 9, Mrs. Pandrea experienced seizures; she lost consciousness that evening. On February 10, she was transported by ambulance to the emergency room at Northwest Medical Center. Her chief complaint was of nausea and vomiting since the chemotherapy session. It was determined that she was having adverse reactions to the Oncovin which was discontinued and replaced with Fludara. Mrs. Pandrea was discharged from Northwest Medical Center on February 13.

Mrs. Pandrea underwent her second cycle of chemotherapy on February 27. On March 6, based on a decreased white blood cell count, Mrs. Pandrea's oncologist prescribed her an

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[2] At trial, it was established that there are over twenty types of non-Hodgkin's lymphoma and knowing which type and classification is an integral part of determining how a patient should be treated.

[3] The Mayo Clinic defines as PET scan as follows: "[a] positron emission tomography (PET) scan is an imaging test that helps reveal how your tissues and organs are functioning. A PET scan uses a radioactive drug (tracer) to show this activity."

[4] In his report, dated February 14, 2002, Dr. Tsivis noted that the additional stainings produced "findings . . . insufficient for further diagnostic evaluation of [the] specimen." However, in the addendum diagnosis of the report, Dr. Tsivis noted that the "needle core biopsy specimen demonstrate[ed] malignant neoplasm consistent with malignant non-Hodgkin's lymphoma."

antibiotic, Levofloxacin. Mrs. Pandrea subsequently developed muscle weakness and pain, and the antibiotic was stopped on March 13.

On March 18, Dr. Stone admitted Mrs. Pandrea to University Hospital, LTD d/b/a University Hospital and Medical Center ("University Hospital") with her chief complaints being difficulty breathing and muscle pain. She was subsequently given a differential diagnosis of rhabdomyolysis by Dr. Charles Kimmel, M.D.[5] Mrs. Pandrea's respiratory efforts continued to decline after she was admitted to University Hospital, and she was intubated by a respiratory therapist on the morning of March 21. Later that day she was transferred to ICU.

The doctors made multiple attempts to wean Mrs. Pandrea from the mechanical ventilator but were unsuccessful until March 25. On March 27, an abdominal x-ray revealed free air below the diaphragm. Mrs. Pandrea was diagnosed with a perforated viscus and had emergency abdominal surgery. Subsequent to the viscus repair surgery, Mrs. Pandrea developed sepsis and died on April 2, 2002. Her family had a private autopsy performed after her death, and the coroner determined that the mass in Mrs. Pandrea's chest was a benign thymoma which was erroneously diagnosed as non-Hodgkin's lymphoma.[6]

LITIGATION HISTORY:

On December 17, 2002, Charles Pandrea, as Plaintiff, filed a Complaint in the 17th Judicial Circuit Court, in and for Broward County, Florida, for the death of his wife, Janet Pandrea, against Abraham Rosenberg, M.D., Oncology and Hematology Associates of West Broward, M.D., P.A., Najib Saba, M.D., Edward Dauer, M.D., P.A., Peter A. Tsivis, M.D., North Broward Hospital District d/b/a Coral Springs Medical Center, Steven Charles Kimmel, M.D., West Broward Rheumatology Associates, Inc., Martin S. Stone, M.D., Martin Spencer Stone, M.D., P.A., Ramon Ramirez, M.D., Leonard Buchbinder, M.D., Abraham A. Chamely, M.D., Abraham A. Chamely, M.D., P.A., Marlon A. Labi, M.D., Ted Hugh Brady, D.O., Marlon A. Labi, M.D. and Associates, P.A., Robert Geronemus, M.D., and South Florida Nephrology Associates, P.A.[7]

In the Complaint, Mr. Pandrea alleged that Dr. Tsivis was

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[5] Rhabdomyolysis is a syndrome of striated muscle necrosis that has many different etiologies. However, because Mrs. Pandrea began experiencing the symptoms of rhabdomyolysis during treatment with Levofloxacin, the coroner later determined that the most likely etiology of rhabdomyolysis in her case was a reaction to the Levofloxacin. Rhabdomyolysis during Levofloxacin therapy is rare but has been reported during clinical trials in less than 1% of cases.

[6] The coroner determined that Mrs. Pandrea's demise was ultimately the result of complications of treatment of rhabdomyolysis. He listed the cause of death as complications of treatment of levofloxacin-induced rhabdomyolysis following chemotherapy for non-Hodgkin's lymphoma.

[7] Of the named Defendants, only the District and Dr. Tsivis were subject to the provisions in section 768.28, F.S., which limits liability to $200,000.

negligent when he failed to properly care and treat Mrs. Pandrea, failed to properly interpret the pathology from the chest mass needle core biopsy, failed to recommend a repeat biopsy due to the material in the specimen being insufficient for any confirmatory studies, and/or failed to recommend appropriate additional diagnostic tests. Mr. Pandrea also alleged that the District was vicariously liable for the actions of its employee, Dr. Tsivis. The Defendants denied these allegations.

Trial commenced on May 6, 2005, and ended on June 8, 2005, when the jury rendered its verdict. The jury awarded Mr. Pandrea $72,498.08 in medical/funeral expenses, $3,000,000 in past pain and suffering and $5,000,000 in future pain and suffering for a total of $8,072,498.08 in damages. As to the cause of Janet Pandrea's death, the jury found Abraham Rosenberg, M.D., to be 50% liable, University Hospital 28% liable, Martin S. Stone, M.D., 12% liable, and the District 10% liable.

The Honorable Judge Robert Collins entered a Final Judgment on June 15, 2005, ordering Dr. Rosenberg to pay $4,043,016.09, the University Hospital to pay $2,252,763.06, Dr. Stone to pay $965,469.88, and the District to pay $808,554.78.

After the Final Judgment was rendered Mr. Pandrea entered into settlement agreements with several of the Defendants; the District did not enter into a settlement agreement with Mr. Pandrea.

Post-verdict, the District paid $200,000 to Mr. Pandrea pursuant to the sovereign immunity limit.

CLAIMANT'S POSITION:

The Claimant asserts that as a result of Dr. Tsivis' negligence, Mrs. Pandrea underwent unnecessary chemotherapy which led to the decreased white blood cell count, which led to the administration of the antibiotic, Levofloxacin, which led to the rhabdomyolysis, which led to her respiratory failure, and ultimately her death.

The Claimant also asserts that under Florida law the concept that an initial wrongdoer is responsible for any negligence that occurs and/or arises as a result of medical treatment received from the injuries that flow from there is well established and applies to Dr. Tsivis' misdiagnosis.[8]

Additionally, the Claimant asserts that it was reasonably foreseeable that Dr. Rosenberg would begin chemotherapy

[8] Respondent asserts that this concept is only relevant when the initial wrongdoer causes a physical harm to the injured party, which Dr. Tsivis did not do in this case.

treatment based on Dr. Tsivis' pathology report which reflected the existence of non-Hodgkin's lymphoma. Dr. Tsivis' initial misread of the pathology slides, Claimant asserts, lead to the series of unfortunate events that caused and/or substantially contributed to cause Mrs. Pandrea's death.

RESPONDENT'S POSITION: The District asserts that Dr. Tsivis' reports were non-diagnostic. To support this assertion, the District points to the fact that Dr. Rosenberg's expert testified that the pathology studies interpreted by Dr. Tsivis were non-diagnostic and agreed that Dr. Rosenberg should not have commenced chemotherapy treatment based upon Dr. Tsivis' reports. Additionally, the District points to the Petitioner's experts who, along with Dr. Rosenberg's expert, agreed that Dr. Rosenberg should not have commenced chemotherapy treatment without obtaining additional biopsy samples and the results of the special staining that he had ordered.

The District also asserts that the jury's verdict in this case was substantially based on a combination of either bias, prejudice or sympathy for the Pandreas and against the District. Further, the District suggests the jury intended to either punish certain co-Defendants in this case for their lack of candor or compassionate medical care or was caught up in a wave of sympathy in favor of the Claimant.

Additionally, the District asserts that Mrs. Pandrea's death was not the direct or natural and probable result of Dr. Tsivis' misinterpretation of the needle core biopsy. In both his initial report and addendum, Dr. Tsivis indicated that the biopsy material was insufficient to run any confirmatory studies. Further, the District asserts that Dr. Rosenberg's negligent commencement of chemotherapy in the absence of a diagnostic pathology study was an unforeseeable, intervening force which extinguishes any liability of Dr. Tsivis.[9]

The District asserts that there are no compelling reasons or justifications to pass and fund the bill.

CONCLUSION OF LAW: The legislature is not bound by the jury's findings of fact. A claim bill is an act of legislative grace in which the legislature allows a citizen to collect damages where they would normally be barred by common law sovereign immunity. The legislature can give the jury's findings of fact weight in making its own determination, but the legislature should conduct its own inquiry of the facts and make its own determination of the facts and law at issue.

I find that Dr. Tsivis was an employee of the District and was in

[9] Respondent points to the testimony of multiple witnesses (of both the Plaintiff and other Defendants) who, during trial and in depositions, testified that Dr. Rosenberg's initiation of chemotherapy based on non-diagnostic studies was not expected or foreseeable.

the course and scope of his employment at the time he interpreted Mrs. Pandrea's needle core biopsy. I find that Dr. Tsivis had a duty to diagnose. I find that both his initial report and addendum were non-diagnostic reports because they did not address what type of non-Hodgkin's lymphoma Mrs. Pandrea might have had and stated that additional tissue would be necessary to perform confirmatory tests. I find that Dr. Tsivis did not breach any duty he owed to Mrs. Pandrea.

Additionally, I find that Dr. Tsivis could not have reasonably foreseen that Dr. Rosenberg would initiate chemotherapy treatment based on Dr. Tsivis' non-diagnostic reports and before Dr. Rosenberg's requested staining results had been rendered. I find that Dr. Rosenberg's commencement of chemotherapy in the absence of a diagnostic pathology study was an unforeseeable, intervening force which extinguishes any liability of Dr. Tsivis.

COLLATERAL SOURCES: Prior to trial, Claimant settled with Dr. Charles Kimmel for $100,000, Dr. Marlon Labi for $200,000, and Dr. Ramon Ramirez for $10,000, for a total of $310,000.

After the Final Order was entered, and pursuant to post-verdict settlement agreements, Claimant received $2,615,000 from Dr. Rosenberg, $1,200,000 from the University Hospital, and $645,000 from Dr. Stone, for a total of $4,460,000.

In total, including settlements before the trial and the post-verdict payments from all the Defendants, Claimant has received $4,970,000.

Additionally, the Claimant had a life insurance policy on Mrs. Pandrea.

RESPONDENT'S ABILITY TO PAY: Should the bill be enacted, the monies would be paid from Broward Health's General Operating Fund. Payment of these funds, although having some impact, would not preclude the North Broward Hospital District from continuing in its mission to provide affordable and quality health care to the general public within the borders of the North Broward Hospital District.

ATTORNEY'S/ LOBBYING FEES: Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 6% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 25% fee. Outstanding costs total $2,129.81.

LEGISLATIVE HISTORY: This is the tenth legislative session in which this claim has been presented to the Legislature. This claim has been filed in both

of the chambers every year beginning in 2009. It has never been heard in a committee in the House. The only time in which it was heard in the Senate was in the 2015 legislative session, in which Senate Bill 28 by Senator Diaz de la Portilla received a favorable vote from the Senate Judiciary Committee. However, the bill died in the Senate Appropriations Subcommittee on Health and Human Services.

RECOMMENDATIONS: For the reasons stated above, I respectfully recommend that the be reported **UNFAVORABLY**.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Harrison, House Sponsor
Senator Steube, Senate Sponsor
Tom Cibula, Senate Special Master

A bill to be entitled

An act for the relief of Charles Pandrea by the North Broward Hospital District; providing for an appropriation to compensate Charles Pandrea, husband of Janet Pandrea, for the death of Janet Pandrea as a result of the negligence of the North Broward Hospital District; providing a limitation on the payment of compensation, fees, and costs; providing an effective date.

WHEREAS, Janet Pandrea died on April 2, 2002, in Broward County as a result of the treatment that she received for non-Hodgkin's lymphoma, a disease that she did not have, and

WHEREAS, the Coral Springs Medical Center, part of the North Broward Hospital District, by and through its pathologist, Peter Tsivis, M.D., breached the applicable standard of care by and through his diagnosis and interpretation of certain slides as being consistent with non-Hodgkin's lymphoma, when the tissue was, in fact, a benign thymoma, and

WHEREAS, based upon this misdiagnosis, Janet Pandrea was subsequently treated with multiple rounds of chemotherapy to which she had adverse reactions, which led to multiple complications and her eventual demise, and

WHEREAS, Charles and Janet Pandrea were married on May 19, 1956, and they had four children together during the course of

their 46-year marriage, and

WHEREAS, Charles Pandrea suffers from the tragic memories of the suffering of his wife from complications of chemotherapy and her prolonged hospital stay and eventual demise, which stemmed from the initial misdiagnosis, and

WHEREAS, Charles Pandrea will continue to suffer mental pain and anguish for the remainder of his life, which has caused and will continue to cause serious psychological problems for him, and

WHEREAS, as a matter of law, a jury in Broward County on June 8, 2005, returned a verdict against the North Broward Hospital District and the verdict was reduced to a final judgment in the amount of $808,554.78 on June 15, 2005, and

WHEREAS, as a matter of law, it was determined that neither Charles Pandrea nor Janet Pandrea caused or contributed to the losses and injuries complained of, and

WHEREAS, the North Broward Hospital District has paid the statutory limit of $200,000 under s. 768.28, Florida Statutes, and

WHEREAS, the North Broward Hospital District is responsible for paying the remainder of the judgment, which is $608,554.78, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The North Broward Hospital District is authorized and directed to appropriate from funds of the district not otherwise appropriated and to draw a warrant in the sum of $608,554.78, payable to Charles Pandrea, husband of Janet Pandrea, deceased, as compensation for the death of Janet Pandrea as a result of the negligence of the North Broward Hospital District.

Section 3. The amount paid by the North Broward Hospital District under s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in the death of Janet Pandrea. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 6527 (2017)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Harrison offered the following:

Amendment (with title amendment)

Remove lines 65-68 and insert:

the death of Janet Pandrea. Of the amount awarded under this act, the total amount paid for attorney fees may not exceed $115,625.41, the total amount paid for lobbyist fees may not exceed $36,513.29, and the total amount paid for costs and other similar expenses relating to this claim may not exceed $2,129.81.

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

Remove lines 20-38 and insert:

WHEREAS, in part based upon the misdiagnosis, Janet Pandrea was subsequently treated by other doctors and underwent multiple rounds of chemotherapy to which she had adverse reactions, which led to multiple complications and her eventual demise, and

WHEREAS, Charles and Janet Pandrea were married on May 19, 1956, and they had four children together during the course of their 46-year marriage, and

WHEREAS, Charles Pandrea suffers from the tragic memories of the suffering of his wife from complications of chemotherapy and her prolonged hospital stay and eventual demise, which stemmed from the initial misdiagnosis, and

WHEREAS, Charles Pandrea will continue to suffer mental pain and anguish for the remainder of his life, which has caused and will continue to cause serious psychological problems for him, and

WHEREAS, Charles Pandrea brought a civil action against the North Broward Hospital District and other treating physicians from other medical providers, and

WHEREAS, as a matter of law, a jury in Broward County on June 8, 2005, returned a verdict in the amount of $8,069,803.50, in which the North Broward Hospital District was found to be 10% at fault and a final judgment was entered in the amount of $808,554.78 on June 15, 2005, and

March 2, 2017

IN THE MATTER FOR RELIEF OF:

Charles Pandrea
Claimant,

v.

North Broward Hospital District
Respondent.
_____/

RE: HB 6527 (companion to SB 16)
Relief of Charles Pandrea v. North Broward Hospital District

COUNTY OF BROWARD)
) SS:
STATE OF FLORIDA)

AFFIDAVIT OF IVAN F. CABRERA, ESQUIRE and MATTHEW BLAIR

PERSONALLY APPEARED before me, the undersigned authorities, **IVAN F. CABRERA, ESQUIRE** and **MATTHEW BLAIR**, who, after being duly sworn, depose and state:

1. My name is IVAN F. CABRERA. I am over twenty-one (21) years of age and have personal knowledge of all of the information contained within this Affidavit.

2. At all times relevant to this cause of action, I am and have been a Partner at the Law Firm of Krupnick Campbell Malone Buser Slama Hancock Liberman, P.A.

3. Although the Law Firm of Krupnick Campbell Malone Buser Slama Hancock Liberman, P.A., utilized a standard contingency fee contract with Mr. Pandrea, Florida law would limit the recovery in cases involving a sovereign entity or subdivisions thereof, to a twenty-five (25%) percent contingency fee. As such, the contingency fee in this cause of action as it relates to the North Broward Hospital District d/b/a Coral Springs Medical Center would be twenty-five (25%) percent.

4. My name is MATTHEW BLAIR. I am over twenty-one (21) years of age and have personal knowledge of all of the information contained within this Affidavit.

5. I am an employee of Corcoran & Johnston in Lutz, Florida and I became involved as a lobbyist in this claim on July 22, 2009.

6. Pursuant to the "Contingency Fee Agreement for Claims Bill Legislative Consulting and Lobbying Services" entered on July 22, 2009, the lobbyist fee is a total of six (6%) percent of the final claims bill amount, contingent upon the bill becoming law.

7. The 6% lobbyist fee is included within the 25% total attorney fee.

8. The outstanding costs of the Law Firm of Krupnick Campbell Malone Buser Slama Hancock Liberman, P.A., as of this date, that will be paid from any amount that may be awarded by the Legislature are $2,129.81.

9. The dollar amount of costs that were paid from the $200,000 statutory cap payment from North Broward Hospital District was **$100,000**, from the total cost amount of $459,505.58 as of 11-11-2005.

10. The total costs expended in this case as of the current date are $481,785.54 (i.e. breakdown $58,324.37 internal / soft costs and $423,461.17 external / hard costs).

FURTHER AFFIANTS SAYETH NAUGHT.

IVAN F. CABRERA, ESQUIRE
Florida Bar No. 972215
Counsel for Claimant / PANDREA
icabrera@krupnicklaw.com
(954)763-8181 office

LISA C. BONO
MY COMMISSION EXPIRES
July 25, 2017
#FF 009545
NOTARY PUBLIC STATE OF FLORIDA

SWORN TO AND SUBSCRIBED
before me this 2nd day of March, 2017

Notary Public / State of Florida
My Commission Expires:

MATTHEW BLAIR
Corcoran & Johnston
Lobbyist for Claimant / PANDREA
matt@corcoranfirm.com
(813)527-0172 office

SWORN TO AND SUBSCRIBED
before me this 2nd day of March, 2017

Notary Public / State of Florida
My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MICHELLE A. KAZOURIS
MY COMMISSION # FF 038908
EXPIRES: August 7, 2017
Bonded Thru Budget Notary Services

STORAGE NAME: h6535.CJC
DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6535 - Representative Jenne
Relief/Vonshelle Brothers/Department of Health

THIS IS AN UNCONTESTED CLAIM FOR $1,000,000 BASED ON A SETTLEMENT AGREEMENT BETWEEN VONSHELLE BROTHERS, AS THE NATURAL PARENT AND LEGAL GUARDIAN ON IYONNA HUGHEY, AND THE DEPARTMENT OF HEALTH AFTER IYONNA SUFFERED INJURIES FROM THE DEPARTMENT'S NEGLIGENCE. THE DEPARTMENT HAS PAID THE STATUTORY LIMITS OF $200,000.

FINDING OF FACT:

On March 16, 2010, twenty-three year old Vonshelle Brothers visited the Brevard County Health Department (BCHD) for her initial pre-natal visit. Vonshelle was nine-weeks pregnant with Iyonna Hughey, her third child. Nurse Elena Cruz-Hunter conducted a Pap test[1] on Vonshelle and sent the test to Quest Diagnostics for analysis.

Quest Diagnostics analyzed the Pap test and returned the test results to the BCHD. In the test results, Quest Diagnostics had the following intepretations:

- Negative for intraepithelial lesion or malignancy.

[1] A Pap test, also known as a Pap smear, is a procedure to test for cervical cancer in women. It involves collecting cells from the cervix, the lower, narrow end of the uterus that is at the top of the vagina. Mayo Clinic, http://www.mayoclinic.org/tests-procedures/pap-smear/basics/definition/prc-20013038.

- Cellular changes consistent with Herpes simplex virus
- Shift in vaginal flora suggestive of bacterial vaginosis.

Additionally, the test result stated "Queued for Alerts call."

The BCHD had a policy in place in how to handle lab slips from entities such as Quest Diagnostic. The policy provides that lab slips will be reviewed by a nurse and initialed. Specifically, negative lab slips should be filed in the client's medical records. Positive lab slips should be pulled and given greater scrutiny. BCHD's policy also provided that any abnormal results needed to be signed by a clinician.

The BCHD received Vonshelle's test results and placed them in her file. There is proof that someone at the health department read the report as there is a check mark adjacent to the interpretations. Nothing from the records show that anyone from Quest Diagnostics called the BCHD or vice versa. The test results were added to Vonshelle's files but no further action was taken regarding the test results. The BCHD did not do any follow up tests to confirm whether Vonshelle had herpes. The BCHD never disclosed the test results to Vonshelle. In fact, Vonshelle returned 15 times during her pregnancy for follow-up appointments, prenatal visits, and ultra sounds. At none of these visits was she told about the herpes results nor were evasive actions taken by her doctor.

On October 14, 2010, at only 36 weeks in to the pregnancy, Vonshelle gave birth to Iyonna Hughey via vaginal delivery at Wuesthoff Medical Center. Vonshelle and Iyonna were discharged from the hospital in good condition on October 16, 2010.

Two weeks later, on the night of October 31, 2010, Vonshelle noticed Iyonna was running a fever. She took Iyonna to a Holmes Regional Medical Center but left after waiting for thirty minutes. She reported that a nurse instructed her to place a wet cloth on Iyonna. It is unconfirmed what was said to her or why Vonshelle left without receiving further medical attention for her daughter.

The next day, November 1, 2010, Vonshelle returned to Wuesthoff Medical Center's Emergency Department with Iyonna, whose condition had only gotten worse. Iyonna was lethargic, not eating, and was continuing to run a fever. A lumbar puncture was performed in which cerebral spinal fluid was collected. Initial diagnosis of Iyonna was that she had meningitis and she was transferred to Arnold Palmer Hospital for further evaluation. However, on November 3, 2010, the final results of the cerebral spinal fluid were reported and indicated Iyonna tested positive for herpes simplex virus type 2.

There are two types of the herpes virus. Herpes simplex virus

type 1 ("HSV-1") is mainly transmitted by oral contact and can cause cold sores and fever blisters around the mouth. Herpes simplex virus type 2 ("HSV-2") is a sexually transmitted infection that causes genital herpes. HSV-2 can be spread through sexual contact or skin-to-skin contact, and in rare circumstances, can be transmitted from a mother to her infant during delivery.[2] If a person with either HSV-1 or HSV-2 is pregnant, their physician may consider a delivery by cesarean section. Both of these viruses remain in the body throughout a person's life, even when they are not showing signs of infection.[3]

Not only was it discovered through the lumbar puncture that Iyonna had HSV-2, it was clear that she had herpes meningoencephalitis. Essentially, the HSV-2 had infected Iyonna's brain. She stayed at the Arnold Palmer Hospital for over a month receiving treatment, including being placed on Acyclovir to help suppress the infection.

As a result of the HSV-2, Iyonna has suffered significant and long lasting developmental delays in both her cognitive and executive functions. Iyonna is now six years-old and cannot speak but a few words. She cannot fully walk on her own. She relies upon others to use the restroom. Dr. Daniel Adler, M.D., who examined Iyonna, states she has a chronic and permanent neurological disability.

Iyonna is now in elementary school but has no wheel chair or walker. She's in a special needs program at Palm Bay Elementary. She resides with her mother and her four sisters in a second floor apartment, in which her mother must carry Iyonna up and down the stairs every day to catch the bus.

LITIGATION HISTORY:

On October 9, 2012, Vonshelle Brothers, individually, and as natural parent of Iyonna Hughey, filed a complaint in Circuit Court of the Eighteenth Judicial Circuit in Brevard County alleging negligence against the BCHD, a department of the Florida Department of Health (DOH). On April 25, 2016, a week before the scheduled jury trial was to begin, the parties entered into a settlement agreement in the amount of $3,200,000. As a term of the settlement agreement, DOH reserved the right to contest a claim bill. DOH paid the $200,000 statutory cap, of which $50,000 went towards the purchase of an annuity which will begin payments when Iyonna turns 18 years-old.

Following the filing of the claim bill in January 2017, the parties reached another settlement. This settlement provides that the

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[2] World Health Organization, "Herpes simplex virus" http://www.who.int/mediacentre/factsheets/fs400/en/ .
[3] Johns Hopkins Medicine, "Herpes Meningoencephalitis" http://www.hopkinsmedicine.org/healthlibrary/conditions/nervous_system_disorders/herpes_meningoencephalitis_134,27/ .

amount requested in the claim bill will only be $1,000,000 and DOH will not contest enactment of the claim bill.

CLAIMANT'S POSITION: Vonshelle, as parent and guardian of Iyonna Hughey, (Claimant) argues the BCHD was negligent when they failed to conduct further testing and analysis when they received the results of the Pap test. The standard of care required the BCHD to have conducted more tests and take further precautions in the pregnancy, such as starting anti-viral medication or delivering Iyonna via cesarean section. If these precautions were followed, then Iyonna would not have suffered irreparable brain damage.

RESPONDENT'S POSITION: DOH does not contest the claim bill and requests the Legislature provide an additional appropriation from General Revenue Fund to DOH to pay the claim.

CONCLUSION OF LAW: Whether or not there is a jury verdict or a settlement agreement, as there is here, every claims bill must be based on facts sufficient to meet the preponderance of evidence standard.

Duty

In Florida, to prevail on a medical malpractice claim, a claimant must show what standard of care was owed by the defendant, how the defendant breached that standard of care, and that the breach was the proximate cause of damages.[4] The professional standard of care is the level of care, skill, and treatment which, in light of all surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.[5] "Generally, expert testimony is required to establish the standard of care prevalent in a particular medical field. Thus, from a professional standpoint, the services rendered by a physician are scrutinized by other physicians in order to determine whether there was a failure to adhere to the requisite standard of care."[6]

Claimant has presented several different experts that testified the BCHD deviated from the standard of care. Sharon Hall, a registered nurse and expert on labor and delivery, stated that the standard of care required the nurses at the BCHD to report any abnormal results in the Pap test and failure to do so was a deviation from the standard of care. Additionally, Dr. Berto Lopez, a practicing medical doctor certified in Obstetrics and Gynecology, provided that the standard of care for ordering tests on patient's samples requires the physician to follow up and be responsible for knowing those test results. Under Dr. Lopez's view of the standard of care, the nurse reviewing the test results and being the arbitrator of what is important falls

[4] *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984).
[5] s. 766.102(1), F.S.
[6] *Moisan v. Frank K. Kriz, J.K., M.D., P.A.*, 531 So. 2d 398, 399 (Fla. 2d DCA 1988).

below the standard of care. The failure of the treating physician to not review the lab results deviates below the standard of care.

From the expert testimony provided, I find the BCHD had a duty to review the lab results and to follow up with further diagnostic testing.

Breach
If the standard of care required the BCHD to follow up on any abnormal reports, then the BCHD clearly breached their duty. From the BCHD's own policy regarding lab results, the BCHD failed to have a clinician review any abnormal test results.

Causation
In order for a defendant to be liable to a claimant, the claimant must show the defendant's actions were the proximate cause of claimant's injuries.[7] In this case, causation was the most contentious issue prior to settlement. the BCHD failed to notice the abnormal test and failed to follow up with any further diagnostic testing. It is clear Iyonna has HSV-2 and herpes encephalitis. At contention in litigation was how Iyonna contracted HSV-2?

The lab results from Quest Diagnostics stated that Vonshelle's Pap test showed "cellular change consistent with Herpes simplex virus." She was not given a more extensive test while pregnant with Iyonna. In the midst of litigation, Vonshelle was tested three times for HSV-2. In two of the tests, which analyzed her blood, Vonshelle tested negative for HSV-2. In a more thorough test, in which Vonshelle's DNA was analyzed, she tested positive for HSV-1 and indeterminate for HSV-2. Dr. Lopez testified that Vonshelle's negative test results for HSV-2 do not preclude her from actually having HSV-2. According to Dr. Lopez, Vonshelle's viral load may not have been sufficient at the time the tests were performed to trigger a positive test result. Vonshelle stated that she had two boils during her pregnancy with Iyonna, one under her arm and another near her genitals. It is unclear whether or not these boils were lesions consistent with HSV-2.

Claimant's attorney argues that despite the inconclusive test results of Vonshelle, based on the timing of the onset of symptoms, it is more likely than not that Iyonna contracted HSV-2 from Vonshelle via vaginal delivery. Nurse Hall, an expert on labor and delivery, stated symptoms of HSV-2 will show up 12 to 14 days after exposure. Dr. Carl Barr, DOH's own medical expert, testified that the most common cause of exposure for infants with HSV-2 was through vertical transmission from mother to child during birth. Dr. Catherine Lamprecht, a pediatric infectious disease specialist, stated the

[7] *Y.H. Invs. v. Godales*, 690 So. 2d 1273, 1279 (Fla. 1997).

timing of Iyonna's symptoms in late October is consistent with exposure to HSV-2 during labor and delivery. She even stated that 98% of the time a baby contracts neonatal herpes, it is from exposure in labor and delivery. Dr. Daniel Adler, an expert on neonatal herpes simplex encephalitis and how newborns contract HSV, stated it was more likely than not an acquisition of HSV-2 occurred during delivery via the birth canal.

Based on the onset of symptoms and the experts presented, I find Iyonna contracted HSV-2 through vaginal delivery. Dr. Lopez testified that if further testing was done of Vonshelle following the Pap test, Iyonna may have never contracted HSV-2. Specifically, a doctor could have started Vonshelle on antiviral therapy which would have lessened the chances of an active lesion and exposure to Iyonna. If there was an acute outbreak of herpes, Vonshelle could have undergone a cesarean section to prevent the transmission of herpes to her child.

Comparative Negligence

One of the questions that would have been presented to a jury is whether anyone else is responsible for Iyonna's injuries besides the BCHD? Certainly Quest Diagnostics knew of an abnormal result and there is no evidence anyone from Quest Diagnostics called the BCHD. Claimant's attorneys stated at the special master hearing that they looked into any claim of liability against Quest Diagnostics and it was seen to be without merit. Their own experts stated the lab company owed no duty to Vonshelle or Iyonna, only to inform the clinician ordering the tests. Additionally, Claimant's attorneys pursued a claim against Wuesthoff Medical Center, the hospital that delivered Iyonna, on whether they should have thoroughly reviewed Vonshelle's medical history and charts before delivery. Again, Claimant's attorney's experts stated that the hospital did not deviate from the standard of care.

Certainly one may choose to blame Vonshelle for contracting HSV-2 and transferring it to her daughter. It is unclear whether Iyonna's father has HSV-2 and gave it to Vonshelle. It is unclear when or how Vonshelle contracted HSV-2. She reported boils on her skin but it is not clear whether they were associated with HSV-2. On October 31, 2010, she left the hospital without letting Iyonna see a doctor, but later returned the next day. It is unclear whether those hours may have altered Iyonna's condition in anyway. It is uncertain if a jury would hold Iyonna responsible for the actions of her mother and reduce any award to Iyonna. What is clear is that Vonshelle's entire claim against DOH has been satisfied and any amount awarded in a claim bill will go to Iyonna's claims and her future care.

Damages
Iyonna's damages are severe and lifelong. Her neurological development is stunted and may never meet that of her peers. She is dependent on others to use the restroom, to bathe, and to walk. Dr. Paul Deutsch, a certified life care planner, opined that Iyonna will remain dependent throughout the remainder of her life. She is receiving therapy at her school but is currently not enrolled in any form of speech therapy. Claimant's attorneys submitted a life care plan which estimates Iyonna's total economic loss at $10,062,029. Even if this life care plan overestimates the cost of her future care, Iyonna will be dependent and require care for the rest of her life. The settlement amount awarded in the bill of $1,000,000, in addition to the $50,000 annuity purchased, is a fair and appropriate amount to compensate Iyonna for her injuries.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorney has an agreement with Claimant to take a fee of 15% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 15% fee. Outstanding costs total $2,214.

LEGISLATIVE HISTORY:

This is the first time this instant claim has been presented to the Legislature

RECOMMENDATIONS:

The bill needs to be amended to reduce the total amount awarded in the bill to $1,000,000 and to provide that the award will be paid to a special needs trust for the care and benefit of Iyonna Hughey with an institutional trustee.

Accordingly, I respectfully recommend that House Bill 6535 be reported **FAVORABLY**.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Jenne, House Sponsor
Senator Rodriguez, Senate Sponsor
Eva Davis, Senate Special Master

A bill to be entitled

An act for the relief of Vonshelle Brothers, individually, and as the natural parent and legal guardian of Iyonna Hughey; providing an appropriation to compensate her and her daughter for injuries and damages sustained as a result of the alleged negligence of the Brevard County Health Department, an agency of the Department of Health; providing that certain payments and the appropriation satisfy all present and future claims related to the alleged negligent acts; providing a limitation on the payment of compensation, fees, and costs; providing an effective date.

WHEREAS, on March 16, 2010, Vonshelle Brothers visited a location of the Brevard County Health Department for her initial prenatal visit, during which a complete obstetrical and gynecological exam was conducted, including a Pap smear, and

WHEREAS, the lab results of the exam were reported to be within normal limits with the exception of the Pap smear, which had tested negative for intraepithelial lesion or malignancy, but showed cellular changes consistent with herpes simplex virus and bacterial vaginosis, and

WHEREAS, despite the results of the Pap smear, the Brevard County Health Department did not report the results to Vonshelle

Brothers and did not acknowledge, record, or otherwise note the herpes simplex virus or the bacterial vaginosis in her prenatal records, and

WHEREAS, Vonshelle Brothers continued to receive treatment from the Brevard County Health Department through the duration of her pregnancy until the birth of her daughter, Iyonna Hughey, on October 14, 2010, at the Wuesthoff Medical Center, and both were discharged from the hospital 2 days later in good condition, and

WHEREAS, on November 1, 2010, Vonshelle Brothers brought Iyonna to the emergency room at Wuesthoff Medical Center citing Iyonna's lack of eating, weak condition, and fever, and

WHEREAS, a lumbar puncture was performed and cerebral spinal fluid was collected which initially suggested that Iyonna had meningitis, which prompted her transfer to the Arnold Palmer Hospital for Children for further evaluation and management, and

WHEREAS, on November 3, 2010, the final results of the cerebral spinal fluid collection were reported, and the fluid had tested positive for herpes simplex type 2, and

WHEREAS, as a result of her diagnosis, Iyonna continues to experience significant developmental delay and neurologic impairment related to the herpes meningoencephalitis and has required continued treatment, including physical therapy, occupational and speech therapy, and neurologic and ophthalmologic care, and

WHEREAS, Iyonna's condition requires her to be under the constant care and supervision of Vonshelle Brothers and has placed the child at heightened risk for the development of seizures and epilepsy, and

WHEREAS, the Brevard County Health Department had a duty to provide a reasonable level of care to Vonshelle Brothers and Iyonna Hughey but that duty was allegedly breached by the department failing to disclose the presence of the herpes simplex virus in Vonshelle Brothers and to order proper treatment of the virus, which eventually resulted in Iyonna's diagnosis, and

WHEREAS, in June 2016, a final order was entered approving a settlement in the sum of $3.2 million between Vonshelle Brothers, individually, and as natural parent and legal guardian of Iyonna Hughey, and the Brevard County Health Department to settle all claims arising out of the factual situation described in this act, and

WHEREAS, the Department of Health has paid $200,000 to Ms. Brothers under the statutory limits of liability set forth in s. 768.28, Florida Statutes, which has left $3 million as the remaining balance of the settlement agreement, NOW, THEREFORE,

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

Section 1. <u>The facts stated in the preamble to this act</u>

are found and declared to be true.

Section 2. The sum of $3 million is appropriated from the General Revenue Fund to the Department of Health for the relief of Vonshelle Brothers, individually, and as natural parent and legal guardian of Iyonna Hughey, to compensate Vonshelle Brothers and Iyonna Hughey for injuries and damages sustained.

Section 3. The Chief Financial Officer is directed to draw a warrant in favor of Vonshelle Brothers, individually and as natural parent and legal guardian of Iyonna Hughey, in the sum of $3 million upon funds of the Department of Health in the State Treasury and to pay the same out of such funds in the State Treasury.

Section 4. The amount paid by the Department of Health pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in injuries and damages to Vonshelle Brothers and Iyonna Hughey. The total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 5. 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	_____

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Jenne offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The sum of $1 million is appropriated from the General Revenue Fund to the Department of Health for the relief of Vonshelle Brothers, as natural parent and legal guardian of Iyonna Hughey, to compensate Iyonna Hughey for injuries and damages sustained.

Section 3. The Chief Financial Officer is directed to draw a warrant in favor of the Supplemental Care Trust for the Benefit of Iyonna Hughey or other special needs trust for the

exclusive use and benefit of Iyonna Hughey, in the sum of $1 million upon funds of the Department of Health in the State Treasury and to pay the same out of such funds in the State Treasury.

Section 4. The amount paid by the Department of Health pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in injuries and damages to Vonshelle Brothers and Iyonna Hughey. Of the amount awarded under this act, the total amount paid for attorney fees may not exceed $100,000, the total amount paid for lobbyist fees may not exceed $50,000, and the total amount paid for costs and other similar expenses relating to this claim may not exceed $2,214.

Section 5. This act shall take effect upon becoming a law.

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

Remove everything before the enacting clause and insert:

A bill to be entitled

An act for the relief of Vonshelle Brothers, as the natural parent and legal guardian of Iyonna Hughey; providing an appropriation to compensate her daughter for injuries and damages sustained as a result of the

alleged negligence of the Brevard County Health Department, an agency of the Department of Health; providing that certain payments and the appropriation satisfy all present and future claims related to the alleged negligent acts; providing a limitation on the payment of compensation, fees, and costs; providing an effective date.

WHEREAS, on March 16, 2010, Vonshelle Brothers visited a location of the Brevard County Health Department for her initial prenatal visit, during which a complete obstetrical and gynecological exam was conducted, including a Pap smear, and

WHEREAS, the lab results of the exam were reported to be within normal limits with the exception of the Pap smear, which had tested negative for intraepithelial lesion or malignancy, but showed cellular changes consistent with herpes simplex virus and bacterial vaginosis, and

WHEREAS, despite the results of the Pap smear, the Brevard County Health Department did not report the results to Vonshelle Brothers, and

WHEREAS, Vonshelle Brothers continued to receive treatment from the Brevard County Health Department through the duration of her pregnancy until the birth of her daughter, Iyonna Hughey, on October 14, 2010, at the Wuesthoff Medical Center, and both

were discharged from the hospital 2 days later in good condition, and

WHEREAS, on November 1, 2010, Vonshelle Brothers brought Iyonna to the emergency room at Wuesthoff Medical Center citing Iyonna's lack of eating, weak condition, and fever, and

WHEREAS, a lumbar puncture was performed and cerebral spinal fluid was collected which initially suggested that Iyonna had meningitis, which prompted her transfer to the Arnold Palmer Hospital for Children for further evaluation and management, and

WHEREAS, on November 3, 2010, the final results of the cerebral spinal fluid collection were reported, and the fluid had tested positive for herpes simplex type 2, and

WHEREAS, as a result of her diagnosis, Iyonna continues to experience significant developmental delay and neurologic impairment related to the herpes meningoencephalitis and has required continued treatment, including physical therapy, occupational and speech therapy, and neurologic and ophthalmologic care, and

WHEREAS, Iyonna's condition requires her to be under the constant care and supervision of Vonshelle Brothers, and

WHEREAS, the Brevard County Health Department had a duty to provide a reasonable level of care to Vonshelle Brothers and Iyonna Hughey but that duty was allegedly breached by the department failing to disclose the presence of the herpes simplex virus in Vonshelle Brothers and to order proper

treatment of the virus, which eventually resulted in Iyonna's diagnosis, and

WHEREAS, in June 2016, a final order was entered approving a settlement in the sum of $3.2 million between Vonshelle Brothers, individually, and as natural parent and legal guardian of Iyonna Hughey, and the Brevard County Health Department to settle all claims arising out of the factual situation described in this act, and

WHEREAS, the Department of Health has paid $200,000 to Ms. Brothers under the statutory limits of liability set forth in s. 768.28, Florida Statutes, and the parties have agreed to a reduced settlement in the amount of $1 million, NOW, THEREFORE,

COMES NOW, MATTHEW BLAIR, who was sworn and declares the following:

1. Ronald S. Gilbert, Esquire was retained by Claimant, Vonshelle Brothers, Individually and as Natural Parent and Guardian of Iyonna Hughey, a Minor, for representation regarding the birth related injury/medical malpractice claim involving her daughter.

2. The representation agreement was pursuant to a contingency fee contract, which has been approved by the Florida Supreme Court.

3. Notwithstanding the representation agreement, Ronald S. Gilbert, Esquire has agreed to represent Claimant through the Claims Bill process for a total amount of fifteen percent (15%) of the Claims Bill for attorney's fees, lobbyist fees, and costs.

4. It has been agreed between Affiant, Claimant, and Attorney that fifteen percent (15%) of the Claims Bill will be paid for full satisfaction of the contingency fee, lobbyist fees, and all costs.

5. The total attorney's fees, lobbyist fees, and costs shall be fifteen percent (15%) of the total approved Claims Bill.

6. The lobbyist fees shall be five percent (5%) of the total approved Claims Bill.

7. The attorney's fees shall not exceed ten percent (10%) less any accrued costs. The current accrued costs total Three Hundred Eighty-Eight Dollars and Thirty-Four Cents ($388.34) for actual costs incurred and paid by Claimants' law firm and One Thousand, Eight Hundred Twenty-Five Dollars and Sixty-Six Cents ($1,825.66) for internal costs accrued by Claimants' law firm. Additional costs will be taken as a reduction in the amount of attorney's fees to Claimants' law firm.

8. Claimants' law firm has already received reimbursement of Ninety-Five Thousand, Three Hundred Ninety-Two Dollars and Ninety-Four Cents ($95,392.94) for actual costs incurred and paid by Claimants' law firm and Six Thousand, Four Hundred Nineteen Dollars and Sixty-Six Cents ($6,419.66) for internal costs accrued by Claimants' law firm. No attorney's fees have been received by Claimants' law firm from the statutory cap payment of Two Hundred Thousand Dollars ($200,000.00).

9. The Senate and House Bills shall be amended to reflect the amount sought for this Claims Bill is One Million Dollars ($1,000,000.00).

Further Affiant Sayeth Naught.

MATTHEW BLAIR
Corcoran & Johnston

STATE OF FLORIDA
COUNTY OF Pasco

The foregoing Affidavit was acknowledged before me this 6th day of March, 2017, by Matthew Blair, who is personally known to me.

Signature of Notary Public

MICHELLE A. KAZOURIS
MY COMMISSION # FF 038908
EXPIRES: August 7, 2017
Bonded Thru Budget Notary Services

Michelle A. KAZOURIS
Printed Name of Notary Public

AFFIDAVIT

COMES NOW, RONALD S. GILBERT, ESQUIRE, who was sworn and declares the following:

1. Affiant was retained by Claimant, Vonshelle Brothers, Individually and as Natural Parent and Guardian of Iyonna Hughey, a Minor, for representation regarding the birth related injury/medical malpractice claim involving her daughter.

2. The representation agreement was pursuant to a contingency fee contract, which has been approved by the Florida Supreme Court.

3. Notwithstanding the representation agreement, Affiant has agreed to represent Claimant through the Claims Bill process for a total amount of fifteen percent (15%) of the Claims Bill for attorney's fees, lobbyist fees, and costs.

4. It has been agreed between Affiant, Claimant, and Lobbyist that fifteen percent (15%) of the Claims Bill will be paid for full satisfaction of the contingency fee, lobbyist fees, and all costs.

5. The total attorney's fees, lobbyist fees, and costs shall be fifteen percent (15%) of the total approved Claims Bill.

6. The lobbyist fees shall be five percent (5%) of the total approved Claims Bill.

7. The attorney's fees shall not exceed ten percent (10%) less any accrued costs. The current accrued costs total Three Hundred Eighty-Eight Dollars and Thirty-Four Cents ($388.34) for actual costs incurred and paid by Claimants' law firm and One Thousand, Eight Hundred Twenty-Five Dollars and Sixty-Six Cents ($1,825.66) for internal costs accrued by Claimants' law firm. Additional costs will be taken as a reduction in the amount of attorney's fees to Claimants' law firm.

8. Claimants' law firm has already received reimbursement of Ninety-Five Thousand, Three Hundred Ninety-Two Dollars and Ninety-Four Cents ($95,392.94) for actual costs incurred and paid by Claimants' law firm and Six Thousand, Four Hundred Nineteen Dollars and Sixty-Six Cents ($6,419.66) for internal costs accrued by Claimants' law firm. No attorney's fees have been received by Claimants' law firm from the statutory cap payment of Two Hundred Thousand Dollars ($200,000.00).

9. The Senate and House Bills shall be amended to reflect the amount sought for this Claims Bill is One Million Dollars ($1,000,000.00).

Further Affiant Sayeth Naught.

RONALD S. GILBERT, ESQUIRE
Colling Gilbert Wright & Carter

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing Affidavit was acknowledged before me this 16TH day of March, 2017, by Ronald S. Gilbert, Esquire, who is personally known to me.

Signature of Notary Public

R. FLANAGAN
Notary Public - State of Florida
My Comm. Expires Jun 12, 2017
Commission # FF 026772

RACHAEL FLANAGAN
Printed Name of Notary Public

STORAGE NAME: h6539.CJC
DATE: 3/10/2017

March 9, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6539 - Representative Byrd
Relief/Eddie Weekley and Charlotte Williams/Agency for Persons with Disabilities

THIS IS AN UNCONTESTED CLAIM FOR $1,000,000 BASED ON A SETTLEMENT AGREEMENT ENTERED INTO BETWEEN EDDIE L. WEEKLEY AND CHARLOTTE WILLIAMS, AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF FRANKLIN W. WEEKLEY, DECEASED, AND THE AGENCY FOR PERSONS WITH DISABILITIES, AS OPERATORS OF THE MARIANNA SUNLAND CENTER, BASED ON THE NEGLIGENCE OF THE AGENCY, WHO FAILED TO PROVIDE FRANKLIN WEEKLEY WITH A SAFE AND SECURE ENVIRONMENT, PROTECTION, AND REASONABLE SUPERVISION WHILE IN DEPARTMENTAL CUSTODY.

FINDING OF FACT:

Early Life and Commitment

Franklin W. Weekley ("Franklin"), born August 14, 1984, was raised along with two siblings by his parents, Eddie Weekley and Charlotte Williams, in the town of Milton, Florida.

Early in life, Franklin began displaying developmental delays, prompting his parents to enroll him in the exceptional students program at his elementary school. When assessed, Franklin was diagnosed with mild mental retardation, a seizure disorder, schizoaffective disorder, and major depression with psychotic

features. Franklin's IQ was determined to be 52 by an adolescent psychiatrist.

In 1999, Franklin was detained by juvenile authorities for allegedly starting a fire in a bedroom of his family's home, and declared incompetent to proceed to trial due to his diminished mental capacity. Consequently, Franklin was committed to the Florida Department of Children and Family Services (DCF) in an effort to place him in an appropriate treatment and living setting.

2001 Transfer to Marianna Sunland Center

Initially transferred to group homes in Orlando and Fort Walton Beach, Florida, Franklin was deemed an elopement risk following several successful attempts at running away from each group home. This precipitated his transfer in November, 2001 to the Marianna Sunland Center (Sunland), a developmental services institution then operated by DCF. Here, Franklin was assigned to the "Hayes House", a cottage style house on Sunland premises occupied by 22 other adult male residents.

Sunland was chosen as the appropriate residential setting for Franklin in part because of assurances made by the department that it was a safe and secure facility equipped to handle a resident with the behavior and elopement issues Franklin had previously exhibited. However, within three weeks of his arrival at the facility, a Sunland behavioral analysis committee reviewing Franklin's placement concluded that Sunland was not an appropriate placement for Franklin, noting "[Franklin] would be more appropriately place in a younger adults program than at Sunland."

Despite this assessment, no transfer was initiated. Instead, staff was instructed to maintain "strict visual one-on-one observation at all times [for Franklin[, as he has a history of elopement and has made threats since admission." In fact, during Franklin's first nine months at Sunland, staff documented 29 acts of physical aggression, 6 suicide threats, 4 self-injurious incidents, and 8 elopement attempts.

Notwithstanding these incidents, and despite Sunland's own behavioral analysis committee's belief that Sunland was not the appropriate setting for Franklin, a representative for DCF testified at a November, 2002 involuntary commitment hearing that Sunland was a safe and secure environment for Franklin, noting, "[t]he positive things that we have going on with him, we can provide all the security needed ... [w]e have all the staff on board that needs to provide him with the services that I feel he needs."

Confrontations with Facility Staff

Although Franklin's individualized Support Plan noted that

"quick confrontation, too many demands, complex instructions, ultimatums and loud voices" were ineffective behavioral modification tools for the youth. Numerous times during his residency at Sunland, Franklin engaged in physical and violent confrontations with facility staff. Frequently, these confrontations necessitated the use of manual restraints in a process where Franklin would be "taken to the mat" by staff, despite staff's apparent lack of Professional Crisis Management training. Additionally, Franklin was often committed to solitary confinement during his stay at Sunland – sometimes overnight, and sometimes for periods of several days.

Disappearance from Sunland

During the early morning hours of December 5, 2002, Franklin declined breakfast, complaining of respiratory and stomach illnesses. Staff's efforts to force him to drink prompted a very aggressive physical altercation with staff, during which Franklin suffered a laceration to the back of his ear. Later in the day, Franklin engaged in three separate altercations with staff, each requiring staff to take him "to the mat" by their own admission. The last log entry noted by the staff indicated that Franklin was apprehended while attempting to elope through a bathroom window.

When the third shift at Sunland began that night, direct care staff correctly reviewed the daily log notes, but both staff members later testified that they were unaware of the incredibly stressful events endured by Franklin earlier in the day. In fact, the house supervisor, Gertrude Sims, testified that she had a complete lack of knowledge regarding Franklin's aggressive tendencies and propensity for elopement.

The staff-on-duty reported that their actions during the third shift that night consisted primarily of mopping floors and washing clothes, and that the exit doors located across the hall from Franklin's room remained unlocked at all times during the shift. Although Sims testified that there were several instances throughout the night shift where both she and the other staff member, James Duncan, were performing duties that would prevent constant monitoring of the unlocked doors, Duncan testified that there was continuous observation of the unlocked doors.

During questioning, Duncan had no explanation for how Franklin successfully eloped during what he represented was staff's constant observation of the Hayes House doors. Highlighting this inconsistency, Sims additionally testified that no precautions were ever made to prevent Franklin from eloping during the night in question.

Around 5:30 a.m. on the morning of December 6, 2002, it was discovered that Franklin Weekley was no longer in his room at the Hayes House.

The Ensuing Search for Franklin Weekley

Following the revelation that Franklin had gone missing, staff members Sims and Duncan began a search of the premises immediately surrounding the Hayes House. Around 9:15 a.m., Superintendent Tracy Clemmons directed Sims and Duncan to submit a written statement of the night's events and to leave for the day.

Nearly three hours went by following Franklin's disappearance before Franklin's parents were notified that their son had gone missing from Sunland. They immediately made the more than two-hour drive to Sunland to assist in the search efforts, but were informed by Clemmons that they were not permitted to participate in the search of Sunland grounds. Instead, they were instructed to conduct their own search outside of the perimeter fence if they wished to participate.

The search officially continued for the next 11 days, and was ultimately expanded to include searches of off-premises businesses and stores in the area. Shortly thereafter, the department discharged Franklin from Sunland and participated in an order holding Franklin in contempt of court for violating the order committing him to Sunland.

Skeletal Remains Discovered

On October 28, 2004, an independent contractor was hired to demolish an old building (known as "Brunner B Building) located approximately 500 yards from the Hayes House on Sunland premises. During the demolition process, one of the workers found skeletal remains located in the basement of the building.

The building where Franklin's remains were discovered was an old boiler room that was abandoned and locked by Sunland maintenance staff. At the time of Franklin's disappearance, however, the building would have been dilapidated to the point where the front entrance was secured by only a chain and padlock. Staff testified that it would be possible to gain entrance to the building by shimmying through the space found between the door and its frame.

The Superintendent of Maintenance later testified that at the time Franklin disappeared in 2002, he considered the building to have been extremely dangerous to anyone who attempted entrance.

The only clothing found at the scene of discovery were partially-deteriorated underpants and an undershirt bearing Franklin's initials on the label. An entire search of the basement area was conducted, and no evidence of shoes, socks, jeans, shirt or jacket was found.

Despite the presence of Franklin's initials on the articles of clothing found in the boiler room basement, the department refused to admit the skeletal remains were Franklin's for several years.

The medical examiner, a forensic anthropologist, and a forensic odontologist hired by the State all agreed that their examination of the remains were consistent with being Franklin's. Despite its own experts' conclusions, however, the department insisted on obtaining DNA evidence before it would admit that the remains were Franklin's. Without objection from his parents, DNA samples were obtained and compared to the skeletal remains at the FDLE laboratory in Jacksonville. Short Tandem Repeat (STR) testing was performed, but rendered inconclusive results due to the degradation of the skeletal sample. These samples were then transferred to the FBI DNA laboratory in Quantico, Virginia, where they underwent mitochondrial DNA testing which, in April 2007, once again resulted in inconclusive results due to the remains' degradation.

In June, 2007, however, the state finally admitted that the remains located were indeed Franklin Weekley's, and requested mediation.

LITIGATION HISTORY:

On March 1, 2004, the parents of Franklin Weekley filed a five-count complaint against the Department of Children and Family Services and Tracy Clemmons, Gertrude Sims and James Duncan individually for writ of habeus corpus, determination of presumptive death, negligence, civil rights violations under 42 USC §1983, and neglect of a vulnerable adult under s. 415.1111, F. S.

As the lawsuit was filed approximately eight months before the youth's skeletal remains were discovered, the primary focus at that time was to compel the department to resume or at least fund a comprehensive search of the Sunland premises and surrounding properties.

When the skeletal remains were found on October 28, 2004, the complaint was amended so that wrongful death and survival claims were substituted for the habeus corpus claim.

In June, 2007, the claimants and the department entered into a Settlement Agreement, whereby the department agreed to pay the claimants $1.3 million. Of this amount, $300,000 has already been paid pursuant to the statutory cap on liability imposed by s. 768.28, F.S.

The Agency for Persons with Disabilities, the successor agency to the Department of Children and Family Services in this matter, fully supports passage of this claims bill, concluding "the Agency had not properly fulfilled its duty to

care for Mr. Weekley and that the failure was a proximate cause of his disappearance and death."

Additionally, then Governor Crist issued an Order requiring the Florida Department of Law Enforcement to launch a full-scale criminal investigation into the events surrounding the disappearance and death of Franklin Weekley.

CONCLUSION OF LAW:

Whether or not there is a jury verdict or a settlement agreement, as there is here, every claims bill must be based on facts sufficient to meet the preponderance of evidence standard.

Duty

From my review of the evidence, I find that the State had a duty to Franklin Weekley, following his commitment and custody with the Department, to provide the youth with a safe and secure environment, protection, and 24-hour supervision.

Specifically, once Sunland was selected as an appropriate residential and treatment destination for Weekley following his elopement attempts at other group homes – in part because of the Department's representation during Weekley's commitment reviews that Sunland amounted to a safe and secure living arrangement for a youth exhibiting the elopement tendencies and behavioral issues that Weekly had repeatedly demonstrated – the Department had a duty to, in fact, provide Weekley with the safe and secure environment it assured to him and his family.

Moreover, after Sunland's own "Temporary Behavior Management Procedures" identified that Weekley needed "strict visual one-on-one observation at all times as he has a history of elopement and has made threats since admission," staff at Sunland assumed a duty to provide this sort of close visual attention. Consistent with this notion, an Order Continuing Involuntary Admission to Residential Services was issued by a circuit court judge roughly two weeks before his disappearance. This Order indicated that Weekley, "lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary and, if not provided, would result in a real and present threat of substantial harm to [Weekley's] well-being; and because of [Weekley's] degree of mental retardation, he is likely to physically injure others if allowed to remain at liberty."

Breach

A preponderance of the evidence establishes that the Department breached their duty to provide Franklin Weekley with a safe and secure environment, protection, and 24-hour supervision.

Franklin was housed with 22 other adult males in his residence

at the Hayes House, despite Sunland's own recommendation that a young adults program would provide a more appropriate living arrangement for the child. Moreover, despite the facility's knowledge of the flight risk posed by Franklin, and frequent threats made by Franklin, the youth was apparently successful in escaping unnoticed through an unlocked and unmonitored exit, in contravention of both the Court's and the facility's instructions to maintain strict, visual one-on-one observation of the youth during his time at Sunland.

Finally, staff at Sunland breached its duty to provide a safe and secure environment to Franklin by permitting an abandoned boiler room located nearby the Hayes House to fall into a state of disrepair, and failing to properly secure such premises to dissuade resident elopement attempts in the building.

Causation

The negligence of the Department and staff at the Marianna Sunland Center were the legal (proximate) cause of the damages suffered by Franklin Weekley and his parents.

Damages

Franklin's parents' pain and suffering claims, outlined in their wrongful death suit against the State, are both tragic and this settlement contemplates their loss.

Franklin's parents initially contested his commitment to the State, and at all times thereafter wanted the child to remain at home with them. Sunland's records are replete with observations of the various behavioral and placement committees regarding the close-knit structure of Franklin's family, and how it was both his parents' and Franklin's goal to have the youth returned home with them as soon as possible.

When the State announced that it was canceling all efforts to search for Franklin after only 11 days, Franklin's parents continued tirelessly for months to search for their son. They passed out hundreds of leaflets, contacted various missing persons and children's bureaus, hospitals and morgues.

With the parents languishing in uncertainty for almost two full years, in October 2004 the skeletal remains were discovered with dilapidated underwear bearing Franklin's name. The medical examiner, a forensic anthropologist, and a forensic odontologist hired by the State all agreed that their examination of the remains were consistent with being Franklin's. Despite its own experts' conclusions, however, the department insisted on obtaining DNA evidence before it would admit that the remains were Franklin's.

It took until June 2007, a full four-and-a-half years after Franklin's disappearance, for the State to acknowledge that the remains were indeed the remains of Franklin Weekley

ATTORNEY'S/ LOBBYING FEES: Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 25% fee. Outstanding costs total $221.38

RECOMMENDATIONS: The bill should be amended to reflect any amount awarded will be placed in a special needs trust.

Accordingly, I respectfully recommend House Bill 6539 be reported **FAVORABLY**.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Byrd, House Sponsor
Senator Gibson, Senate Sponsor
Barbara Crosier, Senate Special Master

A bill to be entitled

An act for the relief of Eddie Weekley and Charlotte Williams, individually and as co-personal representatives of the Estate of Franklin Weekley, their deceased son, for the disappearance and death of their son while he was in the care of the Marianna Sunland Center, currently operated by the Agency for Persons with Disabilities; providing an appropriation to compensate them for the disappearance and death of Franklin Weekley, which were due to the negligence of the Department of Children and Families; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, in November of 2001, Franklin Weekley was diagnosed with mental retardation and a seizure disorder and was admitted to the Marianna Sunland Center, which at the time was operated by the Department of Children and Family Services, now known as Department of Children and Families, and

WHEREAS, on December 6, 2002, Franklin Weekley disappeared from the center and, following a search of the premises by employees of the center, was deemed by the center to have run away, and the case was closed, and

WHEREAS, on October 28, 2004, a demolition crew found the skeletal remains of Franklin Weekley in the basement of a

building adjacent to the premises of the Marianna Sunland Center where Franklin had resided, and

WHEREAS, legal action was filed on behalf of Franklin Weekly's parents against the Department of Children and Family Services and its employees or agents raising negligence, tort, statutory, and civil rights claims concerning the disappearance and death of their son, and

WHEREAS, the parties and the Agency for Persons with Disabilities, which currently operates the Marianna Sunland Center, mediated and reached a settlement of all claims, and

WHEREAS, the plaintiffs and the Agency for Persons with Disabilities entered into a compromise and settlement agreement in which they agreed to a claim bill under which the agency will pay $1 million in addition to the $300,000 it previously paid to settle claims arising out of this matter, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The sum of $1 million is appropriated from the General Revenue Fund to the Agency for Persons with Disabilities, as successor to the Department of Children and Family Services, to be paid for the relief of Eddie Weekley and Charlotte Williams, individually and as co-personal

representatives of the Estate of Franklin Weekley, deceased.

Section 3. The Chief Financial Officer is directed to draw a warrant in favor of Eddie Weekley and Charlotte Williams, individually and as co-personal representatives of the Estate of Franklin Weekley, deceased, in the sum of $1 million upon funds of the Agency for Persons with Disabilities in the State Treasury, and to pay the same out of such funds in the State Treasury.

Section 4. The amount paid by the Agency for Persons with Disabilities pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act resulting in the disappearance and death of Franklin Weekley. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 5. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 6539 (2017)

Amendment No. 1

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

Committee/Subcommittee hearing bill: Civil Justice & Claims Subcommittee

Representative Byrd offered the following:

Amendment

Remove lines 58-67 and insert:

Treasury. Pursuant to the settlement agreement approved by the court in 2007, the funds are to be paid into a Medicaid-compliant special needs trust account established on behalf of Eddie Weekley and Charlotte Williams.

Section 4. The amount paid by the Agency for Persons with Disabilities pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act resulting in the disappearance and death of Franklin Weekley. Of the amount

awarded under this act, the total amount paid for attorney fees may not exceed $200,000, the total amount paid for lobbyist fees may not exceed $50,000, and the total amount paid for costs and other similar expenses relating to this claim may not exceed $221.03.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF ESCAMBIA

BEFORE ME personally appeared Arthur A. Shimek and Mark Pinto and stated under oath as follows:

1. Our names are Arthur A. Shimek and Mark Pinto. We are over 21 years of age and otherwise competent to make this statement set forth herein.

2. We have personal knowledge of all matters and opinions expressed in this affidavit.

3. Arthur A. Shimek is a member of the Florida Bar, Florida Bar No. 436844 practicing at Arthur A. Shimek, P.A., 423 North Baylen Street, Pensacola, Escambia County, Florida.

4. Arthur A. Shimek has been a member of the Florida Bar in good standing for approximately 33 years. Arthur A. Shimek and Karen Gievers represent the Estate of Franklin W. Weekley, and Eddie Weekley and Charlotte Williams as a result of claims arising from the death of Franklin W. Weekley. With regard to attorney's fees, the claimants attorneys are in full compliance with the prohibition in Section 768.28(8), Florida Statutes.

5. The claimants have hired The Fiorentino Group as lobbyists to assist in the claims bill process. A copy of the contract is attached.

6. Attorney's fees that may be awarded by the Legislature, that the claimant has agreed to pay for legal services are 25%.

7. Lobbyist fees that the claimant has agreed to pay for lobbying services are 5%.

8. Attorney's fees specified in paragraph 6 include the lobbyist fees specified in paragraph 7.

9. Outstanding costs that will be paid from any amount that may be awarded by the Legislature are $221.03. None of these costs are internal costs.

10. Costs that were paid from the statutory cap payment were $75,325.70. $74,881.85 were external costs and $443.85 were internal costs.

FURTHER the Affiants sayeth naught.

Arthur A. Shimek

The foregoing instrument was acknowledged before me this 1st day of March, 2017, by Arthur A. Shimek, who is personally known to me.

KRISTINA C. PORTER MY COMMISSION EXPIRES 08-14-2017 NOTARY PUBLIC FF 115540 STATE OF FLORIDA

Kristina C. Porter
Notary Public, State of Florida
My Commission Exp: 8-14-17

Mark Pinto

The foregoing instrument was acknowledged before me this 1st day of March, 2017, by Mark Pinto, who is personally known to me.

Tammy S. LeMaster
Notary Public, State of Florida
My Commission Exp: 2/14/19

NOTARY PUBLIC STATE OF FLORIDA
TAMMY S. LEMASTER
MY COMMISSION # FF 192016
EXPIRES: February 14, 2019
Bonded Thru Budget Notary Services