

Tab 1	CS/SB 206 by JU, Passidomo ; (Similar to CS/H 00277) Electronic Wills					
370522	A	S	RCS	BI, Passidomo	Delete L.93 - 335:	04/17 05:57 PM
Tab 2	CS/SB 830 by RI, Baxley ; (Similar to CS/CS/H 00747) Mortgage Brokering					
333732	D	S	RCS	BI, Baxley	Delete everything after	04/17 05:57 PM
Tab 3	SB 1088 by Torres (CO-INTRODUCERS) Perry ; (Compare to H 01019) Workers' Compensation for First Responders					
Tab 4	CS/SB 1554 by JU, Young ; (Similar to CS/CS/H 00481) Trusts					
939788	A	S	RCS	BI, Young	Delete L.194 - 234:	04/17 05:57 PM
Tab 5	SB 1566 by Simmons ; (Similar to CS/H 01159) Uniform Voidable Transactions Act					

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

BANKING AND INSURANCE
Senator Flores, Chair
Senator Steube, Vice Chair

MEETING DATE: Monday, April 17, 2017
TIME: 4:00—6:00 p.m.
PLACE: *Toni Jennings Committee Room*, 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Steube, Vice Chair; Senators Bracy, Braynon, Farmer, Gainer, Garcia, Mayfield, and Thurston

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	CS/SB 206 Judiciary / Passidomo (Similar CS/H 277)	Electronic Wills; Creating the "Florida Electronic Wills Act"; specifying requirements that must be satisfied in the execution of electronic wills; authorizing an electronic will that is properly executed in this or another state to be offered for and admitted to probate in this state, etc. JU 01/24/2017 Fav/CS BI 04/17/2017 Fav/CS RC	Fav/CS Yeas 6 Nays 2
2	CS/SB 830 Regulated Industries / Baxley (Similar CS/CS/H 747)	Mortgage Brokering; Providing an exemption from regulation under parts I and II of ch. 494, F.S., under certain circumstances, for certain securities dealers, investment advisers, and associated persons, etc. RI 04/04/2017 Fav/CS BI 04/17/2017 Fav/CS CM RC	Fav/CS Yeas 8 Nays 0
3	SB 1088 Torres (Compare H 1019)	Workers' Compensation for First Responders; Revising the standard by which a mental or nervous injury involving a first responder must be demonstrated for purposes of determining eligibility for benefits for employment-related accidents and injuries; removing the limitation that only medical benefits are payable for a mental or nervous injury unaccompanied by a physical injury, etc. BI 04/17/2017 Favorable AGG AP RC	Favorable Yeas 7 Nays 0

COMMITTEE MEETING EXPANDED AGENDA

Banking and Insurance

Monday, April 17, 2017, 4:00—6:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	CS/SB 1554 Judiciary / Young (Similar CS/CS/H 481, Compare CS/H 1379, CS/S 1626)	Trusts; Deleting a requirement that a trust be for the benefit of the trust's beneficiaries; revising provisions relating to notice or sending of electronic trust documents; providing that the Attorney General has standing to assert certain rights in certain proceedings; deleting a restriction on the purpose for which a trust is created, etc. JU 03/22/2017 Fav/CS BI 04/17/2017 Fav/CS RC	Fav/CS Yeas 7 Nays 0
5	SB 1566 Simmons (Similar CS/H 1159)	Uniform Voidable Transactions Act; Citing this act as the "Uniform Voidable Transactions Act"; removing conditions under which a partnership is insolvent; providing conditions under which attachments or other provisional remedies are available to creditors; revising conditions under which a transfer is not voidable, etc. BI 04/17/2017 Favorable CM RC	Favorable Yeas 6 Nays 0

Other Related Meeting Documents

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/CS/SB 206

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; and Senator Passidomo

SUBJECT: Electronic Wills

DATE: April 18, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	Fav/CS
2.	Billmeier	Knudson	BI	Fav/CS
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 206 creates the Florida Electronic Wills Act (Act), which expressly permits the use of electronic wills. The Act regulates how electronic wills may be executed, stored, and admitted to probate. 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 a notary public who is, or at least two witnesses who are, in the same room as the testator; and
- Be electronically signed by the notary public and the two attesting witnesses in the presence of the testator and, in the case of the witnesses, in the presence of each other.

The bill provides that for purposes of the Act, an individual is deemed to be “in the presence” of another individual if the individuals are either in the same physical location or in different physical locations, but can communicate with each other by means of live video and audio conference. The bill provides that any of these documents may be signed by electronic signature.

An electronic will must be stored by a qualified custodian. The bill provides qualifications for qualified custodians, procedures for removal of qualified custodians, and procedures for qualified custodians to transfer an electronic will from one custodian to another custodian.

The bill expands court jurisdiction to include electronic wills where the testator has no connection to Florida. The bill expands venue to include locations where the qualified custodian is located.

II. Present Situation:

A will 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 chs. 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.”³ Other assets are disposed of outside of probate.⁴

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.

Execution of 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.⁵ 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.⁶ These witnesses must sign the will in the presence of each other and the testator.⁷ For wills executed in other states, the requirements may be different.⁸ The consequence of failing to strictly comply with these requirements is that

¹ Section 731.201(40), F.S.

² *See*, s. 731.201(14), F.S.

³ The Florida Bar, *Probate in Florida*,

<http://www.floridabar.org/tfb/tfbconsum.nsf/48e76203493b82ad852567090070c9b9/92f75229484644c985256b2f006c5a7a?OpenDocument#Untitled%20Section> (last accessed April 11, 2017).

⁴ For example, the terms of a decedent’s bank account may include a beneficiary clause, giving the account to whomever the decedent names.

⁵ Section 732.502(1)(a), F.S.

⁶ Section 732.502(1)(b), F.S.

⁷ Section 732.502(1)(c), F.S.

⁸ *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

the will is not valid.⁹ A codicil (amendment) to a will must be executed in the same manner as a will.¹⁰

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.

Some have asserted that an electronically-signed will is not valid in Florida, but s. 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.”¹¹ 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.

Storing a Will

The Florida Probate Code does not specify how a will must be stored.

Probate and Proving a Will

To acquire a court order distributing the testator’s estate assets in line with the terms of a will, the will must be probated.¹² 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.
 - (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.

For a will to be admitted to probate in Florida, it must be “proved.”¹³ 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.

holographic wills (wills written in the hand of the testator, but not properly executed as set forth in s. 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.

⁹ *Allen v. Dalk*, 826 So.2d 245, 247 (Fla. 2002).

¹⁰ Section 732.502(5), F.S.

¹¹ 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, F.S., 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, s. 668.50, F.S., would not appear to *prohibit* electronically signing a will.

¹² *See* s. 733.103(1), F.S.

¹³ Section 733.201(1), F.S.

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.

Proving a Will

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.”¹⁴

Making a Will Self-Proved

A will may be made self-proved. A self-proved will may be admitted to probate without further proof, such as the testimony mentioned above.¹⁵ For a will to be self-proved in this state, the testator must acknowledge the will before an officer authorized to administer oaths (e.g., a notary public). The attesting witnesses must make affidavits before the officer. Lastly, the officer must evidence the acknowledgement and affidavits by a certificate attached to or following the will.¹⁶

Even after a will is proved and admitted to probate, it may be contested.¹⁷ There are several grounds, such as fraud and undue influence, on which a self-proved will might be contested.

Custodian’s Duty to File with Court

The custodian of a will must deposit the will with the court within 10 days after receiving information of the testator’s death.¹⁸ If the custodian fails to do so without just or reasonable cause, he or she is be subject to liability:

Upon petition and notice, the custodian of any will may be compelled to produce and deposit the will. All costs, damages, and a reasonable attorney’s fee shall be adjudged to the petitioner against the delinquent custodian if the court finds that the custodian had no just or reasonable cause for failing to deposit the will.¹⁹

Living Wills & Powers of Attorney

Many aging persons also choose to execute a power of attorney or a living will. A living will, despite its name, is fundamentally different than a will. A living will is a document setting forth

¹⁴ Section 733.201(3), F.S.

¹⁵ Section 733.201(1), F.S.

¹⁶ 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.

¹⁷ See, *Powell v. Eberhardt (in Re Estate of Hartman)*, 836 So.2d 1038, 1039 (Fla.2d DCA 2002).

¹⁸ Section 732.901(1), F.S.

¹⁹ Section 732.901(2), F.S.

a person's desires regarding "providing, withholding, or withdrawal of life-prolonging procedures in the event that such person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state."²⁰ A living will must be executed as follows, which differs from the requirement for executing a will:

A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction.²¹

A power of attorney is a "writing that grants authority to an agent to act in the place of the principal, whether or not the term is used in that writing."²² A power of attorney, like other instruments, must be executed and witnessed according to statutory requirements. Under these requirements, a power of attorney generally must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public.²³ However, if "the principal is physically unable to sign the power of attorney, the notary public before whom the principal's oath or acknowledgment is made may sign the principal's name on the power of attorney."²⁴

Other States' Treatment of Electronic Wills

It appears that Nevada is the only state that, by statute, expressly permits the use of electronic wills.²⁵ This statute has been in effect since 2001.

Although Virginia's statutes do not expressly permit the use of electronic wills, Virginia allows documents to be notarized through live video and audio technology.²⁶ In Tennessee, a court held that a testator validly signed his will when he typed his name in cursive font.²⁷ In Ohio, a court admitted a will to probate that was written and signed with a stylus on an electronic tablet.²⁸

III. Effect of Proposed Changes:

Sections 3 through 9 of this bill create 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, F.S., by a person in the manner prescribed by this act, which disposes of the person's

²⁰ Section 765.302(1), F.S.

²¹ Section 765.302(1), F.S.

²² Section 709.2102(9), F.S. A "durable" power of attorney is one which survives even if the principal becomes incapacitated. Section 709.2104, F.S.

²³ Section 709.2105(2), F.S.

²⁴ Section 709.2105(3), F.S.

²⁵ See Nev. Rev. Stat. s. 133.085.

²⁶ Va. Code Ann. S. 47.1.

²⁷ *Taylor v. Holt*, 134 S.W.3d 830, 833 (Tenn. Ct. App. 2003).

²⁸ *In re Estate of Javier Castro, Deceased*, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013) (James T. Walther, Judge)

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.

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.

Requirements for an Electronic Will (Sections 4 and 5)

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

- Exist in an electronic record²⁹ that is unique and identifiable;
- Be electronically signed³⁰ by the testator in the presence of at least two attesting witnesses;; and
Be electronically signed by the attesting witnesses in the presence of the testator and in the presence of each other.

The bill provides that all questions related to the force, effect, validity, and interpretation of an electronic will must be determined in the same manner as wills executed pursuant to s. 732.502, F.S., unless otherwise provided by the bill.

Executing an Electronic Will (Section 7)

The bill provides that an individual is deemed to be in the presence of or appearing before another individual if the individuals are either in the same physical location or in different physical locations, but can communicate with each other by means of live video conference. If order to be deemed “in the presence” of by video conference, the bill requires that the testator or principal may not be in an end-stage condition³¹ or a vulnerable adult.³² If there is a will contest, the contestant of the document has the burden of proving that the testator or principal was in an end stage condition or was a vulnerable adult at the time of executing the document.

In addition, the bill requires that the video conference signal transmission must be live and in real time and must be secure from interception through lawful means by anyone other than the persons communicating. It requires that the persons communicating must simultaneously see and speak to one another with reasonable clarity.

The bill requires that, in the video conference, the persons communicating must establish the identity of the testator or principal by:

²⁹ An “electronic record” is a “record created, generated, sent, communicated, received, or stored by electronic means.”

³⁰ An “electronic signature” is 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.”

³¹ An “end-stage condition” is “an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.” *See* s. 765.101, F.S.

³² A vulnerable adult “means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.” *See* s. 415.102, F.S.

- Personal knowledge, if the person asserting personal knowledge explains 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
- Presentation of any of the forms of identification of the testator or principal, as set forth in s. 117.05(5)(b)2.a.- i, F.S.³³

The bill requires that, in the video conference, the persons communicating must demonstrate awareness of the events taking place and identifying any document they intend to sign.

The bill requires that at least one of the persons communicating must be either a Florida-licensed attorney who signs as a witness and certifies the electronic will was properly executed or a Florida notary public who signs the will and certifies the will was properly executed.

In the video conference, the testator or principal must provide verbal answers to all of the following questions:

- Are you over the age of 18?
- Are you under the influence of any drugs or alcohol that impairs your ability to make decisions?
- Are you of sound mind?
- Did anyone assist you in accessing this video conference? If so, who?
- Has anyone forced or influenced you to include anything in this document which you do not wish to include?
- Are you signing this document voluntarily?

The electronic record of the document being signed must contain a time-stamped recording of the entire video conference. It must be identifiable with the document being signed and stored in the electronic record containing the document by a qualified custodian in the manner required for the storage of electronic records containing electronic wills.

These provisions apply for purposes of the Electronic Wills Act, the execution and filing of a document with the court as provided in the Electronic Wills Act or the Florida Probate Rules, the execution of a durable power of attorney, or the execution of a living will. The bill provides that any of these documents may be signed by electronic signature.

Documents Deemed to be Executed in Florida (Section 7)

The bill provides that a document that is signed electronically is deemed to be executed in this state if all 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 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; or

³³ Section 117.05(5)(b)(2), F.S., lists various forms of identification such as a driver license, a state identification card, a passport, or a military identification card.

- 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.

Qualified Custodians (Section 9)

The bill provides that a qualified custodian must hold an electronic will. The bill provides that to serve as a qualified custodian of an electronic will, a person must:

- Not be an heir or devisee of the testator;
- Be domiciled in and a resident of this state or be incorporated or organized in this state;
- In the course of maintaining custody of electronic wills, regularly employ, and store electronic records containing electronic wills in, a system that protects the electronic records from destruction, alteration, or unauthorized access and detects changes to the electronic record; and
- 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.

The qualified custodian of an electronic must provide access to or information concerning the electronic will, or the electronic will and the electronic record containing the electronic will, only to the testator and such other persons as directed by the written instructions of the testator, or anyone as directed by a court with jurisdiction over the matter.

The qualified custodian of the electronic record of an electronic will may elect to destroy such record at any time after the earlier of 5th anniversary of the admission of the will of the testator to probate or 20 years after the death of the testator.

A qualified custodian who at any time controls the electronic record of an electronic will may elect to cease serving in such capacity by delivering the electronic will or the electronic record containing the electronic will to the testator, if then living, or by filing the will with the court in accordance with s. 732.901, F.S.

If the outgoing qualified custodian intends to designate a successor qualified custodian, the qualified custodian may cease serving by providing written notice to the testator of the name, address, and qualifications of the proposed successor qualified custodian. The testator must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian. The outgoing qualified custodian must also deliver the electronic record containing the electronic will to the successor qualified custodian. Finally, the outgoing qualified custodian must deliver to the successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;
- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- 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

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

The bill provides to the testator the ability to change qualified custodians. The bill provides that upon the written request of the testator, a qualified custodian who 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 an affidavit providing:

- The outgoing qualified custodian is eligible to act as a qualified custodian in this state;
- The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity;
- 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
- To the best of the qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

The bill provides duties and restrictions on qualified custodians. A qualified custodian:

- Must provide a paper copy of an electronic will and the electronic record, including 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;
- Is 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;
- May not limit liability for such damages;
- May not terminate or suspend access to the electronic will by the testator; and
- Must at all times keep information provided by the testator confidential and may not disclose such information to any third party.

When a qualified custodian receives information that a testator is dead, it must deposit the electronic will with the court pursuant to s. 732.901, F.S.

Venue and Jurisdiction (Section 8)

The bill provides that an electronic will of a nonresident 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.

It provides that the venue for the probate of electronic wills is as provided in s. 733.101(1), F.S., 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. Current law provides that venue for probate of wills:

- In the county in this state where the decedent was domiciled.
- If the decedent had no domicile in this state, then in any county where the decedent's property is located.

- 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.³⁴

This would expand the jurisdiction of Florida courts to situations where a person may not live in Florida, may not have property in Florida, and may not have debtors in Florida.

Proof of Electronic Will (Sections 6 and 10)

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. and are part of the electronic record containing the electronic will or are attached to or logically associated with the electronic will;
- The electronic will designates a qualified custodian; and
- The electronic record that contains the electronic will is held custody of a qualified custodian at all times before being offered to the court for probate.

In addition, the qualified custodian must:

- Certify under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian and that the electronic will has not been altered in any way since the date of its execution; and
- If the execution of the electronic will included the use of video conference, certify under oath that the audio and video recording is in the qualified custodian's custody in the electronic record that contains the electronic will and is available for inspection by the court.

If an electronic will is not self-proved, the bill provides that 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:

- The date on which the electronic will was created, if the date is not indicated in the electronic will itself;
- When and how the electronic will was discovered, and by whom;
- All of the people who had access to the electronic will;
- The method by which the electronic will was stored and the safeguards that were in place to prevent alterations to the electronic will;
- A statement as to whether the electronic will has been altered since its creation; and
- A statement that the electronic will is a true, correct, and complete tangible manifestation of the testator's will.

³⁴ s. 733.101(1), F.S.

The bill also provides that 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.

Miscellaneous Provisions

Section 1 amends s. 731.201, F.S., to provide that the term “will” includes electronic wills.

Section 2 amends s. 732.506, F.S., to provide that current law providing that a will can be revoked by burning, tearing, or otherwise destroying it does not apply to electronic wills.

Section 11 amends s. 736.0403, F.S., to provide that the testamentary aspects of a revocable trust may be executed with the same formalities as those of an electronic will.

Section 12 provides that the bill applies to electronic wills executed on or after July 1, 2017.

Section 13 provides that the bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may facilitate the creation and storage of wills using an Internet-based service. The associated costs are unknown. Further, if an electronic will can be easily created, many people who do not have a will may decide to execute one. However, some may use the services of an Internet-based service instead of, or in addition to, the services of an attorney.

C. **Government Sector Impact:**

The bill apparently allows non-Floridians with no property, no creditors, and no debtors in the state to execute a valid Florida electronic will. Florida courts are given jurisdiction over these electronic wills. The extent to which the bill will result in an increase in probate cases and associated costs to the judicial branch is unknown.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 731.201, 732.506, 733.201, and 736.0403.

This bill creates the following sections of the Florida Statutes: 732.521, 732.522, 732.523, 732.524, 732.525, 732.526, and 732.527.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on April 17, 2017:

The committee substitute revises requirements for the execution of electronic wills, creates requirements for video conferencing, creates additional duties of qualified custodians, and provides that some revocable trusts can be executed with the same formalities as electronic wills.

CS by Judiciary on January 23, 2017:

The committee substitute includes several changes that appear to be designed to increase the integrity of the execution of electronic wills and other documents that are signed electronically. One such change requires the testator or the attesting witnesses to be “in the same room” as the testator when the testator signs an electronic will. In the underlying bill, none of these people need to be in the same room.

Another change requires the signature of two attesting witnesses and a notary public on an electronic will. In the underlying bill, only the notary public or the two witnesses need to sign. Relating to traditional wills, livings wills, and powers of attorney, the committee substitute still provides that the persons signing these documents are, as a matter of law, in each other’s “presence” if they can communicate via live video and audio conference. However, the committee substitute requires these signing ceremonies to be memorialized by a video recording kept in the documents’ electronic record.

The committee substitute makes it easier to execute a will, electronic will, living will, or power of attorney that is deemed to be executed in Florida. This is achieved by no longer requiring that such documents state that they are governed by the laws of this state.

In many ways, the committee substitute adds consumer protections to the relationship between a testator and his or her qualified custodian. For example, the committee substitute expressly states that a qualified custodian will be liable for the negligent loss or destruction of the electronic record. Also, a qualified custodian must allow the testator access to his or her electronic will at all times. Moreover, a qualified custodian must ensure the confidentiality of all information given to the custodian by the testator. However, under the committee substitute, a qualified custodian is no longer required to store several items, including identification of the testator and witnesses, in the electronic record of an electronic will.

The committee substitute does away with the concept of a “certified paper original,” a defined term that was fairly pervasive in the underlying bill. Nonetheless, the committee substitute permits admission of “true and correct” paper copies of electronic wills to probate. Moreover, the committee substitute provides that the copy constitutes an original of the electronic will.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/17/2017	.	
	.	
	.	
	.	

The Committee on Banking and Insurance (Passidomo) recommended the following:

Senate Amendment (with title amendment)

Delete lines 93 - 335
and insert:

(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



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11 on or after his or her death and includes an instrument that
12 appoints a personal representative or revokes or revises another
13 will or electronic will.

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

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

18 732.523 Electronic wills.—Notwithstanding s. 732.502:

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

21 (a) Exist in an electronic record that is unique and
22 identifiable.

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

25 (c) Be electronically signed by the attesting witnesses in
26 the presence of the testator and in the presence of each other.

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

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

34 732.524 Self-proof of electronic will.—An electronic will
35 is self-proved if all of the following requirements are met:

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

38 (2) The acknowledgment of the electronic will by the
39 testator and the affidavits of the witnesses are made in



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40 accordance with s. 732.503 and are part of the electronic record
41 containing the electronic will, or are attached to, or are
42 logically associated with, the electronic will.

43 (3) (a) The electronic will designates a qualified
44 custodian;

45 (b) The electronic record that contains the electronic will
46 is held in the custody of a qualified custodian at all times
47 before being offered to the court for probate; and

48 (c) The qualified custodian who has custody of the
49 electronic will at the time of the testator's death:

50 1. Certifies under oath that, to the best knowledge of the
51 qualified custodian, the electronic record that contains the
52 electronic will was at all times before being offered to the
53 court in the custody of a qualified custodian in compliance with
54 s. 732.527 and that the electronic will has not been altered in
55 any way since the date of its execution; and

56 2. If the execution of the electronic will included the use
57 of video conference under s. 732.525(1) (b), certifies under oath
58 that the audio and video recording required under s.
59 732.525(1) (b)9. is in the qualified custodian's custody in the
60 electronic record that contains the electronic will and is
61 available for inspection by the court.

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

64 732.525 Method and place of execution.—For purposes of this
65 act, the execution and filing of a document with the court as
66 provided in this act or the Florida Probate Rules, the execution
67 of a durable power of attorney under s. 709.2105, and the
68 execution of a living will under s. 765.302:



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

72 (a) In the same physical location; or

73 (b) In different physical locations, but can communicate
74 with each other by means of live video conference, if the
75 following requirements are met:

76 1. The testator or principal may not be in an end-stage
77 condition as defined in s. 765.101 or a vulnerable adult as
78 defined s. 415.102. The contestant of the document has the
79 burden of proving that the testator or principal was in an end-
80 stage condition or was a vulnerable adult at the time of
81 executing the document.

82 2. The signal transmission must be live and in real time.

83 3. The signal transmission must be secure from interception
84 through lawful means by anyone other than the persons
85 communicating.

86 4. The persons communicating must simultaneously see and
87 speak to one another with reasonable clarity.

88 5. In the video conference, the persons communicating must
89 establish the identity of the testator or principal by:

90 a. Personal knowledge, if the person asserting personal
91 knowledge explains how the identity of the testator or principal
92 has come to be known to, and the length of time for which it has
93 been known by, such person; or

94 b. Presentation of any of the forms of identification of
95 the testator or principal, as set forth in s. 117.05(5)(b)2.a.-
96 i.

97 6. In the video conference, the persons communicating must



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98 demonstrate awareness of the events taking place, which may be
99 achieved, without limitation, by stating their names and
100 identifying any document they intend to sign.

101 7. At least one of the persons communicating must be
102 either:

103 a. An attorney licensed to practice law in this state:

104 (I) Who electronically signs the document as a witness;

105 (II) Whose status as an attorney licensed to practice law

106 in this state is indicated adjacent to his or her electronic
107 signature; and

108 (III) Whose electronic signature is accompanied by his or

109 her statement that, to the best of his or her knowledge, the

110 execution of the document complied with the requirements of this
111 section; or

112 b. A Florida notary public:

113 (I) Who electronically signs the document;

114 (II) Whose electronic signature is accompanied by a notary
115 public seal that meets the requirements of s. 117.021(3); and

116 (III) Whose electronic signature and seal are accompanied

117 by his or her certification that, to the best of his or her

118 knowledge, the execution of the document complied with the

119 requirements of this section.

120

121 If a document is required to be witnessed or acknowledged, the

122 witness or notary fulfilling that requirement may be the same

123 witness or notary who fulfills the requirement of this

124 subparagraph.

125 8. In the video conference, the testator or principal must

126 provide verbal answers to all of the following questions:



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- 127 a. Are you over the age of 18?
- 128 b. Are you under the influence of any drugs or alcohol that
129 impairs your ability to make decisions?
- 130 c. Are you of sound mind?
- 131 d. Did anyone assist you in accessing this video
132 conference? If so, who?
- 133 e. Has anyone forced or influenced you to include anything
134 in this document which you do not wish to include?
- 135 f. Are you signing this document voluntarily?
- 136 9. A time-stamped recording of the entire video conference
137 must be identifiable with the document being signed and stored
138 in the electronic record containing the document by a qualified
139 custodian in the manner required pursuant to s. 532.527(1)(c)
140 for the storage of electronic records containing electronic
141 wills.
- 142 a. Without limitation, a recording is identifiable with a
143 document if the recording and document share an identification
144 number.
- 145 b. If the recording is not reasonably accessible by a
146 person presented with the document, such person may treat the
147 document as if it does not include the signature of any
148 signatory who appeared by means of live video conference;
149 however, an electronic will whose execution included the use of
150 video conference under this section may be proved as provided in
151 s. 733.201(4). Without limitation, a recording is reasonably
152 accessible if it is accessible at no charge over the internet
153 pursuant to instructions set forth in the document.
- 154 (2) If a law requires a record to be in writing, an
155 electronic record satisfies such provision.



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

158 (4) A document that is signed electronically is deemed to
159 be executed in this state if all of the following requirements
160 are met:

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

165 (b) The person creating the document is, or the attesting
166 witnesses or Florida notary public whose electronic signatures
167 are obtained in the execution of the document are, physically
168 located within this state at the time the document is executed.

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

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

175 732.526 Probate.—An electronic will of a nonresident of
176 this state which is executed or deemed executed in another state
177 in accordance with the laws of that state or of this state may
178 be offered for and admitted to original probate in this state
179 and is subject to the jurisdiction of the courts of this state.
180 The venue for the probate of electronic wills is as provided in
181 s. 733.101(1) or, in the case of the electronic will of a
182 nonresident, may be the county in which the qualified custodian
183 or attorney for the petitioner or personal representative has
184 his or her domicile or registered office.



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

187 732.527 Qualified custodians.—

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

190 (a) Not be named as a fiduciary under the electronic will
191 or an heir or devisee, as defined in s. 731.201, of the
192 testator;

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

195 (c) In the course of maintaining custody of electronic
196 wills, regularly employ, and store electronic records containing
197 electronic wills in, a system that:

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

200 2. Detects any change to an electronic record; and

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

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

211 (a) To the testator;

212 (b) To persons authorized by the testator in the electronic
213 will or in written instructions signed by the testator in



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214 accordance with s. 732.502;

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

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

219 (3) The qualified custodian of the electronic record of an
220 electronic will may elect to destroy such record, including any
221 of the documentation required to be created and stored under
222 paragraph (1)(d), at any time after the earlier of the 5th
223 anniversary of the conclusion of the administration of the
224 estate of the testator or 20 years after the death of the
225 testator.

226 (4) A qualified custodian who at any time maintains custody
227 of the electronic record of an electronic will may elect to
228 cease serving in such capacity by:

229 (a) Delivering the electronic will or the electronic record
230 containing the electronic will to the testator, if then living,
231 or, after the death of the testator, by filing the will with the
232 court in accordance with s. 732.901; and

233 (b) If the outgoing qualified custodian intends to
234 designate a successor qualified custodian, by doing the
235 following:

236 1. Providing written notice to the testator of the name,
237 address, and qualifications of the proposed successor qualified
238 custodian. The testator must provide written consent before the
239 electronic record, including the electronic will, is delivered
240 to a successor qualified custodian;

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



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243 3. Delivering to the successor qualified custodian an
244 affidavit of the outgoing qualified custodian stating that:
245 a. The outgoing qualified custodian is eligible to act as a
246 qualified custodian in this state;
247 b. The outgoing qualified custodian is the qualified
248 custodian designated by the testator in the electronic will or
249 appointed to act in such capacity under this paragraph;
250 c. The electronic will has at all times been in the custody
251 of one or more qualified custodians in compliance with this
252 section since the time the electronic record was created, and
253 identifying such qualified custodians; and
254 d. To the best of the outgoing qualified custodian's
255 knowledge, the electronic will has not been altered since the
256 time it was created.
257
258 For purposes of making this affidavit, the outgoing qualified
259 custodian may rely conclusively on any affidavits delivered by a
260 predecessor qualified custodian in connection with its
261 designation or appointment as qualified custodian; however, all
262 such affidavits must be delivered to the successor qualified
263 custodian.
264 (5) Upon the request of the testator which is made in a
265 writing signed in accordance with s. 732.502, a qualified
266 custodian who at any time maintains custody of the electronic
267 record of the testator's electronic will must cease serving in
268 such capacity and must deliver to a successor qualified
269 custodian designated in writing by the testator the electronic
270 record containing the electronic will and the affidavit required
271 in subparagraph (4) (b) 3.



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

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

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

286 (9) The qualified custodian shall be liable for any damages
287 caused by the negligent loss or destruction of the electronic
288 record, including the electronic will, while it is in the
289 possession of the qualified custodian. A qualified custodian may
290 not limit liability for such damages.

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

293 (11) Upon receiving information that the testator is dead,
294 a qualified custodian must deposit the electronic will with the
295 court in accordance with s. 732.901. A qualified custodian may
296 not charge a fee for depositing the electronic will with the
297 clerk, providing the affidavits made in accordance with s.
298 732.503, or furnishing in writing any information requested by a
299 court under paragraph (1) (d).

300 (12) Except as provided in this act, a qualified custodian



301 must at all times keep information provided by the testator
302 confidential and may not disclose such information to any third
303 party.

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

306 733.201 Proof of wills.—

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

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

313 (3) If it appears to the court that the attesting witnesses
314 cannot be found or that they have become incapacitated after the
315 execution of the will or their testimony cannot be obtained
316 within a reasonable time, a will, other than an electronic will,
317 may be admitted to probate upon the oath of the personal
318 representative nominated by the will as provided in subsection
319 (2), whether or not the nominated personal representative is
320 interested in the estate, or upon the oath of any person having
321 no interest in the estate under the will stating that the person
322 believes the writing exhibited to be the true last will of the
323 decedent.

324 (4) If an electronic will, including an electronic will
325 whose execution included the use of a video conference under s.
326 732.525(1)(b), is not self-proved, an electronic will may be
327 admitted to probate upon the oath of the two attesting witnesses
328 for the electronic will taken before any circuit judge, any
329 commissioner appointed by the court, or the clerk. If it appears



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330 to the court that the attesting witnesses cannot be found, that
331 they have become incapacitated after the execution of the
332 electronic will, or that their testimony cannot be obtained
333 within a reasonable time, an electronic will may be admitted to
334 probate upon the oath of two disinterested witnesses providing
335 all of the following information:

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

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

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

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

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

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

350 (g) If the execution of an electronic will included the use
351 of a video conference under s. 732.525(1)(b), a statement as to
352 whether a recording of the video conference is available for
353 inspection by the court or cannot be found after a diligent
354 search.

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



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359 Section 11. Paragraph (b) of subsection (2) of section
360 736.0403, Florida Statutes, is amended to read:

361 736.0403 Trusts created in other jurisdictions; formalities
362 required for revocable trusts.—

363 (2) Notwithstanding subsection (1):

364 (b) The testamentary aspects of a revocable trust, executed
365 by a settlor who is a domiciliary of this state at the time of
366 execution, are invalid unless the trust instrument is executed
367 by the settlor with the formalities required for the execution
368 of a will under s. 732.502 or an electronic will under s.

369 732.523 which is self-proved; however, the qualified custodian
370 of the trust instrument may not also be a trustee of the trust
371 ~~in this state~~. For purposes of this subsection, the term
372 "testamentary aspects" means those provisions of the trust
373 instrument that dispose of the trust property on or after the
374 death of the settlor other than to the settlor's estate.

375

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

377 And the title is amended as follows:

378 Delete lines 5 - 56

379 and insert:

380 732.506, F.S.; excluding electronic wills from
381 specified methods to revoke a will; creating s.

382 732.521, F.S.; providing a short title; creating s.

383 732.522, F.S.; defining terms; creating s. 732.523,

384 F.S.; specifying requirements that must be satisfied
385 in the execution of electronic wills; creating s.

386 732.524, F.S.; providing requirements for self-proof

387 of electronic wills; creating s. 732.525, F.S.;



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388 specifying the circumstances under which a person is
389 deemed to be in the presence of or appearing before
390 another person; providing that an electronic record
391 satisfies the requirement that a record be in writing;
392 providing that an electronic signature satisfies the
393 requirement that a document be signed; providing
394 requirements for certain documents to be deemed
395 executed in this state; creating s. 732.526, F.S.;
396 authorizing an electronic will of a nonresident of
397 this state which is properly executed in this or
398 another state to be offered for and admitted to
399 probate in this state; providing the venue for the
400 probate of such electronic will; creating s. 732.527,
401 F.S.; specifying requirements for service as a
402 qualified custodian; requiring qualified custodians to
403 provide access to or information concerning the
404 electronic will, or the electronic record containing
405 the electronic will, only to specified persons or as
406 directed by a court; authorizing a qualified custodian
407 to destroy the electronic record of an electronic will
408 after a certain date; providing conditions under which
409 a qualified custodian may cease serving as a qualified
410 custodian; requiring a qualified custodian to cease
411 serving in such capacity upon the written request of
412 the testator; requiring that a successor qualified
413 custodian agree in writing to serve in that capacity
414 for an electronic will before succeeding to office;
415 specifying what constitutes an affidavit of a
416 qualified custodian; requiring a qualified custodian



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417 to deliver certain documents upon request from the
418 testator; prohibiting a qualified custodian from
419 charging the testator a fee for such documents under
420 certain circumstances; providing that a qualified
421 custodian is liable for certain damages under certain
422 circumstances; prohibiting a qualified custodian from
423 terminating or suspending access to, or downloads of,
424 an electronic will by the testator; requiring a
425 qualified custodian to deposit an electronic will with
426 the court upon receiving information that the testator
427 is dead; prohibiting a qualified custodian from
428 charging a fee for certain actions taken upon the
429 death of the testator; requiring a qualified custodian
430 to keep certain information confidential; amending s.
431 733.201, F.S.; providing for the proof of electronic
432 wills; providing requirements for admitting an
433 electronic will that is not self-proved into probate;
434 providing that a paper copy of an electronic will
435 constitutes an "original" of the electronic will
436 subject to certain conditions; amending s. 736.0403,
437 F.S.; providing that, for purposes of establishing the
438 validity of the testamentary aspects of a revocable
439 trust, the qualified custodian of the trust instrument
440 may not also be a trustee of the trust; providing
441 applicability; providing an

By the Committee on Judiciary; and Senator Passidomo

590-00962-17

2017206c1

1 A bill to be entitled
 2 An act relating to electronic wills; amending s.
 3 731.201, F.S.; revising the definition of the term
 4 "will" to include electronic wills; amending s.
 5 732.506, F.S.; excepting electronic wills from
 6 revocation provisions; creating s. 732.521, F.S.;
 7 providing a short title; creating s. 732.522, F.S.;
 8 defining terms; creating s. 732.523, F.S.; specifying
 9 requirements that must be satisfied in the execution
 10 of electronic wills; creating s. 732.524, F.S.;
 11 providing that electronic wills may be made self-
 12 proved at the time of execution; providing
 13 requirements for self-proof of electronic wills;
 14 creating s. 732.525, F.S.; specifying the
 15 circumstances under which a person is deemed to be in
 16 the presence of another; providing that an electronic
 17 signature satisfies the requirement that a document be
 18 signed; providing requirements for certain documents
 19 to be deemed executed in this state; creating s.
 20 732.526, F.S.; authorizing an electronic will that is
 21 properly executed in this or another state to be
 22 offered for and admitted to probate in this state;
 23 providing the venue for the probate of such electronic
 24 will; creating s. 732.527, F.S.; specifying
 25 requirements for service as a qualified custodian;
 26 requiring qualified custodians to provide access to or
 27 information concerning the electronic will or the
 28 electronic record containing the electronic will, only
 29 to specified persons; authorizing the qualified
 30 custodian to deposit an electronic will with the clerk
 31 of court; authorizing a qualified custodian to destroy
 32 the electronic record of an electronic will after a

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

590-00962-17

2017206c1

33 certain date; providing for cessation of service of a
 34 qualified custodian; requiring that a qualified
 35 custodian who elects to cease serving in such capacity
 36 provide written notice to the testator under certain
 37 circumstances; requiring a qualified custodian to
 38 deliver certain documents to specified persons when he
 39 or she ceases to serve in such capacity; requiring a
 40 qualified custodian to cease serving in such capacity
 41 under certain circumstances; requiring that a
 42 successor qualified custodian agree in writing to
 43 serve in that capacity for an electronic will before
 44 succeeding to office; specifying what constitutes an
 45 affidavit of the qualified custodian; requiring a
 46 qualified custodian to deliver certain documents upon
 47 request from a testator; providing that a qualified is
 48 liable for certain damages under certain
 49 circumstances; requiring a qualified custodian to keep
 50 certain information confidential; amending s. 733.201,
 51 F.S.; providing for the proof of electronic wills;
 52 providing requirements for admitting an electronic
 53 will that is not self-proved into probate; providing
 54 that a paper copy of an electronic will constitutes an
 55 "original" of the electronic will subject to certain
 56 conditions; providing applicability; providing an
 57 effective date.

58
 59 Be It Enacted by the Legislature of the State of Florida:

60
 61 Section 1. Subsection (40) of section 731.201, Florida

Page 2 of 12

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

590-00962-17

2017206c1

62 Statutes, is amended to read:

63 731.201 General definitions.—Subject to additional
64 definitions in subsequent chapters that are applicable to
65 specific chapters or parts, and unless the context otherwise
66 requires, in this code, in s. 409.9101, and in chapters 736,
67 738, 739, and 744, the term:

68 (40) "Will" means an instrument, including a codicil,
69 executed by a person in the manner prescribed by this code,
70 which disposes of the person's property on or after his or her
71 death and includes an instrument which merely appoints a
72 personal representative or revokes or revises another will. The
73 term "will" includes an electronic will as defined in s.
74 732.522.

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

77 732.506 Revocation by act.—A will or codicil, other than an
78 electronic will, is revoked by the testator, or some other
79 person in the testator's presence and at the testator's
80 direction, by burning, tearing, canceling, defacing,
81 obliterating, or destroying it with the intent, and for the
82 purpose, of revocation.

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

85 732.521 Short title.—Sections 732.521-732.527 may be cited
86 as the "Florida Electronic Wills Act."

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

89 732.522 Definitions.—As used in ss. 732.521-732.527, the
90 term:

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

93 (2) "Electronic signature" means an electronic sound,
94 symbol, or process attached to or logically associated with a
95 record and executed or adopted by a person with the intent to
96 sign the record.

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

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

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

107 732.523 Electronic wills.—Notwithstanding s. 732.502:

108 (1) An electronic will must:

109 (a) Exist in an electronic record.

110 (b) Be electronically signed by the testator in the
111 presence of a notary public who is, or at least two attesting
112 witnesses who are, in the same room as the testator.

113 (c) Be electronically signed by the notary public and the
114 two attesting witnesses in the presence of the testator and, in
115 the case of the witnesses, in the presence of each other. The
116 notary public's signature must be accompanied by a notary public
117 seal that meets the requirements of s. 117.021(3).

118 (2) Except as otherwise provided in this act, all questions
119 as to the force, effect, validity, and interpretation of an

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120 electronic will that complies with this section must be
 121 determined in the same manner as in the case of a will executed
 122 in accordance with s. 732.502.

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

125 732.524 Self-proof of electronic will.—An electronic will
 126 is self-proved if all of the following requirements are met:

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

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

134 (3) (a) The electronic will is deposited with the clerk
 135 before the death of the testator in accordance with s. 732.901
 136 with a certification signed by the testator confirming that the
 137 electronic will is a valid will of the testator; or

138 (b) 1. The electronic will designates a qualified custodian;
 139 and

140 2. The qualified custodian certifies under oath that to its
 141 best knowledge the electronic will was at all times under the
 142 control of a qualified custodian before being offered to the
 143 court and that the electronic will has not be altered in any way
 144 since the date of its execution.

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

147 732.525 Method and place of execution.—For purposes of this
 148 act, the execution and filing of a document with the court as

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149 provided in this act or the Florida Probate Rules, the execution
 150 of a durable power of attorney under s. 709.2105, and the
 151 execution of a living will under s. 765.302:

152 (1) An individual is deemed to be in the presence of
 153 another individual if the individuals are either:

154 (a) In the same physical location; or

155 (b) In different physical locations, but can communicate
 156 with each other by means of live video and audio conference,
 157 provided that a video transcript of the execution of the
 158 document is recorded and stored in, or attached to or logically
 159 associated with, the electronic record of the document.

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

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

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

168 (b) The person creating the document is, or the attesting
 169 witnesses or Florida notary public whose electronic signatures
 170 are obtained in the execution of the document are, physically
 171 located within this state at the time the document is executed.

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

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

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178 732.526 Probate.—An electronic will that is executed or
 179 deemed executed in another state in accordance with the laws of
 180 that state or of this state may be offered for and admitted to
 181 original probate in this state and is subject to the
 182 jurisdiction of the courts of this state. The venue for the
 183 probate of electronic wills is as provided in s. 733.101(1) or,
 184 in the case of the electronic will of a nonresident, may be the
 185 county in which the qualified custodian or attorney for the
 186 petitioner or personal representative has his or her domicile or
 187 registered office.

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

190 732.527 Qualified custodians.—

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

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

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

197 (c) Consistently employ a system for ensuring the
 198 safekeeping of electronic records and store electronic records
 199 containing electronic wills under such system; and

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

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

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207 (2) The qualified custodian of an electronic will shall
 208 provide access to or information concerning the electronic will,
 209 or the electronic will and the electronic record containing the
 210 electronic will, only to the testator and such other persons as
 211 directed by the written instructions of the testator. A
 212 qualified custodian may also deposit the electronic will with
 213 the clerk by complying and in accordance with s. 732.901.

214 (3) The qualified custodian of the electronic record of an
 215 electronic will may elect to destroy such record, including any
 216 of the documentation required to be created and stored under
 217 paragraph (1) (d), at any time after the 5th anniversary of the
 218 admission of the will of the testator to probate.

219 (4) A qualified custodian who at any time controls the
 220 electronic record of an electronic will may elect to cease
 221 servicing in such capacity by:

222 (a) Delivering the electronic will or the electronic record
 223 containing the electronic will to the testator, if then living,
 224 or, after the death of the testator, to the personal
 225 representative;

226 (b) Depositing the electronic will, including an
 227 acknowledgement of affidavits made in accordance with s.
 228 732.503, with the clerk after complying with s. 732.901; or

229 (c)1. If the outgoing qualified custodian intends to
 230 designate a successor qualified custodian, providing written
 231 notice to the testator or, after the testator's death, the
 232 testator's nominated personal representative of the name,
 233 address, and qualifications of the proposed successor qualified
 234 custodian. The testator or a testator's nominated personal
 235 representative must provide written consent before the

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236 electronic record, including the electronic will, is delivered
 237 to a successor qualified custodian;

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

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

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

244 b. The outgoing qualified custodian is the qualified
 245 custodian designated by the testator in the electronic will or
 246 appointed to act in such capacity under paragraph (4) (c);

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

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

253
 254 For purposes of making this affidavit, the outgoing qualified
 255 custodian may rely conclusively on any affidavits delivered by a
 256 predecessor qualified custodian in connection with its
 257 designation or appointment as qualified custodian; however, all
 258 such affidavits must be delivered to the successor qualified
 259 custodian.

260 (5) Upon the written request of the testator, a qualified
 261 custodian who at any time controls the electronic record of the
 262 testator's electronic will must cease serving in such capacity
 263 and must deliver to a successor qualified custodian designated
 264 in writing by the testator the electronic will and the affidavit

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265 required in this subparagraph (4) (c)3.

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

269 (7) If a qualified custodian is an entity, an affidavit of
 270 a duly authorized officer or agent of such entity shall
 271 constitute the affidavit of the qualified custodian.

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

277 (9) The qualified custodian shall be liable for any damages
 278 caused by the negligent loss or destruction of the electronic
 279 record, including the electronic will, while it is in the
 280 possession of the qualified custodian. A qualified custodian may
 281 not limit liability for such damages.

282 (10) A qualified custodian may not terminate or suspend
 283 access to the electronic will by the testator.

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

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

290 733.201 Proof of wills.—

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

293 (2) A will, other than an electronic will, may be admitted

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294 to probate upon the oath of any attesting witness taken before
295 any circuit judge, commissioner appointed by the court, or
296 clerk.

297 (3) If it appears to the court that the attesting witnesses
298 cannot be found or that they have become incapacitated after the
299 execution of the will or their testimony cannot be obtained
300 within a reasonable time, a will, other than an electronic will,
301 may be admitted to probate upon the oath of the personal
302 representative nominated by the will as provided in subsection
303 (2), whether or not the nominated personal representative is
304 interested in the estate, or upon the oath of any person having
305 no interest in the estate under the will stating that the person
306 believes the writing exhibited to be the true last will of the
307 decedent.

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

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

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

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

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323 will.

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

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

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

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

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

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

THE FLORIDA SENATE APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

April 17, 2017

Meeting Date

CS/SB 206

Bill Number (if applicable)

370522

Amendment Barcode (if applicable)

Topic Electronic Wills

Name Bruce Stone

Job Title Attorney

Address 6475 SW 92 Street

Street

Phone 3057531642

Miami

FL

33156

Email brucemstone@gmail.com

City

State

Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing appearing as a private citizen

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

SB 206

Bill Number (if applicable)

370522

Amendment Barcode (if applicable)

Topic Electronic Wills

Name Michael Delgado

Job Title General Counsel, Willing.com

Address 8724 sunset Dr Unit 169

Phone 908-581-7222

MIAMI

City

FL

State

33173

Zip

Email michael@willing.com

Speaking: [X] For [] Against [] Information

Waive Speaking: [] In Support [] Against (The Chair will read this information into the record.)

Representing Willing.com

Appearing at request of Chair: [] Yes [] No

Lobbyist registered with Legislature: [] Yes [X] No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

SB 206
Bill Number (if applicable)

#370522
Amendment Barcode (if applicable)

Topic Electronic Wills

Name Kenneth Pratt

Job Title Senior VP of Governmental Affairs

Address 1001 Thomasville Rd, Ste 201
Street

Phone 850-509-8020

Tallahassee FL 32301
City State Zip

Email kpratt@floridabankers.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Bankers Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

206

Bill Number (if applicable)

Topic Electronic Will

Amendment Barcode (if applicable)

Name Ms. Zayne Smith

Job Title Associate State Director

Address 200 W. College Ave.
Street

Phone 850 228-4243

Tampa
City

FL
State

32301
Zip

Email zsmith@aarpa.org

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing AARP

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE

APPEARANCE RECORD

4/17/16

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

206

Meeting Date

Bill Number (if applicable)

370522

Topic Electronic Wills

Amendment Barcode (if applicable)

Name Twyla Sketchley

Job Title Attorney

Address 3689 Coolidge Ct, Ste 8

Phone 850-894-0152

TLH FL 32311

Email info@sketchleylaw.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Elder Law Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

SB 206
Bill Number (if applicable)

Topic Durable Powers of Attorney - Electronic Wills Amendment Barcode (if applicable)

Name William Sklar

Job Title Florida Bar RPPTL Section - Real Property Division

Address 215 S. Monroe Street Ste 500 Phone 561-654-4953

Tallahassee Fla 32301 Email wsklar@ctjb-law.com
City State Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing FLA Bar RPPTL

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

206

Bill Number (if applicable)

Topic Electronic Wills

Amendment Barcode (if applicable)

Name Sarah Butters

Job Title Attorney - Ausley McMullen

Address 123 South Calhoun Street

Phone 850 425-5447

Street

Tallahassee, FL 32301

Email sbutters@ausley.com

City

State

Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing The Real Property, Probate and Trust Law Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

April 17, 2017

Meeting Date

CS for SB 206

Bill Number (if applicable)

~~370522~~

Amendment Barcode (if applicable)

Topic Electronic Wills

Name Fletch Belcher

Job Title Probate Litigation Attorney

Address 540 Fourth Street North

Street

St. Petersburg

City

FL

State

33701

Zip

Phone 727-580-0998

Email wfbelcher@gmail.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Self [Speaking against bill & for any amendment to require actual presence of witnesses]

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

9/17/17

Meeting Date

SB 206

Bill Number (if applicable)

Topic Electronic wills

Amendment Barcode (if applicable)

Name Michael Delgado

Job Title General Counsel, Willing.com

Address 8724 Sunset Dr Unit 169

Phone 408-581-7222

Street

Miami

City

FL

State

33173

Zip

Email michael@willing.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Willing.com

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/CS/SB 830

INTRODUCER: Banking and Insurance Committee; Regulated Industries Committee; and Senator Baxley

SUBJECT: Mortgage Brokering

DATE: April 18, 2017 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	Fav/CS
2.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	Fav/CS
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 830 exempts a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation as a loan originator or mortgage broker under ch. 494, F.S., if the person in the normal course of conducting securities business with corporate or individual clients:

- Solicits or offers to solicit a mortgage loan from a securities client, or refers a securities client to a an entity exempt from regulation under parts I or II of ch. 494, F.S., pursuant to s. 494.00115, F.S., a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- Does not accept or offer to accept a mortgage loan application, negotiate or offer to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiate or offer to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain.

Any referral or solicitation made pursuant to this exemption must comply with the provisions of ch. 517, F.S., the federal Real Estate Settlement Procedures Act, and any applicable federal law or general law of this state.

The bill may have an insignificant, negative fiscal impact to state government. *See* Section V, Fiscal Impact Statement.

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

II. Present Situation:

State Regulation of Non-Depository Mortgage Business

The Office of Financial Regulation (OFR) regulates state-chartered banks, credit unions, other financial institutions, as well as finance companies, and the securities industry.¹ The OFR's Division of Consumer Finance licenses and regulates various aspects of the non-depository financial services industries, including individuals and businesses engaged in the mortgage business.

Under ch. 494, F.S., the OFR licenses and regulates the following individuals and businesses:

- **Loan originator**, who, directly or indirectly, solicits or offers to solicit a mortgage loan, accepts or offers to accept an application for a mortgage loan, negotiates or offers to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiates or offers to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain. The term includes an individual who is required to be licensed as a loan originator under the S.A.F.E. Mortgage Licensing Act of 2008.² The term does not include an employee of a mortgage broker or mortgage lender whose duties are limited to physically handling a completed application form or transmitting a completed application form to a lender on behalf of a prospective borrower.³
- **Mortgage broker**, who conducts loan originator activities through one or more licensed loan originators employed by the mortgage broker or as independent contractors to the mortgage broker.⁴
- **Mortgage lender**, who makes a mortgage loan or services a mortgage loan for others, or, for compensation or gain, directly or indirectly, sells or offers to sell a mortgage loan to a noninstitutional investor.⁵ A mortgage lender may act as a mortgage broker.⁶

Under ch. 494, F.S., these licensees are subject to:

- Requirements for the maintenance of books and records relating to the licensee's compliance with the chapter, with regard to expenses paid by the licensee on behalf of the borrower, and relating to its advertisements.⁷
- The OFR's investigation and examination authority.⁸

¹ Section 20.121(3)(a)2. and (d), F.S. The OFR is under the Financial Services Commission (commission). The commission is a separate budget entity under the Department of Financial Services (DFS), and is not subject to the control or supervision by the DFS. The commission, comprised of the Governor and Cabinet, appoints the OFR Commissioner.

² The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act) (12 U.S.C. s. 5101-5116), enacted on July 30, 2008, establishes minimum standards for the licensing and registration of state-licensed mortgage loan originators, and mandates a nationwide licensing and registration system for residential mortgage loan originators.

³ Section 494.001(17), F.S.

⁴ Section 494.001(22), F.S.

⁵ Section 494.001(23), F.S.

⁶ Section 494.0073, F.S.

⁷ Sections 494.0016 and 494.00165(2), F.S.

⁸ Section 494.0012, F.S.

- The OFR’s enforcement authority such as injunctions, cease and desist orders, suspension or revocation of licensure, and administrative fines.⁹

In order to obtain a license as a mortgage loan originator, an individual must:¹⁰

- Complete a 20-hour prelicensing class;¹¹
- Pass a written test (cost: \$110);¹²
- Submit an application form;
- Submit a nonrefundable application fee of \$215;
- Submit fingerprints, the cost of which is borne by the applicant; and
- Authorize access to his or her credit report, the cost of which is borne by the applicant.

In order to obtain a license as a mortgage broker, a person must:¹³

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$525;
- Submit fingerprints for each of the applicant’s control persons,¹⁴ the cost of which is borne by the person subject to the background check; and
- Authorize access to the credit reports of each of the applicant’s control persons, the cost of which is borne by the applicant.

In order to obtain licensure as a mortgage lender, a person must:¹⁵

- Submit an application form, which must designate a qualified principal loan originator;
- Submit a nonrefundable application fee of \$600;
- Submit fingerprints for each of the applicant’s control persons, the cost of which is borne by the person subject to the background check;
- Submit a copy of the applicant’s financial audit report for the most recent fiscal year, which must document that the applicant has a net worth of at least \$63,000 if the applicant is not seeking a servicing endorsement, or at least \$250,000 if the applicant is seeking a servicing endorsement; and
- Authorize access to the credit reports of each of the applicant’s control persons, the cost of which is borne by the applicant.

A mortgage loan originator, broker, and lender license must be annually renewed by December 31.¹⁶ In order to renew:

⁹ Sections 494.0013, 494.0014, and 494.00255, F.S.

¹⁰ Section 494.00312, F.S.

¹¹ The cost of prelicensing courses may vary by course provider, but one such course provider charges \$349 for the required 20-hour course. See MortgageEducation.com, Mortgage Loan Originator Courses, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 25, 2017).

¹² Nationwide Multistate Licensing System & Registry, Uniform State Test (UST) Implementation Information, <http://mortgage.nationwidelicingsystem.org/profreq/testing/Pages/UniformStateTest.aspx> (last visited Mar. 25, 2017).

¹³ Section 494.00321, F.S.

¹⁴ “Control persons” is defined in s. 494.001(6), F.S., to mean, in part, “an individual, partnership, corporation, trust, or other organization that possesses the power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise.”

¹⁵ Section 494.00611, F.S.

¹⁶ Sections 494.00312(7), 494.00321(7), and 494.00611, F.S.

- A mortgage loan originator license, an individual must submit a renewal form and a nonrefundable renewal fee of \$170; provide documentation of completion of at least 8 hours of continuing education courses;¹⁷ and authorize access to his or her credit report, the cost of which is borne by the licensee.¹⁸
- A mortgage broker license, a person must submit a renewal form and a nonrefundable renewal fee of \$475; submit fingerprints for any new control persons who have not been screened; and authorize access to the credit reports of each of the mortgage broker's control persons, the cost of which is borne by the licensee.¹⁹
- A mortgage lender license, a person must submit a renewal form and a nonrefundable renewal fee of \$575; submit fingerprints for any new control persons who have not been screened; submit proof that the mortgage lender continues to meet the applicable net worth requirement; and authorize access to the credit reports of each of the mortgage lender's control persons, the cost of which is borne by the licensee.²⁰

The following persons are exempt from mortgage broker and mortgage lender regulation under ch. 494, F.S.:²¹

- Any person operating exclusively as a registered loan originator²² in accordance with the S.A.F.E. Act.
- A depository institution; certain regulated subsidiaries that are owned and controlled by a depository institution; or institutions regulated by the Farm Credit Administration.
- The Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; any agency of the Federal Government; any state, county, or municipal government; or any quasi-governmental agency that acts in such capacity under the specific authority of the laws of any state or the United States.
- An attorney licensed in this state who negotiates the terms of a mortgage loan on behalf of a client as an ancillary matter to the attorney's representation of the client.
- A person involved solely in the extension of credit relating to the purchase of a timeshare plan.
- A person who performs only real estate brokerage activities and is licensed or registered in this state under part I of ch. 475, F.S., unless the person is compensated by a lender, a mortgage broker, or other loan originator or by an agent of such lender, mortgage broker, or other loan originator.

The following persons are exempt from the mortgage lender licensing requirements of ch. 494, F.S.:²³

¹⁷ The cost of continuing education courses may vary by course provider, but one such course provider charges \$129 for the required 8-hour course. See MortgageEducation.com, Mortgage Loan Originator Courses, <https://www.mortgage-education.com/StatePage.aspx?StateCode=FL> (last visited Mar. 30, 2017).

¹⁸ Section 494.00313, F.S.

¹⁹ Section 494.00322, F.S.

²⁰ Section 494.00612, F.S.

²¹ Section 494.00115(1), F.S.

²² A "registered loan originator" is "a loan originator who is employed by a depository institution, by a subsidiary that is owned and controlled by a depository institution and regulated by a federal banking agency, or by an institution regulated by the Farm Credit Administration, and who is registered with and maintains a unique identifier through the [Nationwide Mortgage Licensing System and Registry]." A registered loan originator must comply with federal registration requirements rather than the loan originator licensing requirements under ch. 494, F.S.

²³ Section 494.00115(2), F.S.

- A person acting in a fiduciary capacity conferred by the authority of a court.
- A person who, as a seller of his or her own real property, receives one or more mortgages in a purchase money transaction.
- A person who acts solely under contract and as an agent for federal, state, or municipal agencies for the purpose of servicing mortgage loans.
- A person who makes only nonresidential mortgage loans and sells loans only to institutional investors.
- An individual making or acquiring a mortgage loan using his or her own funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.
- An individual selling a mortgage that was made or purchased with that individual's funds for his or her own investment, and who does not hold himself or herself out to the public as being in the mortgage lending business.

Federal Real Estate Settlement Procedures Act of 1974

The Real Estate Settlement Procedures Act²⁴ (the Act) became effective on June 20, 1975.²⁵ The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. In addition, the Act also prohibits specific practices, such as kickbacks,²⁶ and places limitations upon compensation and fees.²⁷

Federal Securities Regulation

The federal Securities Exchange Act of 1934 ('34 Act) requires registration of securities market participants like broker-dealers and exchanges.²⁸ Generally, any person acting as “broker” or “dealer” as defined in the '34 Act must be registered with the Securities and Exchange Commission (SEC) and join a self-regulatory organization (SRO), like the Financial Industry Regulatory Authority (FINRA) or a national securities exchange.

The '34 Act broadly defines “broker” as “any person engaged in the business of effecting transactions in securities for the account of others,” which the SEC has interpreted to include involvement in any of the key aspects of a securities transaction, including solicitation, negotiation, and execution.²⁹ A “dealer” is “any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise.”³⁰

²⁴ 12 U.S.C. ss. 2601 et seq.

²⁵ 12 CFR Part 1024 (Regulation X) implements RESPA.

²⁶ 12 CFR s. 1024.14.

²⁷ *Id.*

²⁸ *Supra*, note 21.

²⁹ 15 U.S.C. ss. 78c(4) and 78o. U.S. Securities and Exchange Commission, Guide to Broker-Dealer Registration, <https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html> (last visited March 30, 2017).

³⁰ 15 U.S.C. s. 78c(5).

State Securities Regulation

In addition to federal securities laws, “Blue Sky Laws” are state laws designed to protect investors against fraudulent sales practices and activities by requiring companies making offerings of securities to register their offerings before they can be sold in that state and by requiring licensure for brokerage firms, their brokers, and investment adviser representatives.³¹

In Florida, OFR’s Division of Securities oversees the Securities and Investor Protection Act, ch. 517, F.S. (act), which regulates the offer and sale of securities in, to, or from Florida by firms, branch offices, and individuals affiliated with these firms. The act requires the following individuals or businesses to be registered with the OFR under s. 517.12, F.S., in order for such persons to sell or offer to sell any securities in or from offices in this state, or to sell securities to persons in this state from offices outside this state.³²

- **Dealers**, which include:³³
 - Any person, other than an associated person registered under ch. 517, F.S., who engages, either for all or part of her or his time, directly or indirectly, as broker or principal in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.
 - Any issuer who through persons directly compensated or controlled by the issuer engages, either for all or part of her or his time, directly or indirectly, in the business of offering or selling securities which are issued or are proposed to be issued by the issuer.
- **Investment advisors**, which include:³⁴
 - Any person who receives compensation, directly or indirectly, and engages for all or part of her or his time, directly or indirectly, or through publications or writings, in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities, except a dealer whose performance of these services is solely incidental to the conduct of her or his business as a dealer and who receives no special compensation for such services.
 - But does not include a “federal covered advisor.”³⁵
- **Associated persons**, with respect to a *dealer or investment adviser*, include:³⁶
 - Any partner, officer, director, or branch manager of a dealer or investment adviser or any person occupying a similar status or performing similar functions;
 - Any natural person directly or indirectly controlling or controlled by such dealer or investment adviser, other than an employee whose function is only clerical or ministerial; or
 - Any natural person, other than a dealer, employed, appointed, or authorized by a dealer, investment adviser, or issuer to sell securities in any manner or act as an investment adviser as defined in this section.

³¹ U.S. Securities and Exchange Commission, Blue Sky Laws, <http://www.sec.gov/answers/bluesky.htm> (last visited March 30, 2017).

³² Section 517.12(1), F.S.

³³ Section 517.021(6)(a), F.S.

³⁴ Section 517.021(14)(a), F.S.

³⁵ Section 517.021(9) and (14)(b)9., F.S. A federal covered advisor must be registered under federal law and must provide a notice-filing to the OFR pursuant to ss. 517.021 and 517.1201, F.S.

³⁶ Section 517.021(2)(a), F.S.

- **Associated persons**, with respect to a *federal covered adviser*, includes any person who is an investment adviser representative and who has a place of business in this state.

Wells Fargo Declaratory Statement

In May 2016, Wells Fargo Advisors, LLC (Wells Fargo), filed a petition for a declaratory statement³⁷ with the OFR to determine whether it would be in compliance with ch. 494, F.S., if it were to start compensating its financial advisors for certain mortgage loan originator activities that it argued were purely incidental to the otherwise authorized securities and investment activities for Wells Fargo and its financial advisors.³⁸

Wells Fargo is a full-service broker-dealer firm subject to supervision by the SEC and the OFR.³⁹ Wells Fargo is indirectly owned by Wells Fargo & Co., a bank holding company that also owns certain national banks.⁴⁰ Therefore, Wells Fargo is affiliated with such banks through common ownership.⁴¹

Despite the fact that Wells Fargo holds a mortgage broker license and many of its financial advisors hold a license as a mortgage loan originator, Wells Fargo and its financial advisors do not:

- Solicit the general public for mortgage loans;
- Solicit lenders on behalf of borrowers;
- Take, complete, accept, or assist in preparing applications for any mortgage loans;
- Negotiate the interest rate, terms or conditions for new or existing mortgage loans; or
- Offer any mortgage loans to borrowers.⁴²

If Wells Fargo's securities clients raise issues about other financial matters, such as a business need or a residential mortgage, the financial advisors may inform securities clients that the affiliated banks make mortgage loans and may provide bank-approved material.⁴³ If a securities client contacts an affiliated bank regarding a mortgage loan and ultimately obtains mortgage financing, Wells Fargo provides "additional compensation" to the financial advisor who interacted with the particular client.⁴⁴ Neither Wells Fargo nor the financial advisor, however, receive a fee of any kind from either the securities client obtaining the mortgage loan, or the affiliated bank making the mortgage loan.⁴⁵ Wells Fargo and the financial advisor do not have any additional involvement with the affiliated banks' mortgage loan origination process.⁴⁶

³⁷ Pursuant to s. 120.565(1), F.S., "any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances."

³⁸ *In Re Petition for Declaratory Statement, Wells Fargo Advisors, LLC*, Case No. 66425, p. 1 & 4-6 (Fla. OFR Aug. 15, 2016).

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at 3 & 5.

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

The determinative issues in the Declaratory Statement and Final Order issued by the OFR (OFR Declaratory Statement) were: 1) the prohibition against a mortgage broker paying a commission to any person not licensed or exempt from licensure under ch. 494, F.S.;⁴⁷ 2) permitting “additional compensation” related to the mortgage loans to be paid to the financial adviser; and 3) the referral aspect of the above set of facts.⁴⁸

The OFR Declaratory Statement concluded that both the compensation and the referral require Wells Fargo to be licensed as either a mortgage broker or mortgage lender and require that its financial advisors be licensed as mortgage loan originators.⁴⁹

III. Effect of Proposed Changes:

The bill amends s. 494.00115, F.S., to exempt a securities dealer, investment advisor, or associated person registered under ch. 517, F.S., from regulation as a loan originator or mortgage broker under ch. 494, F.S., if the person in the normal course of conducting securities business with corporate or individual clients:

- Solicits or offers to solicit a mortgage loan from a securities client, or refers a securities client to an entity exempt from regulation under parts I or II of ch. 494, F.S., pursuant to s. 494.00115, F.S.,⁵⁰ a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator; and
- Does not accept or offer to accept an application for a mortgage loan, negotiate or offer to negotiate the terms or conditions of a new or existing mortgage loan on behalf of a borrower or lender, or negotiate or offer to negotiate the sale of an existing mortgage loan to a noninstitutional investor for compensation or gain.

The bill provides that any referral or solicitation made pursuant to this exemption must comply with ch. 517, F.S., the federal Real Estate Settlement Procedures Act, and any other applicable federal law or general law of this state.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

⁴⁷ Section 494.0038(2), F.S.

⁴⁸ Declaratory Statement and Final Order, *In Re: Petition for Declaratory Statement, Wells Fargo Advisors, LLC*, Case No. 66425 (Fla. OFR Aug. 15, 2016), at pages 7-8.

⁴⁹ *Id.* at 8 - 9.

⁵⁰ Section 494.00115(1)(b), F.S., provides an exemption from regulation as a mortgage broker or loan originator under parts I and II of ch. 494, F.S., for a “depository institution; subsidiaries that are owned and controlled by a depository institution and regulated by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the National Credit Union Administration, or the Federal Deposit Insurance Corporation; or institutions regulated by the Farm Credit Administration.” The Federal Deposit Insurance Act defines a “depository institution” as a bank or saving association. *See* 12 U.S.C. 1813(c).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may decrease licensing costs for securities dealers, investment advisors, or associated persons exempted from the license requirements under ch. 494, F.S.

C. Government Sector Impact:

The OFR states that the licensure exemption for securities dealers, investment advisors, or associated persons may result in an insignificant loss in revenues.⁵¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 494.00115 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on April 17, 2017:

The CS requires that any referral or solicitation made pursuant to this exemption must comply with the provisions of ch. 517, F.S., the federal Real Estate Settlement Procedures Act, 12 U.S.C. ss. 2601 et seq.; and any applicable federal law or general law of this state.

⁵¹ See 2017 Agency Legislative Bill Analysis issued by the OFR for SB 830, dated February 15, 2017 (on file with Senate Committee on Regulated Industries) at pages 3-4.

CS by Regulated Industries on April 4, 2017:

The committee substitute exempts securities dealers, investment advisors, and associated persons from regulation as a loan originator or mortgage broker if they solicit or offer to solicit, during the normal course of conducting securities business with a corporate or individual client, a mortgage loan from a securities client, or refer a securities client to an entity exempt from regulation under parts I or II of chapter 494, F.S., pursuant to s. 494.00115, F.S., a licensed mortgage broker, a licensed mortgage lender, or a registered loan originator.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/17/2017	.	
	.	
	.	
	.	

The Committee on Banking and Insurance (Baxley) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsections (2) and (3) of section 494.00115,
Florida Statutes, are renumbered as subsections (3) and (4),
respectively, and a new subsection (2) is added to that section,
to read:

494.00115 Exemptions.—

(2) (a) A securities dealer, an investment adviser, or an



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11 associated person registered under s. 517.12 is exempt from
12 regulation under this part and part II of this chapter if such
13 person, in the normal course of conducting securities business
14 with a corporate or an individual client:

15 1. Solicits or offers to solicit a mortgage loan from a
16 securities client or refers a securities client to an entity
17 exempt under paragraph (1) (b), a licensed mortgage broker, a
18 licensed mortgage lender, or a registered loan originator; and

19 2. Does not accept or offer to accept an application for a
20 mortgage loan, negotiate or offer to negotiate the terms or
21 conditions of a new or existing mortgage loan on behalf of a
22 borrower or lender, or negotiate or offer to negotiate the sale
23 of an existing mortgage loan to a noninstitutional investor for
24 compensation or gain.

25 (b) Any solicitation or referral made pursuant to this
26 subsection must comply with chapter 517; the federal Real Estate
27 Settlement Procedures Act, 12 U.S.C. ss. 2601 et seq.; and any
28 applicable federal law or general law of this state.

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

30
31 ===== T I T L E A M E N D M E N T =====

32 And the title is amended as follows:

33 Delete everything before the enacting clause
34 and insert:

35 A bill to be entitled
36 An act relating to mortgage brokering; amending s.
37 494.00115, F.S.; providing an exemption from
38 regulation under parts I and II of ch. 494, F.S., for
39 certain securities dealers, investment advisers, and



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40 associated persons; providing requirements for certain
41 solicitations and referrals; providing an effective
42 date.

By the Committee on Regulated Industries; and Senator Baxley

580-03438-17

2017830c1

1 A bill to be entitled
 2 An act relating to mortgage brokering; amending s.
 3 494.00115, F.S.; providing an exemption from
 4 regulation under parts I and II of ch. 494, F.S.,
 5 under certain circumstances, for certain securities
 6 dealers, investment advisers, and associated persons;
 7 providing an effective date.
 8
 9 Be It Enacted by the Legislature of the State of Florida:
 10
 11 Section 1. Subsections (2) and (3) of section 494.00115,
 12 Florida Statutes, are renumbered as subsections (3) and (4),
 13 respectively, and a new subsection (2) is added to that section,
 14 to read:
 15 494.00115 Exemptions.—
 16 (2) A securities dealer, an investment adviser, or an
 17 associated person registered under s. 517.12 is exempt from
 18 regulation under this part and part II of this chapter if such
 19 person, in the normal course of conducting securities business
 20 with a corporate or an individual client:
 21 (a) Solicits or offers to solicit a mortgage loan from a
 22 securities client or refers a securities client to an entity
 23 exempt under paragraph (1)(b), a licensed mortgage broker, a
 24 licensed mortgage lender, or a registered loan originator; and
 25 (b) Does not accept or offer to accept an application for a
 26 mortgage loan, negotiate or offer to negotiate the terms or
 27 conditions of a new or existing mortgage loan on behalf of a
 28 borrower or lender, or negotiate or offer to negotiate the sale
 29 of an existing mortgage loan to a noninstitutional investor for

Page 1 of 2

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

580-03438-17

2017830c1

30 compensation or gain.
 31 Section 2. This act shall take effect July 1, 2017.

Page 2 of 2

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

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

830

Bill Number (if applicable)

Topic Mortgage Brokering

Amendment Barcode (if applicable)

Name Greg Black

Job Title Attorney

Address 119 S. Monroe Street, Suite 200

Phone 8502059000

Street

Tallahassee

FL

32301

City

State

Zip

Email greg.black@mhdfirm.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Securities Industry and Financial Markets Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

F30
Bill Number (if applicable)

Topic Mortgage Broker Bill

Amendment Barcode (if applicable)

Name Anthony DiMarco

Job Title EVP of Govt. Relations

Address 10015 Thomasville Rd

Phone 224-2265

Street
City Tallahassee State FL Zip 32303

Email admar@flbankers.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Bankers Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

830

Meeting Date

Bill Number (if applicable)

Topic Mortgage Broker Exemption

Amendment Barcode (if applicable)

Name Sean Stafford

Job Title

Address (1) E. Park Ave
Street

Phone 850-727-5000

33312
City State Zip

Email

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Securities Dealers Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1088

INTRODUCER: Senators Torres and Perry

SUBJECT: Workers' Compensation for First Responders

DATE: April 14, 2017

REVISED: 4/17/2017

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Favorable
2.			AGG	
3.			AP	
4.			RC	

I. Summary:

SB 1088 revises benefits and standards for determining benefits for employment-related accidents and injuries of “first responders,” which will generally increase the likelihood of eligibility for workers’ compensation benefits. “First responders” are law enforcement officers, firefighters, or emergency medical technicians or paramedics employed by state or local government. First responders includes volunteer law enforcement officers, firefighters, or emergency medical technicians or paramedics engaged by the state or a local government.

The bill:

- Authorizes the payment of indemnity benefits or death benefits to first responders that experience a mental or nervous injury that is unaccompanied by a physical injury. Currently, only medical benefits are allowed for a mental or nervous injury that is unaccompanied by a physical injury.
- Changes the evidentiary standard from clear and convincing evidence to a preponderance of evidence.

The bill may have an indeterminate fiscal impact on state and local governments.

II. Present Situation:

Florida Workers’ Compensation System

Employers are required to pay compensation or furnish benefits that are required under ch. 440, F.S., if an employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of the employment.¹ Generally, employers may secure

¹ Section 440.09(1), F.S.

coverage from an authorized carrier, qualify as a self-insurer,² or purchase coverage from the Workers' Compensation Joint Underwriting Association, the insurer of last resort.³

Workers' compensation is the injured employee's remedy for "compensable" workplace injuries.⁴ An accidental compensable injury must be the major contributing cause of any resulting injury, meaning that the cause must be more than 50 percent responsible for the injury as compared to all other causes combined, as demonstrated by medical evidence only.⁵ An injury or disease caused by a toxic substance is not an injury by accident arising out of employment unless there is clear and convincing evidence establishing that exposure to the specific substance caused the injury or diseases sustained by the employee.⁶

Section 440.093, F.S., sets forth the conditions under which a mental or nervous injury is compensable. A mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment. Mental or nervous injuries without an accompanying physical injury requiring medical treatment are not compensable. In addition, a physical injury resulting from a mental or nervous injury unaccompanied by a physical trauma requiring medical treatment is not compensable.

Further, s. 440.093, F.S., provides that mental or nervous injuries occurring as a manifestation of an injury compensable under ch. 440, F.S., must be demonstrated by clear and convincing medical evidence. The compensable physical injury must be the major contributing cause of the mental or nervous injury. The law also limits the duration of temporary benefits for a compensable mental or nervous injury to no more than 6 months after the employee reaches maximum medical improvement.

Injured workers are entitled to receive all medically necessary remedial treatment, care, and attendance, including medications, medical supplies, durable medical equipment, and prosthetics, for as long as the nature of the injury and process of recovery requires.⁷

Indemnity benefits only become payable to employees who are disabled for at least 8 days due to a compensable workplace injury.⁸ These benefits are generally payable at 66 2/3 percent of the employee's average weekly wage (AWW),⁹ up to the maximum weekly benefit established by law.¹⁰ Indemnity benefits fall into one of four categories: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability.

² Section 440.38, F.S.

³ Section 627.311(5)(a), F.S.

⁴ "Compensable" means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment. s. 440.13(1)(d), F.S.

⁵ Section 440.09(1), F.S.

⁶ Section 440.02(1), F.S.

⁷ Section 440.13(2)(a), F.S.

⁸ Section 440.12(1), F.S.

⁹ An injured workers' average weekly wage is an amount equal to one-thirteenth of the total amount of wages earned during the 13 weeks immediately preceding the compensable accident. s. 440.14(1), F.S.

¹⁰ Section 440.15(1)-(4), F.S.

- Temporary partial disability and temporary total disability benefits are payable for up to a combined total of 260 weeks.¹¹
- Permanent partial disability benefits are payable as impairment income benefits that are provided for a variable number of weeks depending upon the value of the injured worker's permanent impairment rating pursuant to a statutory formula.¹²
- Permanent total disability benefits are payable until the age of 75, unless the work-related accident occurs after the worker's 70th birthday, then the benefit is paid for 5 years.¹³

Section 440.15(3), F.S., provides that permanent impairment benefits are limited for a permanent psychiatric impairment to one percent permanent impairment.

Workers' Compensation Benefits for First Responders

In 2007, the Legislature enacted significant changes in workers' compensation benefits for first responders that provide benefits and standards for determining benefits for employment-related accidents and injuries of first responders. A "first responder" is a law enforcement officer, as defined in s. 943.10, F.S., a firefighter as defined in s. 633.102, F.S., or an emergency medical technician or paramedic as defined in s. 401.23, F.S., employed by state or local government.¹⁴ Further, a volunteer law enforcement officer, firefighter, or emergency medical technician or paramedic engaged by the state or a local government is considered a first responder of the state or local government.¹⁵

In regards to compensability for a mental or nervous injury involving a first responder, s. 112.1815, F.S.:

- Requires that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence.
- Authorizes the payment of only medical benefits in employment-related cases involving a mental or nervous injury without an accompanying physical injury requiring medical treatment.
- Prohibits the payment of indemnity benefits unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.
- Provides that benefits for first responders are not subject to any limitation on temporary benefits under s. 440.93, F.S., or the one percent limitation on permanent psychiatric impairments benefits under s. 440.15, F.S.

¹¹ Section 440.15(2) and (4), F.S. Section 440.15(2)(a), F.S., specify that temporary total disability benefits are payable for 104 weeks; however, the Florida Supreme Court has found this provision unconstitutional and the statute has reverted to 260 weeks of temporary total disability benefits pursuant to this case law. *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. Jun. 9, 2016). Section 440.15(4)(e), F.S., provides that temporary partial disability benefits; however, the 1st DCA applied the holding in *Westphal* to these benefits finding the limitation unconstitutional and reverted the limitation to the 260 weeks previously allowed. *Jones v. Food Lion, Inc.*, No. 1D15-3488, 2016 Fla. App. LEXIS 16710 (Fla. 1st DCA Nov. 9, 2016).

¹² Section 440.15(3), F.S.

¹³ Section 440.15(1), F.S.

¹⁴ Ch. 2007-1, Laws of Fla.

¹⁵ Section 112.1815, F.S.

State Survey of Compensability for Workers' Compensation Mental Injuries

Often stress-related injuries do not result from a physical injury. These types of injuries are referred to as “mental-mental” injuries because they are caused by a purely mental stimulus that leads to a mental impairment, such as depression or post-traumatic stress disorder (PTSD). This stimulus could be witnessing, but not being physically injured by, a particularly horrific accident, workplace incident, or crime scene.

In 2017, the National Council on Compensation Insurance (NCCI) issued a report summarizing compensability for injuries¹⁶ in the United States.¹⁷ Highlights of the study include:

- **Compensability for Mental-Mental Injuries:** 27 jurisdictions, including Florida, have statutory language expressly allowing compensation for nonphysical mental (mental-mental) injuries or stress in limited circumstances.¹⁸
- **Mental-Mental and Mental-Physical Exclusions:** Montana is the only state that specially denies compensability for both mental-physical and mental-mental injuries.
- **Personnel Actions:** 21 states specify that stress arising out of a personnel action is not compensable.

2016 Pulse Shooting in Orlando, Florida

On June 12, 2016, 49 people were killed and at least 68 others were injured at a shooting at the Pulse nightclub in Orlando, Florida. The shooting has been characterized as one of the deadliest mass shootings in modern U.S. history.¹⁹ One police officer was recently profiled who was diagnosed with post-traumatic stress disorder and has been out of work since shortly after the shooting.²⁰ While the City of Orlando Police Department is paying his full salary, Florida law does not require the employer to pay because workers' compensation compensability for PTSD must be accompanied by a physical injury, which the officer does not have.

Florida Retirement System

Today, the Florida Retirement System (FRS)²¹ is the fourth largest public retirement system in the United States. The FRS offers members a choice between the Pension Plan (a defined benefit plan) and the Investment Plan (a defined contribution plan). Generally, FRS membership is compulsory for employees filling a regularly established position in a state agency, county

¹⁶ Reference to mental injuries also includes mental impairments or disorders that are occupational diseases. The District of Columbia and Kansas laws do not expressly provide for compensation of mental injuries, but they do reference mental conditions and/or mental providers.

¹⁷ NCCI, *Compensability for Workers' Compensation Mental Injuries* (2017) (on file with Senate Banking and Insurance Committee).

¹⁸ Compensable mental-mental injuries must typically be considered extraordinary and the predominate or substantial contributing cause.

¹⁹ CBS News, *Report reveals dramatic new details from Orlando nightclub massacre*, (Apr. 14, 2017) available at <http://www.cbsnews.com/news/orlando-nightclub-shooting-report-reveals-new-details-inside-pulse/> (last viewed Apr. 14, 2017).

²⁰ Orlando Sentinel, *Proposed bills would cover first responders who have PTSD* (Feb. 27, 2017) available at <http://www.orlandosentinel.com/news/breaking-news/> (last viewed Apr. 14, 2017).

²¹ Florida Retirement System Pension Plan and Other State Administered Systems Comprehensive Annual Financial Report Fiscal Year Ended June 30, 2016, available at http://www.myflorida.com/audgen/pages/pdf_files/2017-073.pdf (last viewed Apr. 11, 2017).

agency, state university, state college, or district school board with some limited exceptions. Participation by cities, municipalities, special districts, charter schools, and metropolitan planning organizations, although optional, is generally irrevocable after the election to participate is made. The five classes of membership are Regular Class, Senior Management Service Class, Special Risk Class, Special Risk Administrative Support Class, and Elected Officers' Class.

Special Risk Class of the FRS

The Special Risk Class is composed of state and local government employees who are employed in certain categories of law – enforcement officers, firefighting, criminal detention, and emergency medical care -- and meet the criteria to qualify for this class.²² A person who is a member in the Special Risk Class may retire at an earlier age and is eligible to receive higher disability and death benefits than Regular Class members.

In creating the Special Risk Class of membership within the FRS, the Legislature recognized that certain employees must, as an essential function of their positions, perform work that is physically demanding or that requires extraordinary agility and mental acuity.²³ The Legislature further found that, as persons in such positions age, they may not be able to continue performing their duties without posing a risk to the health and safety of themselves, the public and their coworkers.

Disability Benefits for Members of the FRS

The FRS provides disability benefits for its active members who are permanently, totally disabled from useful employment. The level of disability benefit an eligible disabled member is minimally entitled depends upon membership class, and whether the disabling injury or illness was job related. For Special Risk Class members retiring on or after July 1, 2000, the minimum in-line-of-duty disability benefit is 65 percent of average final compensation (AFC) as of the member's disability retirement date.

Criteria for disability benefits under the FRS. Section 121.091(4), F.S., provides that any FRS²⁴ member who is totally and permanently disabled due to a condition or impairment of health caused by an injury or illness (including tuberculosis, heart disease, or hypertension) is entitled to disability benefits. The disabling injury or illness must have occurred before the member terminated employment. If the injury or illness arises out of and in the actual performance of duty required by his job, the member is entitled to in-line-of-duty disability benefits.

There are several important differences in the laws applicable to disability benefits, depending on whether the disability is found to be due to an injury or illness “suffered in the line of duty”:

²² Section 121.0515(1), F.S.

²³ Id.

²⁴ Members of both the FRS Pension Plan and the FRS Investment Plan are eligible for disability coverage.

- *Eligibility* — A FRS member is eligible for in-line-of-duty disability benefits from his/her first day on the job. In contrast, the member must have 8 years of creditable service²⁵ before becoming disabled in order to receive disability retirement benefits for any disability occurring other than in the line of duty.
- *Burden of Proof* — Proof of disability is required, including certification by two Florida-licensed physicians that the member's disability is total and permanent (i.e., that the member is prevented by reason of a medically determinable physical or mental impairment from engaging in gainful employment of any type). It is the responsibility of the applicant to provide such proof. Unless a legal presumption applies such as the one provided under s. 112.18, F.S., to qualify to receive the higher in-line-of-duty disability benefits, the member must also show by competent evidence that the disability occurred in the line of duty.
- *Chapter 175, F.S. plans* — Pension plans established pursuant to ch. 175, F.S., must provide a minimum line of duty benefit equal to the firefighter's accrued retirement benefit, but no less than 42 percent of his or her average monthly salary at the time of disability. Disability occurs when an injured plan member is wholly prevented from rendering useful and efficient service as a firefighter and is likely to remain so in the opinion of the board of trustees, after the member has been examined by a duly qualified doctor, selected by the board. Local law plans may have enacted disability benefits that exceed the minimum requirements.

Existing In-Line-of-Duty Disability Presumptions

Section 112.18, F.S., establishes a presumption for state and local firefighters, law enforcement, correctional and correctional probation officers regarding determinations of job-related disability. This statute provides that certain diseases (tuberculosis, heart disease, and hypertension) acquired by these officers are presumed to have been suffered in the line of duty. This presumption in law has the effect of shifting from the employee to the employer the burden of proving by competent evidence that the disabling disease was not related to the person's employment.

Section 175.231, F.S., provides a similar presumption for firefighters in any municipality, special fire control district, chapter plan, local law municipality, local law special fire control district, or local law plan under ch. 175, F.S., whose death or disability is the result of tuberculosis, heart disease, or hypertension. Section 185.34, F.S., provides a similar presumption for municipal police officers' pension plans.

Section 112.181, F.S., provides a presumption applicable to any emergency rescue or public safety worker, including a firefighter, that such employee qualifies for in the line of duty disability or death benefits if such disability or death is due to hepatitis, meningococcal meningitis, or tuberculosis.

Absent one of the existing presumptions, the FRS member has the burden of proof when claiming in the line of duty disability or death benefits. The employee must show by competent evidence that the death or disability occurred in the line of duty in order to receive the higher

²⁵ Until July 1, 2001, any member who joined the FRS on or after July 1, 1980, was required to complete 10 years of creditable service to qualify for disability benefits for a disability that was not job-related. Under current law, the 10-year service requirement has been reduced to 8 years.

benefits.²⁶ If the employee or the employee's survivors cannot meet the burden of proof, the employee or the employee's survivors are entitled only to the lesser benefits available under regular death or disability benefits.

Death Benefits Available for FRS Members

The FRS currently provides death benefits for surviving spouses and/or eligible dependents of active members. Under s. 121.091(7), F.S., death benefits may be paid for an active member of the FRS Pension Plan who dies before retirement due to an injury or illness (including tuberculosis, heart disease, or hypertension). If the injury or illness arises out of and in the actual performance of duty required by the job, the member's surviving spouse and/or eligible dependent(s) are entitled to in-line-of-duty death benefits. There are important differences in the laws applicable to death benefits, depending on whether the death is found to be due to an injury or illness "suffered in the line of duty."

From the first day on the job, an FRS Pension Plan member is eligible for in-line-of-duty death benefits that will pay a minimum monthly benefit to a survivor equal to half the member's last monthly salary. If the deceased member would have been entitled to a higher retirement benefit based on service credit, the higher benefit would be payable to his/her spouse or eligible dependent(s). The survivor benefit for Special Risk Class members killed in the line of duty is 100 percent of the member's base pay at the time of death if the member's death occurs on or after July 1, 2013. Unless a legal presumption applies such as those provided under s. 112.18, F.S., the eligible beneficiary must show by competent evidence that the death occurred in the line of duty to qualify to receive the higher in-line-of-duty death benefits.

Local Government Pension Plans

Chapters 175 and 185, F.S., provide funding mechanisms for pension plans of municipal firefighters and police officers, respectively. Both chapters provide a uniform retirement system for firefighters and police officers and set standards for operating and funding of pension systems through a trust fund supported by a tax on insurance premiums. Most Florida firefighters and local law enforcement officers participate in these plans. To be considered totally and permanently disabled, charter plan employees must only be found disabled from rendering useful and efficient service as a firefighter or police officer.²⁷ Under local law plans, the standards may vary for determining eligibility for disability retirement, death benefits, and the benefits paid, although all plans must abide by minimum standards established under ss. 175.351 and 185.35, F.S., respectively.

III. Effect of Proposed Changes:

Section 1 amends s. 112.1815, F.S., to revise compensability standards and benefits for first responders. The section provides that if a mental or nervous injury results in disability or death, payments of indemnity benefits or death benefits may be due even if no physical injury occurred. Under current law, the indemnity benefits are not due unless a physical injury arising out of the

²⁶ Sections 121.091(4)(c) and (7)(d), F.S.

²⁷ Sections 175.191 and 185.18, F.S.

injury accompanies the mental or nervous injury. Further, current law provides that only medical benefits are payable for a mental or nervous injury unaccompanied by a physical injury.

The bill provides that a mental or nervous injury occurring as a manifestation of a compensable injury must be demonstrated by clear and convincing evidence. Under current law, evidentiary standard is clear and convincing evidence. A preponderance of evidence is evidence that is of greater weight or more convincing than the evidence offered in opposition to it.²⁸ Clear and convincing evidence is more compelling and persuasive than a preponderance of the evidence; it “is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.”²⁹

Section 2 provides the bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18(a) of the Florida Constitution provides, in pertinent part, that “no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless:

- The law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; or
- The expenditure is required to comply with a law that applies to all persons similarly situated, including state and local governments.

Although the bill does not contain an express finding that the law fulfills an important state interest, the bill does appear to apply to all persons similarly situated, including state agencies, school boards, community colleges, counties, municipalities, special districts, and private entities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁸ Blacks Law Dictionary 5th Edition, *Preponderance of Evidence*, pg. 1064 (1979)

²⁹ Florida Supreme Court, *Florida Standard Jury Instructions in Civil Cases*, see pg. 170 (April 10, 2017).

http://www.floridasupremecourt.org/civ_jury_instructions/EntireDocument/SJI%20Civil%2004%2012%2017.pdf (Last accessed April 14, 2017).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Lowering the compensability standards relating to mental or nervous injuries is expected to increase the number of compensable claims for first responders. The bill provides that if a mental or nervous injury results in disability or death, payment of indemnity or death benefits may be due even if no physical injury occurred. As a result, first responders with a mental or nervous injury without an unaccompanying physical injury could receive indemnity benefits.

The fiscal impact on private employers is indeterminate.

NCCI Analysis of SB 1088³⁰

According to NCCI, the implementation of SB 1088 may result in an indeterminate increase in system costs for first responders' occupational classifications in Florida. However, the impact on overall workers' compensation costs would be expected to be small, since the data reported to NCCI show that first responders represent approximately 2.5 percent of statewide losses in Florida.³¹ The ultimate system cost impact would be realized through future loss experience and reflected in subsequent NCCI rate filings in Florida. A small impact in this context is defined as an impact on overall system costs of less than 1 percent, which is less than \$36 million.

NCCI is unable to quantify the expected increase in the frequency of mental-physical claims or severity of mental-mental claims under SB 1088. However, although events leading to mental injuries cannot be predicted with certainty, the incidence of one type of mental injury, posttraumatic stress disorder (PTSD), is estimated to be significantly higher for first responders compared to the general population. According to the U.S. Department of Veterans Affairs, about 55 percent of the population will experience at least one trauma in their lives and, as a result, about 7-8 percent of the population will have PTSD at some point in their lives.³² In comparison, the National Center for Biotechnical Information (NCBI) concluded that the prevalence of PTSD among Emergency Medical Technicians (EMTs) is greater than 20 percent,³³ and various sources

³⁰ NCCI, *Analysis of SB 1088* (Apr. 2017) (on file with Senate Banking and Insurance Committee).

³¹ The 2.5 percent may be an underestimate for the total population of Florida workers, as many entities that employ law enforcement officers, firefighters, and emergency medical technicians are self-insured and do not report data to NCCI.

³² U.S. Department of Veterans Affairs. (No date). How Common is PTSD? Available at <https://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp> (last viewed Apr. 17, 2017)

³³ Donnelly, E., and Siebert, D. (2009, Sep-Oct). Occupational risk factors in the emergency medical services. Available at <http://www.ncbi.nlm.nih.gov/pubmed/20066645> (last viewed Apr. 17, 2017).

have reported the prevalence of PTSD among firefighters to be in the 7 percent to 37 percent range.³⁴

Due to the high prevalence of PTSD in firefighters, EMTs, and other first responders, NCCI estimates that the increase in compensable mental-physical claims or severity of mental-mental claims could be significant for these occupational classifications. Additionally, the award of indemnity benefits provides additional incentive to claim mental-mental benefits, which may result in increased utilization of the workers' compensation system.

NCCI notes that some published research has linked certain mental injuries (e.g., PTSD) as a cause of other serious physical health conditions.³⁵ However, aggravated psychosomatic conditions may be difficult to directly link to PTSD. As such, the degree to which workers' compensation coverage would compensate for these related injuries or conditions is unclear.

C. Government Sector Impact:

The fiscal impact is indeterminate. State and local governments may incur higher claim costs for workers' compensation benefits of first responders. See NCCI Analysis of SB 1088 in Private Sector Impact, above.

According to the Division of Risk Management of the Department of Financial Services (DFS),³⁶ since the passage of s. 112.1815, F.S., available records indicate that only one state employee has received medical benefits relating to a work-related mental condition without a physical injury since s. 112.1815, F.S., was enacted in 2007.

Assuming the frequency does not significantly increase, and using an average Florida indemnity cost of \$15,378 for all claims as calculated by NCCI, DFS indicates there is a potential for small increases in claims costs. A state employee that is unable to return to work due to the extent of his or her mental injuries could result in a much higher cost depending on his or her age and salary.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

³⁴ Tull, Matthew. (2013, January 29). Rates of PTSD in Firefighters. Available at <http://ptsd.about.com/od/prevalence/a/Firefighters.htm>. (last viewed Apr. 17, 2017).

³⁵ Carsten Spitzer, MD, Sven Barnow, PhD, Henry Völzke, MD, Ulrich John, PhD, Harald J. Freyberger, MD and Hans Joergen Grabe, MD. Trauma, Posttraumatic Stress Disorder, and Physical Illness: Findings from the General Population. *Psychosomatic Medicine: Journal of Biobehavioral Medicine* (Nov./Dec. 2009). Available at <http://www.psychosomaticmedicine.org/content/71/9/1012.full#ref-list-1> (last viewed Apr. 17, 2017).

³⁶ Department of Financial Services, *Legislative Analysis of SB 1088* (Feb. 27, 2017) (on file with Senate Banking and Insurance Committee).

VIII. Statutes Affected:

This bill substantially amends section 112.1815 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

By Senator Torres

15-01326-17

20171088__

A bill to be entitled

An act relating to workers' compensation for first responders; amending s. 112.1815, F.S.; revising the standard by which a mental or nervous injury involving a first responder must be demonstrated for purposes of determining eligibility for benefits for employment-related accidents and injuries; removing the limitation that only medical benefits are payable for a mental or nervous injury unaccompanied by a physical injury; revising eligibility for certain payments provided under the Workers' Compensation Law; providing an effective date.

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

Section 1. Subsection (2) of section 112.1815, Florida Statutes, is amended to read:

112.1815 Firefighters, paramedics, emergency medical technicians, and law enforcement officers; special provisions for employment-related accidents and injuries.—

(2) (a) For the purpose of determining benefits under this section relating to employment-related accidents and injuries of first responders, the following shall apply:

1. An injury or disease caused by the exposure to a toxic substance is not an injury by accident arising out of employment unless there is a preponderance of the evidence establishing that exposure to the specific substance involved, at the levels to which the first responder was exposed, can cause the injury or disease sustained by the employee.

Page 1 of 2

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

15-01326-17

20171088__

2. Any adverse result or complication caused by a smallpox vaccination of a first responder is deemed to be an injury by accident arising out of work performed in the course and scope of employment.

3. A mental or nervous injury involving a first responder and occurring as a manifestation of a compensable injury must be demonstrated by a preponderance of the ~~clear and convincing~~ evidence. For a mental or nervous injury arising out of the employment unaccompanied by a physical injury involving a first responder, ~~only~~ medical benefits under s. 440.13 shall be payable for the mental or nervous injury. If the mental or nervous injury results in disability or death of a first responder ~~However,~~ payment of indemnity as provided in s. 440.15 or s. 440.16 may be due even if no physical injury occurred ~~may not be made unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.~~ Benefits for a first responder are not subject to any limitation on temporary benefits under s. 440.093 or the 1-percent limitation on permanent psychiatric impairment benefits under s. 440.15(3) (c).

(b) In cases involving occupational disease, both causation and sufficient exposure to a specific harmful substance shown to be present in the workplace to support causation shall be proven by a preponderance of the evidence.

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

Page 2 of 2

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

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Meeting Date _____

1088
Bill Number (if applicable)

Topic PTSD / Workers Comp

Amendment Barcode (if applicable) _____

Name Lisa Henning

Job Title Consultant / Legislative Director

Address 242 Office Plaza Dr.

Phone 850-766-8808

Tallahassee FL 32301
City State Zip

Email lphlegislative@aol.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Fraternal Order of Police

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

SB 1088
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Kraig Conn

Job Title _____

Address 301 S. Bronough
Street

Phone 222 9684

T-11 FL 32301
City State Zip

Email Kconn@flcities.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida League of Cities

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/2017

Meeting Date

1088

Bill Number (if applicable)

Topic Workers' Compensation for First Responders

Amendment Barcode (if applicable)

Name Matt Puckett

Job Title Lobbyist

Address 300 East Brevard St

Phone

Street

Tallahassee

FL

32301

City

State

Zip

Email

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Police Benevolent Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

04.17.17

Meeting Date

SB 1088

Bill Number (if applicable)

Topic Workers Comp for First Responders & PTSD Coverage Amendment Barcode (if applicable)

Name Amanda Murdock

Job Title Financial Advisor

Address 2416 47th terrace

Street

Phone 772-360-6103

Vero Beach FL 32966

City

State

Zip

Email amandajmurdock@bellsouth.net

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Self

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE

APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

1088
Bill Number (if applicable)

Topic PTSD COVERAGE FOR FIRST RESPONDERS

Amendment Barcode (if applicable)

Name JESSICA REALIN

Job Title DOMESTIC

Address P.O. Box 2148
Street

Phone 407-822-5215

NEW SMYRNA BEACH FL
City State

32170
Zip

Email JESSICAREALIN@gmail.com

Speaking: For Against Information

~~Waive Speaking: In Support Against
(The Chair will read this information into the record.)~~

Representing SELF

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

SB1088

Bill Number (if applicable)

Topic PTSD for 1st responders has a human cost

Amendment Barcode (if applicable)

Name Micah Vandegrift

Job Title Assoc. University Librarian (FSU)

Address 1519 Jackson St.

Phone 850-559-9887

Street
Tallahassee

FL

32303

Email micahvandegrift@gmail.com

City Tallahassee *State* FL *Zip* 32303

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Family of 1st responder dealing with PTSD

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17
Meeting Date

Topic Workers Camp First Responders Bill Number 1088
408 (if applicable)

Name Jim Tolley Amendment Barcode _____ (if applicable)

Job Title President

Address 343 West Madison Phone 850 224 7333
Street

Tallahassee FL 32301 E-mail tolley@mindspring.com
City State Zip

Speaking: For Against Information

Representing Florida Professional Firefighters

Appearing at request of Chair: Yes No Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: CS/CS/SB 1554

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; and Senator Young

SUBJECT: Trusts

DATE: April 18, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
2.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1554 amends the Florida Trust Code (Code) to protect the trust creator's intent as paramount in trust interpretation. Historically, a trust was administered with the primary intent of accomplishing the intent of the settlor. Recent changes to trust law may be interpreted to require the administration of a trust for the benefit of the beneficiaries instead. This bill deletes language related to benefiting the beneficiaries and thus makes the intent of the settlor the primary intent of trust administration.

The bill changes portions of the Code related to the trustee and their duties, liabilities, and powers to provide which provisions of the Code govern a trustee's duty to provide an accounting to the beneficiaries and extend the period for beneficiaries to file actions alleging a breach of trust.

Additionally, the bill limits the application of the portion of the Code relating to posting documents electronically, revises procedural requirements for such postings, and provides consequences for failing to maintain receipts of electronic postings.

The bill also expands the state's decanting statute. Decanting is a trustee's power to cure or avoid issues with a trust by distributing trust property from one trust to a second trust, as opposed to distributing property directly to a beneficiary. The bill:

- Expands a trustee's ability to decant trust principal under the terms of the trust;
- Provides support for disabled beneficiaries; and

- Imposes greater notice requirements when a trustee exercises the ability to decant trust principal.

The bill modifies portions of the Code related to notices for charitable trusts. The bill requires that notice be sent to only one entity, the Attorney General, rather than to a state attorney in some instances and the Attorney General in others. The bill specifies the method by which the Attorney General is to receive notice and gives the Attorney General standing in actions related to charitable trusts.

II. Present Situation:

Trusts in General

A trust is a legal instrument, into which a “settlor” places property in the care of a “trustee,” who administers the property according to the terms of the trust and for the benefit of one or more “beneficiaries.” For example, a father might place \$100,000 in trust for the benefit of his children, the proceeds to be used only for their education, and appoint the father’s certified financial planner as the trustee.

Guiding Interpretive Principles of Trusts

A trust, like any other legal document, may be ambiguous at one or more points. Ambiguous trust language can lead to lawsuits where two persons with an interest in the trust would like the language interpreted in different ways. In resolving the meaning of ambiguous trust language in these cases, it is a settled matter of this state’s case law that “the polestar of trust interpretation is the settlors’ intent.”¹

However, some argue that this guiding principal should be significantly tempered by, or even replaced by, the “benefit of the beneficiaries” standard. Were this standard to replace the settlors’ intent standard in interpreting a trust, a court would ask how a given ambiguous term could be interpreted to benefit the beneficiaries, rather than how it could be interpreted to effectuate the settlor’s intent.

There is some concern that an unambiguous trust term that a court determines is not in the best interest of the beneficiaries could effectively be undone by a court. This concern is bolstered by some of the language in this state’s trust statute.

For instance, s. 736.0105, F.S., sets forth default and mandatory rules for trusts. The mandatory rules include a requirement that a “trust and its terms be *for the benefit of the trust’s beneficiaries*, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.”² The statute governing trust purposes requires that a trust and its terms be “for the benefit of its beneficiaries.”³

¹ E.g., *L’Argent v. Barnett Bank, N.A.*, 730 So.2d 395, 397 (Fla.2d DCA 1999).

² Section 736.0105, F.S. Emphasis added.

³ Section 736.0404, F.S.

Trustee Compensation

A trustee is entitled to compensation for his or her efforts, either as specified in the trust or in an amount that is reasonable under the circumstances.⁴ However, even when the trust specifies the trustee's compensation, a court may adjust it up or down if the trustee's duties are substantially different than contemplated at the trust's creation or if the specified compensation is unreasonably low or high.⁵ Thus, one could say that a trustee is entitled to compensation that is reasonable under the circumstances, regardless of the terms of the trust.

Trusts are sometimes administered by co-trustees. The law is not clear as to whether these co-trustees may be compensated, in the aggregate, in an amount that would be impermissibly high for a sole trustee.

Trust "Decanting"

Under certain circumstances, a trustee may invade the corpus, or principal, of a trust to make distributions to a person. Under certain circumstances, a trustee may instead place trust principal into another trust; this is often called "decanting."⁶ If a trust grants a trustee the "absolute power"⁷ to invade the principal of a trust (the "first trust") in order to give it to one or more persons, the trustee may instead take the trust principal and put it into another trust (the "second trust"), if:⁸

- The beneficiaries of the second trust are only those of the first trust; and
- The second trust does not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust.

Additionally, if any contributions to the first trust qualified for a specified deduction for certain federal tax purposes, the trustee may only decant if the second trust does not contain any provision that, if contained in the first trust, would have prevented it from qualifying for the reduction, or would have decreased the size of the deduction.⁹

Several of the key aspects of the current decanting statute that are modified by the bill are discussed in more detail in the Effect of Proposed Changes section of this analysis.

Charitable Trusts

A charitable trust is a trust, or portion of a trust, created for a charitable purpose.¹⁰ These purposes include, but are not limited to, the relief of poverty; the advancement of the arts,

⁴ Section 736.0708(1), F.S.

⁵ Section 736.0708(2), F.S.

⁶ Decanting is a word commonly used in relation to wine to describe the act of pouring wine from its bottle into another container before service.

⁷ Section 736.04117(1)(b), F.S., provides that an "absolute power" to "invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes."

⁸ Section 736.04117(1)(a), F.S.

⁹ Section 736.04117(1)(a)3., F.S.

¹⁰ Section 736.0103(5), F.S.

sciences, education, or religion; and the promotion of health, governmental, or municipal purposes.¹¹ As such, charitable trusts are said to be for the benefit of the community or the public, instead of for the benefit of one or more individuals.

One of the unique characteristics of a charitable trust is the way in which it involves the local state attorney's office.¹² For instance, regarding private foundation trusts, the trustee may amend the trust instrument to permit him or her to make certain mandatory distributions only with the consent of a state attorney.¹³ Another way that the state attorney may be involved in charitable trust administration is through the process of a trustee's release of the trustee's power to select charitable donees. One way that this release may be accomplished is by specifying a charitable organization as the sole beneficiary of a trust. In order to accomplish this, the trustee must file with the state attorney proof of the consent of the organization to this arrangement.¹⁴

Statute of Limitations on Actions Against a Trustee

The law requires a trustee to give accounting for the trust to the beneficiaries.¹⁵ Failure to give an accounting constitutes an actionable breach of trust.¹⁶ Current law is not clear as to when the statute of limitations begins to run on a claim for a failure to account.

Providing Documents and Notices Electronically

The Florida Trust Code requires trustees and others to provide each other several documents. For example, trustees must provide trust accounting documents to beneficiaries. One permissible method of sending these documents is by posting them to a secure electronic account or website. This method of sending, posting, and sharing of documents is subject to special regulation under the law.¹⁷

III. Effect of Proposed Changes:

Protecting Settlers' Intent (Sections 1, 2, 5)

The bill removes three provisions of the Florida Trust Code that require that every trust and trust term be for the "benefit of the trust's beneficiaries." This is intended to ensure that this state's statutes are consistent with settled case law that provides that the settlor's intent is paramount in interpreting ambiguous trust terms. It is also intended to ensure that a settlor's express, unambiguous desires as set forth in a trust instrument are not undone by a court that determines that these terms do not (optimally) benefit the trust's beneficiaries.

¹¹ Section 736.0405(1), F.S.

¹² By *local* state attorney's office, it is meant the state attorney's office for the judicial circuit of the principal place of administration of the trust.

¹³ Section 736.1206(2), F.S.

¹⁴ See ss. 736.1208(5) and 736.1209, F.S.

¹⁵ Section 736.0813, F.S.

¹⁶ See ss. 735.1001(1)-(2), F.S.

¹⁷ See s. 736.0109(3), F.S.

Compensation for Multiple Trustees (Section 7)

The Florida Statutes currently entitle a trustee to compensation that is reasonable under the circumstances. However, the compensation statute is written in the singular (“a trustee”), and is unclear regarding co-trustee compensation. The bill clarifies that each co-trustee is entitled to compensation that is reasonable under the circumstances, even if the aggregated amount would be too much to pay a sole trustee.

Charitable Trusts Involve the Attorney General (Sections 4, 11, 12, 13, 14, 15, 16)

Under current law, the state attorney’s office in the judicial circuit where a charitable trust is administered is involved in the administration of the trust. Under the bill, the state Attorney General’s Office fulfills the responsibilities currently fulfilled by the state attorneys’ offices. The bill provides that the Attorney General has standing to assert the rights of a qualified beneficiary of a charitable trust in judicial proceedings.

Trust “Decanting” (Section 6)

The bill extensively amends s. 736.04117, F.S., pertaining to the decanting of trusts. Decanting a trust, very generally, involves a trustee taking the principal of a trust and putting it into one or more other trusts. A trustee might wish to make distributions from one trust to another trust in order to avoid the expense involved modifying a trust.

“Absolute Power” Not Necessary to Decant

Under current law, decanting may only be done by one who is expressly given “absolute power” to make principal distributions from the first trust. The bill creates a new type of trustee, called an “authorized trustee,”¹⁸ who may invade trust assets under the conditions set forth in the bill. The bill allows an authorized trustee with absolute power to invade the trust’s principal to appoint¹⁹ all or part of the principal of the trust to a second trust if the beneficiaries of the second trust include only beneficiaries of the first trust and the second trust does not reduce any vested interest.²⁰ The second trust may:

- Retain a power of appointment granted in the first trust;
- Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;
- Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;
- Create or modify a power of appointment if the powerholder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary of the first trust; and

¹⁸ The bill defines “authorized trustee” as a trustee, other than the settlor or a beneficiary, who has the power to invade the principal of a trust.”

¹⁹ The power of appointment is the authority to designate recipients of beneficial interests in property.

²⁰ “Vested interest” is “a current unconditional right to receive a mandatory distribution of income, a specified dollar amount, or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount, or a percentage of value of a trust, which right is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion.”

- Extend the term of the second trust beyond the term of the first trust.

An authorized trustee who has non-absolute power under the first trust to distribute trust principal to a beneficiary may instead distribute that principal to one or more second trusts. However, if an authorized trustee exercises this power:

- The second trusts, in the aggregate, must grant each beneficiary of the first trust substantially similar interests as they had under the first trust;
- The term of the second trust may extend beyond the term of the first trust;
- If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary, and the class of permissible appointees shall be the same as in the first trust; and
- If the first trust does not grant a power of appointment to a beneficiary of the first trust, then the second trust may not grant a power of appointment in the second trust to such beneficiary.

Authority of Authorized Trustee to Decant to Supplemental Needs Trust

An authorized trustee without absolute authority or general authority to decant may be able to decant trust principal to a supplemental needs trust.²¹ The supplemental needs trust must only benefit the beneficiary of the first trust and the authorized trustee must determine that the supplemental needs trust furthers the purposes of the first trust.

Prohibited Distributions

The bill prohibits distributions from a trust that would prevent a contribution to a trust from qualifying for various federal tax deductions and exclusions.

Notice of Decanting

As under current law, a trustee who intends to decant must first give notice to the persons specified in statute. However, under the bill, this notice must include a copy of the trust document for any second trust into which the principal from the first trust is to be placed.

Actions against a Trustee (Sections 8, 9, 10)

The law requires a trustee to give accounting for the trust to the beneficiaries.²² Failure to give an account constitutes an actionable breach of trust.²³ One of the remedies that a court may award on this action is to force the trustee to give an account.²⁴ Current law is unclear as to when the statute of limitations begins to run on a claim for a failure to account. A recent case found that an action for a trustee's failure to account was subject to the general limitations statute, and could not be brought for a failure occurring more than 4 years before the date the action was filed.²⁵

²¹ A supplemental needs trust is a trust that the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary who has a disability is eligible for governmental benefits.

²² Section 736.0813, F.S.

²³ See s. 736.1001(1)-(2), F.S.

²⁴ *Id.*

²⁵ See *Corya v. Sanders*, 155 So.3d 1279 (Fla.4th DCA 2009).

The bill expressly states that a failure to account, and even the beneficiary's knowledge of the failure, does not cause a 4-year clock to run on the beneficiary's time to file suit. Additionally, the bill expressly states that the action is not subject to the general limitations statute. As a result, the limitation on bringing this action appears to be 10, 20, or 40 years, depending on the circumstances of a given case.²⁶

Providing Documents and Notices Electronically (Section 3)

The Florida Trust Code requires trustees and others to provide each other various documents. For example, trustees must provide trust accounting documents to beneficiaries. One permissible method of sending these documents is by posting them to a secure electronic account or website. This method of sending, posting, and sharing of documents is subject to special regulation under the law.²⁷ The bill amends the requirements as to documents that are provided to recipients *solely* through electronic posting and deemed sent for the purposes of the statute regulating methods of notice and waiver.²⁸ The bill provides that before documents can be posted on an electronic account, the recipient must sign an authorization solely for the purpose of allowing electronic posting. The authorization must specifically indicate whether a trust accounting, trust disclosure document, or limitation notice may be posted electronically and must generally indicate the other types of documents that will be posted.

The bill provides that if a document is provided solely through electronic posting, the recipient must be able to access the document until the earlier of 4 years after the date the document is deemed received by the recipient or the date the recipient's access to the electronic account is terminated.

If access to the electronic account is terminated sooner than 4 years after the document is deemed received, any applicable limitations period is tolled from the date access to the electronic account is terminated until 45 days after the sender provides one of the following:

- Notice of such termination and notification to the recipient that he or she may request that any documents sent during the prior 4 years solely through electronic posting be provided to him or her by other means at no cost; or
- Notice of such termination and notification to the recipient that his or her access to the electronic account or website has been restored.

This notice must be provided by a means other than electronic posting.

Effective Date

The bill takes effect July 1, 2017.

²⁶ See s. 736.1008(6), F.S.

²⁷ See s. 736.0109(3), F.S.

²⁸ Section 736.0109, F.S.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 736.0103, 736.0105, 736.0109, 736.0110, 736.0404, 736.04117, 736.0708, 736.08135, 736.1008, 736.1201, 736.1205, 736.1206, 736.1207, 736.1208, and 736.1209.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Banking and Insurance on April 17, 2017:

The CS clarifies when limitations periods begin to run or are tolled for documents sent to recipients solely through electronic posting.

CS by Judiciary on March 22, 2017:

The CS includes several technical wording changes that were made to the underlying bill.

- B. **Amendments:**

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
04/17/2017	.	
	.	
	.	
	.	

The Committee on Banking and Insurance (Young) recommended the following:

Senate Amendment

Delete lines 194 - 234

and insert:

(g) If a document is provided to a recipient solely through electronic posting pursuant to this subsection, the recipient must be able to access and print or download the document until the earlier of ~~remain accessible to the recipient on the electronic account or website for at least 4 years after the~~ date that the document is deemed received by the recipient or



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11 the date upon which the recipient's access to the electronic
12 account or website is terminated for any reason.

13 1. If the recipient's access to the electronic account or
14 website is terminated for any reason, such termination does not
15 invalidate the notice or sending of any document previously
16 posted on the electronic account or website in accordance with
17 this subsection, but may toll the applicable limitations period
18 as provided in subparagraph 2.

19 2. If the recipient's access to the electronic account or
20 website is terminated by the sender sooner than 4 years after
21 the date on which the document was received by the recipient,
22 any applicable limitations period set forth in s. 736.1008(1) or
23 (2) which is still running is tolled for any information
24 adequately disclosed in a document sent solely by electronic
25 posting, from the date on which the recipient's access to the
26 electronic account or website was terminated by the sender until
27 45 days after the date on which the sender provides one of the
28 following to the recipient by means other than electronic
29 posting:

30 a. Notice of such termination and notification to the
31 recipient that he or she may request that any documents sent
32 during the prior 4 years solely through electronic posting be
33 provided to him or her by other means at no cost; or

34 b. Notice of such termination and notification to the
35 recipient that his or her access to the electronic account or
36 website has been restored.

37
38 Any applicable limitations period is further tolled from the
39 date on which any request is made pursuant to sub-subparagraph



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40 2.a. until 20 days after the date on which the requested
41 documents are provided to the recipient by means other than
42 electronic posting ~~The electronic account or website must allow~~
43 ~~the recipient to download or print the document. This subsection~~
44 ~~does not affect or alter the duties of a trustee to keep clear,~~
45 ~~distinct, and accurate records pursuant to s. 736.0810 or affect~~
46 ~~or alter the time periods for which the trustee must maintain~~
47 ~~those records.~~

By the Committee on Judiciary; and Senator Young

590-02715-17

20171554c1

1 A bill to be entitled
 2 An act relating to trusts; amending s. 736.0103, F.S.;
 3 redefining the term "interests of the beneficiaries";
 4 amending s. 736.0105, F.S.; deleting a requirement
 5 that a trust be for the benefit of the trust's
 6 beneficiaries; amending s. 736.0109, F.S.; revising
 7 provisions relating to notice or sending of electronic
 8 trust documents; providing requirements for such
 9 documents to be deemed sent; requiring a certain
 10 authorization to specify documents subject to
 11 electronic posting; revising requirements for a
 12 recipient to electronically access such documents;
 13 prohibiting the termination of a recipient's
 14 electronic access to such documents from invalidating
 15 certain notice or sending of electronic trust
 16 documents; tolling specified limitations periods under
 17 certain circumstances; providing requirements for
 18 electronic access to such documents to be deemed
 19 terminated by a sender; providing applicability;
 20 amending s. 736.0110, F.S.; providing that the
 21 Attorney General has standing to assert certain rights
 22 in certain proceedings; amending s. 736.0404, F.S.;
 23 deleting a restriction on the purpose for which a
 24 trust is created; amending s. 736.04117, F.S.;
 25 defining and redefining terms; authorizing an
 26 authorized trustee to appoint all or part of the
 27 principal of a trust to a second trust under certain
 28 circumstances; providing requirements for the second
 29 trust and its beneficiaries; providing that the second

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30 trust may retain, omit, or create specified powers;
 31 authorizing the term of the second trust to extend
 32 beyond the term of the first trust; providing
 33 requirements for distributions to a second trust when
 34 the authorized trustee does not have absolute power;
 35 providing requirements for such second trust;
 36 providing requirements for grants of power by the
 37 second trust; authorizing a second trust created by an
 38 authorized trustee without absolute power to grant
 39 absolute power to the second trust's trustee;
 40 authorizing an authorized trustee to appoint the
 41 principal of a first trust to a supplemental needs
 42 trust under certain circumstances; providing
 43 requirements for such supplemental needs trust;
 44 prohibiting an authorized trustee from distributing
 45 the principal of a trust in a manner that would reduce
 46 specified tax benefits; prohibiting the distribution
 47 of S corporation stock from a first trust to a second
 48 trust under certain circumstances; prohibiting a
 49 settlor from being treated as the owner of a second
 50 trust if he or she was not treated as the owner of the
 51 first trust; prohibiting an authorized trustee from
 52 distributing a trust's interest in property to a
 53 second trust if it is subject to specified rules of
 54 the Internal Revenue Code; prohibiting the exercise of
 55 power to invade a trust's principal to increase an
 56 authorized trustee's compensation or relieve him or
 57 her from certain liability; specifying who an
 58 authorized trustee must notify when he or she

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59 exercises his or her power to invade the trust's
 60 principal; specifying the documents that the
 61 authorized trustee must provide with such notice;
 62 amending s. 736.0708, F.S.; providing that a cotrustee
 63 is entitled to reasonable compensation when the trust
 64 does not specify compensation; providing that
 65 reasonable compensation may be greater for multiple
 66 trustees than for a single trustee; amending s.
 67 736.08135, F.S.; revising applicability; amending s.
 68 736.1008, F.S.; clarifying that certain knowledge by a
 69 beneficiary does not cause a claim for breach of trust
 70 or commence the running of a period of limitations or
 71 laches; providing intent; providing for retroactive
 72 application; amending s. 736.1201, F.S.; defining the
 73 term "delivery of notice"; conforming a provision to
 74 changes made by the act; amending s. 736.1205, F.S.;
 75 requiring an authorized trustee to provide certain
 76 notice to the Attorney General rather than the state
 77 attorney; amending ss. 736.1206, 736.1207, 736.1208,
 78 and 736.1209, F.S.; conforming provisions; providing
 79 effective dates.

80
 81 Be It Enacted by the Legislature of the State of Florida:

82
 83 Section 1. Subsection (11) of section 736.0103, Florida
 84 Statutes, is amended to read:

85 736.0103 Definitions.—Unless the context otherwise
 86 requires, in this code:

87 (11) "Interests of the beneficiaries" means the beneficial

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88 interests intended by the settlor as provided in the terms of a
 89 ~~the~~ trust.

90 Section 2. Paragraph (c) of subsection (2) of section
 91 736.0105, Florida Statutes, is amended to read:

92 736.0105 Default and mandatory rules.—

93 (2) The terms of a trust prevail over any provision of this
 94 code except:

95 (c) The requirement that a trust ~~and its terms be for the~~
 96 ~~benefit of the trust's beneficiaries, and that the trust~~ have a
 97 purpose that is lawful, not contrary to public policy, and
 98 possible to achieve.

99 Section 3. Subsections (1) and (3) of section 736.0109,
 100 Florida Statutes, are amended to read:

101 736.0109 Methods and waiver of notice.—

102 (1) Notice to a person under this code or the sending of a
 103 document to a person under this code must be accomplished in a
 104 manner reasonably suitable under the circumstances and likely to
 105 result in receipt of the notice or document. Permissible methods
 106 of notice or for sending a document include first-class mail,
 107 personal delivery, delivery to the person's last known place of
 108 residence or place of business, ~~or~~ a properly directed facsimile
 109 or other electronic message, or posting to a secure electronic
 110 account or website in accordance with subsection (3).

111 (3) A document that is sent solely by posting to an
 112 electronic account or website is not deemed sent for purposes of
 113 this section unless the sender complies with this subsection.
 114 The sender has the burden of proving compliance with this
 115 subsection ~~In addition to the methods listed in subsection (1)~~
 116 ~~for sending a document, a sender may post a document to a secure~~

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117 ~~electronic account or website where the document can be~~
118 ~~accessed.~~

119 ~~(a) Before a document may be posted to an electronic~~
120 ~~account or website,~~ The recipient must sign a separate written
121 authorization solely for the purpose of authorizing the sender
122 to post documents on an electronic account or website before
123 such posting. The written authorization must:

124 1. Specifically indicate whether a trust accounting, trust
125 disclosure document, or limitation notice, as those terms are
126 defined in s. 736.1008(4), will be posted in this manner, and
127 generally enumerate the other types of documents that may be
128 posted in this manner.

129 2. Contain specific instructions for accessing the
130 electronic account or website, including the security procedures
131 required to access the electronic account or website, such as a
132 username and password.

133 3. Advise the recipient that a separate notice will be sent
134 when a document is posted to the electronic account or website
135 and the manner in which the separate notice will be sent.

136 4. Advise the recipient that the authorization to receive
137 documents by electronic posting may be amended or revoked at any
138 time and include specific instructions for revoking or amending
139 the authorization, including the address designated for the
140 purpose of receiving notice of the revocation or amendment.

141 5. Advise the recipient that posting a document on the
142 electronic account or website may commence a limitations period
143 as short as 6 months even if the recipient never actually
144 accesses the electronic account, electronic website, or ~~the~~
145 document.

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146 (b) Once the recipient signs the written authorization, the
147 sender must provide a separate notice to the recipient when a
148 document is posted to the electronic account or website. As used
149 in this subsection, the term "separate notice" means a notice
150 sent to the recipient by means other than electronic posting,
151 which identifies each document posted to the electronic account
152 or website and provides instructions for accessing the ~~posted~~
153 document. The separate notice requirement is deemed satisfied if
154 the recipient accesses the document on the electronic account or
155 website.

156 (c) A document sent by electronic posting is deemed
157 received by the recipient on the earlier of the date on which
158 ~~that~~ the separate notice is received or the date on which ~~that~~
159 the recipient accesses the document on the electronic account or
160 website.

161 (d) At least annually after a recipient signs a written
162 authorization, a sender shall send a notice advising recipients
163 who have authorized one or more documents to be posted to an
164 electronic account or website that such posting may commence a
165 limitations period as short as 6 months even if the recipient
166 never accesses the electronic account or website or the document
167 and that authority to receive documents by electronic posting
168 may be amended or revoked at any time. This notice must be given
169 by means other than electronic posting and may not be
170 accompanied by any other written communication. Failure to
171 provide such notice within 380 days after the last notice is
172 deemed to automatically revoke the authorization to receive
173 documents in the manner permitted under this subsection 380 days
174 after the last notice is sent.

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175 (e) The notice required in paragraph (d) may be in
 176 substantially the following form: "You have authorized the
 177 receipt of documents through posting to an electronic account or
 178 website on which ~~where~~ the documents can be accessed. This
 179 notice is being sent to advise you that a limitations period,
 180 which may be as short as 6 months, may be running as to matters
 181 disclosed in a trust accounting or other written report of a
 182 trustee posted to the electronic account or website even if you
 183 never actually access the electronic account or website or the
 184 documents. You may amend or revoke the authorization to receive
 185 documents by electronic posting at any time. If you have any
 186 questions, please consult your attorney."

187 (f) A sender may rely on the recipient's authorization
 188 until the recipient amends or revokes the authorization by
 189 sending a notice to the address designated for that purpose in
 190 the authorization or in the manner specified on the electronic
 191 account or website. The recipient, at any time, may amend or
 192 revoke an authorization to have documents posted on the
 193 electronic account or website.

194 (g) If a document is provided to a recipient solely through
 195 electronic posting and is deemed sent for purposes of this
 196 section:

197 1. The recipient must be able to access and print or
 198 download the document until the earlier of:

199 a. The date on which the recipient's access to the
 200 electronic account or website is terminated for any reason; or

201 b. ~~Four~~ must remain accessible to the recipient on the
 202 electronic account or website for at least 4 years after the
 203 date on which ~~that~~ the document is deemed received by the

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204 recipient.

205 2. If the recipient's access to the electronic account or
 206 website is terminated for any reason, such termination does not
 207 invalidate the notice or sending of any document previously
 208 posted on the electronic account or website in accordance with
 209 this subsection ~~The electronic account or website must allow the~~
 210 ~~recipient to download or print the document. This subsection~~
 211 ~~does not affect or alter the duties of a trustee to keep clear,~~
 212 ~~distinct, and accurate records pursuant to s. 736.0810 or affect~~
 213 ~~or alter the time periods for which the trustee must maintain~~
 214 ~~these records.~~

215 3. If the recipient's access to the electronic account or
 216 website is terminated by the sender before the time period set
 217 forth in sub-subparagraph 1.b., any applicable limitations
 218 period set forth in s. 736.1008(1) or (2) which is still open is
 219 tolled for any information adequately disclosed in such document
 220 as follows:

221 a. From the date on which the recipient's access to the
 222 electronic account or website is terminated by the sender until
 223 45 days after the date on which the sender provides notification
 224 of such termination to the recipient by means other than
 225 electronic posting, and:

226 (I) The recipient may request that any documents sent
 227 during the prior 4 years solely through electronic posting be
 228 provided to him or her by other means at no cost; or

229 (II) The recipient's access to the electronic account or
 230 website is restored; and

231 b. From the date on which any request is made pursuant to
 232 sub-sub-subparagraph 3.a.(I) until 20 days after the date on

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233 which the requested documents are provided to the recipient by
 234 means other than electronic posting.

235 (h) For purposes of this subsection, access to an
 236 electronic account or website is terminated by the sender when
 237 the sender unilaterally terminates the recipient's ability to
 238 access the electronic website or account or download or print
 239 any document posted on such website or account. Access is not
 240 terminated by the sender when access is terminated by an action
 241 of the recipient or by an action of the sender in response to
 242 the recipient's request to terminate access. The recipient's
 243 revocation of authorization pursuant to paragraph (f) is not
 244 considered a request to terminate access. To be effective, the
 245 posting of a document to an electronic account or website must
 246 be done in accordance with this subsection. The sender has the
 247 burden of establishing compliance with this subsection.

248 (i) This subsection does not affect or alter the duties of
 249 a trustee to keep clear, distinct, and accurate records pursuant
 250 to s. 736.0810 or affect or alter the time periods for which the
 251 trustee must maintain such records preclude the sending of a
 252 document by other means.

253 (j) This subsection governs the posting of a document
 254 solely for the purpose of giving notice under this code or the
 255 sending of a document to a person under this code and does not
 256 prohibit or otherwise apply to the posting of a document to an
 257 electronic account or website for any other purpose or preclude
 258 the sending of a document by any other means.

259 Section 4. Subsection (3) of section 736.0110, Florida
 260 Statutes, is amended to read:

261 736.0110 Others treated as qualified beneficiaries.-

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262 (3) The Attorney General may assert the rights of a
 263 qualified beneficiary with respect to a charitable trust having
 264 its principal place of administration in this state. The
 265 Attorney General has standing to assert such rights in any
 266 judicial proceedings.

267 Section 5. Section 736.0404, Florida Statutes, is amended
 268 to read:

269 736.0404 Trust purposes.-A trust may be created only to the
 270 extent the purposes of the trust are lawful, not contrary to
 271 public policy, and possible to achieve. ~~A trust and its terms~~
 272 ~~must be for the benefit of its beneficiaries.~~

273 Section 6. Effective upon becoming a law, section
 274 736.04117, Florida Statutes, is amended to read:

275 736.04117 Trustee's power to invade principal in trust.-

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

277 (a) "Absolute power" means ~~Unless the trust instrument~~
 278 ~~expressly provides otherwise, a trustee who has absolute power~~
 279 ~~under the terms of a trust to invade the principal of the trust,~~
 280 ~~referred to in this section as the "first trust," to make~~
 281 ~~distributions to or for the benefit of one or more persons may~~
 282 ~~instead exercise the power by appointing all or part of the~~
 283 ~~principal of the trust subject to the power in favor of a~~
 284 ~~trustee of another trust, referred to in this section as the~~
 285 ~~"second trust," for the current benefit of one or more of such~~
 286 ~~persons under the same trust instrument or under a different~~
 287 ~~trust instrument; provided:~~

288 ~~1. The beneficiaries of the second trust may include only~~
 289 ~~beneficiaries of the first trust;~~

290 ~~2. The second trust may not reduce any fixed income,~~

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291 ~~annuity, or unitrust interest in the assets of the first trust,~~
292 ~~and~~

293 ~~3. If any contribution to the first trust qualified for a~~
294 ~~marital or charitable deduction for federal income, gift, or~~
295 ~~estate tax purposes under the Internal Revenue Code of 1986, as~~
296 ~~amended, the second trust shall not contain any provision which,~~
297 ~~if included in the first trust, would have prevented the first~~
298 ~~trust from qualifying for such a deduction or would have reduced~~
299 ~~the amount of such deduction.~~

300 ~~(b) For purposes of this subsection, an absolute power to~~
301 ~~invade principal shall include a power to invade principal that~~
302 ~~is not limited to specific or ascertainable purposes, such as~~
303 ~~health, education, maintenance, and support, regardless of~~
304 ~~whether or not the term "absolute" is used. A power to invade~~
305 ~~principal for purposes such as best interests, welfare, comfort,~~
306 ~~or happiness constitutes shall constitute an absolute power not~~
307 ~~limited to specific or ascertainable purposes.~~

308 (b) "Authorized trustee" means a trustee, other than the
309 settlor or a beneficiary, who has the power to invade the
310 principal of a trust.

311 (c) "Beneficiary with a disability" means a beneficiary of
312 the first trust who the authorized trustee believes may qualify
313 for governmental benefits based on disability, regardless of
314 whether the beneficiary currently receives those benefits or has
315 been adjudicated incapacitated.

316 (d) "Current beneficiary" means a beneficiary who, on the
317 date his or her qualification is determined, is a distributee or
318 permissible distributee of trust income or principal. The term
319 includes the holder of a presently exercisable general power of

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320 appointment but does not include a person who is a beneficiary
321 only because he or she holds another power of appointment.

322 (e) "Governmental benefits" means financial aid or services
323 from any state, federal, or other public agency.

324 (f) "Internal Revenue Code" means the Internal Revenue Code
325 of 1986, as amended.

326 (g) "Power of appointment" has the same meaning as provided
327 in s. 731.201(30).

328 (h) "Presently exercisable general power of appointment"
329 means a power of appointment exercisable by the powerholder at
330 the relevant time. The term:

331 1. Includes a power of appointment that is exercisable only
332 after the occurrence of a specified event or that is subject to
333 a specified restriction, but only after the event has occurred
334 or the restriction has been satisfied.

335 2. Does not include a power exercisable only upon the
336 powerholder's death.

337 (i) "Substantially similar" means that there is no material
338 change in a beneficiary's beneficial interests or in the power
339 to make distributions and that the power to make a distribution
340 under a second trust for the benefit of a beneficiary who is an
341 individual is substantially similar to the power under the first
342 trust to make a distribution directly to the beneficiary. A
343 distribution is deemed to be for the benefit of a beneficiary
344 if:

345 1. The distribution is applied for the benefit of a
346 beneficiary;

347 2. The beneficiary is under a legal disability or the
348 trustee reasonably believes the beneficiary is incapacitated,

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349 and the distribution is made as permitted under this code; or

350 3. The distribution is made as permitted under the terms of
 351 the first trust instrument and the second trust instrument for
 352 the benefit of the beneficiary.

353 (j) "Supplemental needs trust" means a trust that the
 354 authorized trustee believes would not be considered a resource
 355 for purposes of determining whether the beneficiary who has a
 356 disability is eligible for governmental benefits.

357 (k) "Vested interest" means a current unconditional right
 358 to receive a mandatory distribution of income, a specified
 359 dollar amount, or a percentage of value of a trust, or a current
 360 unconditional right to withdraw income, a specified dollar
 361 amount, or a percentage of value of a trust, which right is not
 362 subject to the occurrence of a specified event, the passage of a
 363 specified time, or the exercise of discretion.

364 1. The term includes a presently exercisable general power
 365 of appointment.

366 2. The term does not include a beneficiary's interest in a
 367 trust if the trustee has discretion to make a distribution of
 368 trust property to a person other than such beneficiary.

369 (2) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN
 370 AUTHORIZED TRUSTEE HAS ABSOLUTE POWER TO INVADE.-

371 (a) Unless a trust instrument expressly provides otherwise,
 372 an authorized trustee who has absolute power under the terms of
 373 the trust to invade its principal, referred to in this section
 374 as the "first trust," to make current distributions to or for
 375 the benefit of one or more beneficiaries may instead exercise
 376 such power by appointing all or part of the principal of the
 377 trust subject to such power in favor of a trustee of one or more

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378 other trusts, whether created under the same trust instrument as
 379 the first trust or a different trust instrument, including a
 380 trust instrument created for the purposes of exercising the
 381 power granted by this section, each referred to in this section
 382 as the "second trust," for the current benefit of one or more of
 383 such beneficiaries only if:

384 1. The beneficiaries of the second trust include only
 385 beneficiaries of the first trust; and

386 2. The second trust does not reduce any vested interest.

387 (b) In an exercise of absolute power, the second trust may:

388 1. Retain a power of appointment granted in the first
 389 trust;

390 2. Omit a power of appointment granted in the first trust,
 391 other than a presently exercisable general power of appointment;

392 3. Create or modify a power of appointment if the
 393 powerholder is a current beneficiary of the first trust;

394 4. Create or modify a power of appointment if the
 395 powerholder is a beneficiary of the first trust who is not a
 396 current beneficiary, but the exercise of the power of
 397 appointment may take effect only after the powerholder becomes,
 398 or would have become if then living, a current beneficiary of
 399 the first trust; and

400 5. Extend the term of the second trust beyond the term of
 401 the first trust.

402 (c) The class of permissible appointees in favor of which a
 403 created or modified power of appointment may be exercised may
 404 differ from the class identified in the first trust.

405 (3) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN
 406 AUTHORIZED TRUSTEE DOES NOT HAVE ABSOLUTE POWER TO INVADE.-

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407 Unless the trust instrument expressly provides otherwise, an
 408 authorized trustee who has a power, other than an absolute
 409 power, under the terms of a first trust to invade principal to
 410 make current distributions to or for the benefit of one or more
 411 beneficiaries may instead exercise such power by appointing all
 412 or part of the principal of the first trust subject to such
 413 power in favor of a trustee of one or more second trusts. If the
 414 authorized trustee exercises such power:

415 (a) The second trusts, in the aggregate, shall grant each
 416 beneficiary of the first trust beneficial interests in the
 417 second trusts which are substantially similar to the beneficial
 418 interests of the beneficiary in the first trust.

419 (b) If the first trust grants a power of appointment to a
 420 beneficiary of the first trust, the second trust shall grant
 421 such power of appointment in the second trust to such
 422 beneficiary, and the class of permissible appointees shall be
 423 the same as in the first trust.

424 (c) If the first trust does not grant a power of
 425 appointment to a beneficiary of the first trust, then the second
 426 trust may not grant a power of appointment in the second trust
 427 to such beneficiary.

428 (d) Notwithstanding paragraphs (a), (b), and (c), the term
 429 of the second trust may extend beyond the term of the first
 430 trust, and, for any period after the first trust would have
 431 otherwise terminated, in whole or in part, under the provisions
 432 of the first trust, the trust instrument of the second trust
 433 may, with respect to property subject to such extended term:

434 1. Include language providing the trustee with the absolute
 435 power to invade the principal of the second trust during such

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436 extended term; and

437 2. Create a power of appointment, if the powerholder is a
 438 current beneficiary of the first trust, or expand the class of
 439 permissible appointees in favor of which a power of appointment
 440 may be exercised.

441 (4) DISTRIBUTION FROM FIRST TRUST TO SUPPLEMENTAL NEEDS
 442 TRUST.—

443 (a) Notwithstanding subsections (2) and (3), unless the
 444 trust instrument expressly provides otherwise, an authorized
 445 trustee who has the power under the terms of a first trust to
 446 invade the principal of the first trust to make current
 447 distributions to or for the benefit of a beneficiary with a
 448 disability may instead exercise such power by appointing all or
 449 part of the principal of the first trust in favor of a trustee
 450 of a second trust that is a supplemental needs trust if:

451 1. The supplemental needs trust benefits the beneficiary
 452 with a disability;

453 2. The beneficiaries of the second trust include only
 454 beneficiaries of the first trust; and

455 3. The authorized trustee determines that the exercise of
 456 such power will further the purposes of the first trust.

457 (b) Except as affected by any change to the interests of
 458 the beneficiary with a disability, the second trusts, in the
 459 aggregate, shall grant each other beneficiary of the first trust
 460 beneficial interests in the second trusts which are
 461 substantially similar to such beneficiary's beneficial interests
 462 in the first trust.

463 (5) PROHIBITED DISTRIBUTIONS.—

464 (a) An authorized trustee may not distribute the principal

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465 of a trust under this section in a manner that would prevent a
 466 contribution to that trust from qualifying for, or that would
 467 reduce the exclusion, deduction, or other federal tax benefit
 468 that was originally claimed or could have been claimed for, that
 469 contribution, including:

470 1. The exclusions under s. 2503(b) or s. 2503(c) of the
 471 Internal Revenue Code;

472 2. A marital deduction under s. 2056, s. 2056A, or s. 2523
 473 of the Internal Revenue Code;

474 3. A charitable deduction under s. 170(a), s. 642(c), s.
 475 2055(a), or s. 2522(a) of the Internal Revenue Code;

476 4. Direct skip treatment under s. 2642(c) of the Internal
 477 Revenue Code; or

478 5. Any other tax benefit for income, gift, estate, or
 479 generation-skipping transfer tax purposes under the Internal
 480 Revenue Code.

481 (b) If S corporation stock is held in the first trust, an
 482 authorized trustee may not distribute all or part of that stock
 483 to a second trust that is not a permitted shareholder under s.
 484 1361(c) (2) of the Internal Revenue Code. If the first trust
 485 holds stock in an S corporation and is, or but for provisions of
 486 paragraphs (a), (c), and (d) would be, a qualified subchapter S
 487 trust within the meaning of s. 1361(d) of the Internal Revenue
 488 Code, the second trust instrument may not include or omit a term
 489 that prevents it from qualifying as a qualified subchapter S
 490 trust.

491 (c) Except as provided in paragraphs (a), (b), and (d), an
 492 authorized trustee may distribute the principal of a first trust
 493 to a second trust regardless of whether the settlor is treated

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494 as the owner of either trust under ss. 671-679 of the Internal
 495 Revenue Code; however, if the settlor is not treated as the
 496 owner of the first trust, he or she may not be treated as the
 497 owner of the second trust unless he or she at all times has the
 498 power to cause the second trust to cease being treated as if it
 499 were owned by the settlor.

500 (d) If an interest in property which is subject to the
 501 minimum distribution rules of s. 401(a) (9) of the Internal
 502 Revenue Code is held in trust, an authorized trustee may not
 503 distribute such an interest to a second trust under subsection
 504 (2), subsection (3), or subsection (4) if the distribution would
 505 shorten the otherwise applicable maximum distribution period.

506 (6) EXERCISE BY WRITING.—The exercise of a power to invade
 507 principal under subsection (2), subsection (3), or subsection
 508 (4) must The exercise of a power to invade principal under
 509 subsection (1) shall be by a written an instrument in writing,
 510 signed and acknowledged by the authorized trustee, and filed
 511 with the records of the first trust.

512 (7) (3) RESTRICTIONS ON EXERCISE OF POWER.—The exercise of a
 513 power to invade principal under subsection (2), subsection (3),
 514 or subsection (4):

515 (a) Is (1) shall be considered the exercise of a power of
 516 appointment, excluding other than a power to appoint to the
 517 authorized trustee, the authorized trustee's creditors, the
 518 authorized trustee's estate, or the creditors of the authorized
 519 trustee's estate.

520 (b) Is, and shall be subject to the provisions of s.
 521 689.225 covering the time at which the permissible period of the
 522 rule against perpetuities begins and the law that determines the

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523 permissible period of the rule against perpetuities of the first
524 trust.

525 (c) May be to a second trust created or administered under
526 the law of any jurisdiction.

527 (d) May not:

528 1. Increase the authorized trustee's compensation beyond
529 the compensation specified in the first trust instrument; or

530 2. Relieve the authorized trustee from liability for breach
531 of trust or provide for indemnification of the authorized
532 trustee for any liability or claim to a greater extent than the
533 first trust instrument; however, the exercise of the power may
534 divide and reallocate fiduciary powers among fiduciaries and
535 relieve a fiduciary from liability for an act or failure to act
536 of another fiduciary as otherwise allowed under law or common
537 law.

538 (8) NOTICE.—

539 (a)(4) The authorized trustee shall provide written
540 notification of the manner in which he or she intends to
541 exercise his or her power to invade principal to notify all
542 qualified beneficiaries of the following parties first trust, in
543 writing, at least 60 days before prior to the effective date of
544 the authorized trustee's exercise of such power the trustee's
545 power to invade principal pursuant to subsection (2), subsection
546 (3), or subsection (4): (1), of the manner in which the trustee
547 intends to exercise the power.

548 1. All qualified beneficiaries of the first trust;

549 2. If paragraph (5)(c) applies, the settlor of the first
550 trust;

551 3. All trustees of the first trust; and

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552 4. Any person who has the power to remove or replace the
553 authorized trustee of the first trust.

554 ~~(b) The authorized A copy of the proposed instrument~~
555 ~~exercising the power shall satisfy the trustee's notice~~
556 obligation to provide notice under this subsection is satisfied
557 when he or she provides copies of the proposed instrument
558 exercising the power, the trust instrument of the first trust,
559 and the proposed trust instrument of the second trust.

560 (c) If all of those required to be notified ~~qualified~~
561 beneficiaries waive the notice period by signed written
562 instrument delivered to the authorized trustee, the authorized
563 trustee's power to invade principal shall be exercisable
564 immediately.

565 (d) The authorized trustee's notice under this subsection
566 does ~~shall~~ not limit the right of any beneficiary to object to
567 the exercise of the authorized trustee's power to invade
568 principal except as otherwise provided in other applicable
569 provisions of this code.

570 (9)(5) INAPPLICABILITY OF SPENDTHRIFT CLAUSE OR OTHER
571 PROHIBITION.—The exercise of the power to invade principal under
572 subsection (2), subsection (3), or subsection (4) ~~(4)~~ is not
573 prohibited by a spendthrift clause or by a provision in the
574 trust instrument that prohibits amendment or revocation of the
575 trust.

576 (10)(6) NO DUTY TO EXERCISE.—Nothing in this section is
577 intended to create or imply a duty to exercise a power to invade
578 principal, and no inference of impropriety may ~~shall~~ be made as
579 a result of an authorized trustee's failure to exercise a
580 trustee not exercising the power to invade principal conferred

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581 under subsections (2), (3), and (4) ~~subsection (1)~~.

582 ~~(11)(7) NO ABRIDGEMENT OF COMMON LAW RIGHTS. The provisions~~
 583 ~~of~~ This section ~~may shall~~ not be construed to abridge the right
 584 of any trustee who has a power of invasion to appoint property
 585 in further trust that arises under the terms of the first trust
 586 or under any other section of this code or under another
 587 provision of law or under common law.

588 Section 7. Subsection (1) of section 736.0708, Florida
 589 Statutes, is amended to read:

590 736.0708 Compensation of trustee.-

591 (1) If the terms of a trust do not specify a the trustee's
 592 compensation, the a trustee, including each cotrustee, is
 593 entitled to compensation that is reasonable under the
 594 circumstances. In the aggregate, the reasonable compensation for
 595 multiple trustees may be greater than for a single trustee.

596 Section 8. Subsection (3) of section 736.08135, Florida
 597 Statutes, is amended to read:

598 736.08135 Trust accountings.-

599 (3) Subsections (1) and (2) govern the form and content of
 600 This section applies to all trust accountings rendered for any
 601 accounting periods beginning on or after January 1, 2003, and
 602 all trust accountings rendered on or after July 1, 2017. This
 603 subsection does not affect the beginning period from which a
 604 trustee is required to render a trust accounting.

605 Section 9. Subsection (3) of section 736.1008, Florida
 606 Statutes, is amended to read:

607 736.1008 Limitations on proceedings against trustees.-

608 (3) When a trustee has not issued a final trust accounting
 609 or has not given written notice to the beneficiary of the

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610 availability of the trust records for examination and that
 611 claims with respect to matters not adequately disclosed may be
 612 barred, a claim against the trustee for breach of trust based on
 613 a matter not adequately disclosed in a trust disclosure document
 614 is barred as provided in chapter 95 and accrues when the
 615 beneficiary has actual knowledge of:

616 (a) The facts upon which the claim is based, if such actual
 617 knowledge is established by clear and convincing evidence; or

618 (b) The trustee's repudiation of the trust or adverse
 619 possession of trust assets.

620
 621 Paragraph (a) applies to claims based upon acts or omissions
 622 occurring on or after July 1, 2008. A beneficiary's actual
 623 knowledge that he or she has not received a trust accounting
 624 does not cause a claim to accrue against the trustee for breach
 625 of trust based upon the failure to provide a trust accounting
 626 required by s. 736.0813 or former s. 737.303 and does not
 627 commence the running of any period of limitations or laches for
 628 such a claim, and paragraph (a) and chapter 95 do not bar any
 629 such claim.

630 Section 10. The changes to ss. 736.08135 and 736.1008,
 631 Florida Statutes, made by this act are intended to clarify
 632 existing law, are remedial in nature, and apply retroactively to
 633 all cases pending or commenced on or after July 1, 2017.

634 Section 11. Present subsections (2), (3), and (4) of
 635 section 736.1201, Florida Statutes, are redesignated as
 636 subsections (3), (4), and (5), respectively, present subsection
 637 (5) of that section is amended, and a new subsection (2) is
 638 added to that section, to read:

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639 736.1201 Definitions.—As used in this part:

640 (2) "Delivery of notice" means delivery of a written notice
 641 required under this part using any commercial delivery service
 642 requiring a signed receipt or by any form of mail requiring a
 643 signed receipt.

644 ~~(5) "State attorney" means the state attorney for the~~
 645 ~~judicial circuit of the principal place of administration of the~~
 646 ~~trust pursuant to s. 736.0108.~~

647 Section 12. Section 736.1205, Florida Statutes, is amended
 648 to read:

649 736.1205 Notice that this part does not apply.—In the case
 650 of a power to make distributions, if the trustee determines that
 651 the governing instrument contains provisions that are more
 652 restrictive than s. 736.1204(2), or if the trust contains other
 653 powers, inconsistent with the provisions of s. 736.1204(3) that
 654 specifically direct acts by the trustee, the trustee shall
 655 notify the ~~state~~ Attorney General by delivery of notice when the
 656 trust becomes subject to this part. Section 736.1204 does not
 657 apply to any trust for which notice has been given pursuant to
 658 this section unless the trust is amended to comply with the
 659 terms of this part.

660 Section 13. Subsection (2) of section 736.1206, Florida
 661 Statutes, is amended to read:

662 736.1206 Power to amend trust instrument.—

663 (2) In the case of a charitable trust that is not subject
 664 to ~~the provisions of~~ subsection (1), the trustee may amend the
 665 governing instrument to comply with ~~the provisions of~~ s.
 666 736.1204(2) after delivery of notice to, and with the consent
 667 of, the state Attorney General.

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

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668 Section 14. Section 736.1207, Florida Statutes, is amended
 669 to read:

670 736.1207 Power of court to permit deviation.—This part does
 671 not affect the power of a court to relieve a trustee from any
 672 restrictions on the powers and duties that are placed on the
 673 trustee by the governing instrument or applicable law for cause
 674 shown and on complaint of the trustee, ~~the state~~ Attorney
 675 General, or an affected beneficiary and notice to the affected
 676 parties.

677 Section 15. Paragraph (b) of subsection (4) of section
 678 736.1208, Florida Statutes, is amended to read:

679 736.1208 Release; property and persons affected; manner of
 680 effecting.—

681 (4) Delivery of a release shall be accomplished as follows:

682 (b) If the release is accomplished by reducing the class of
 683 permissible charitable organizations, by delivery of notice a
 684 copy of the release to the ~~state~~ Attorney General, including a
 685 copy of the release.

686 Section 16. Section 736.1209, Florida Statutes, is amended
 687 to read:

688 736.1209 Election to come under this part.—With the consent
 689 of that organization or organizations, a trustee of a trust for
 690 the benefit of a public charitable organization or organizations
 691 may come under s. 736.1208(5) by delivery of notice to filing
 692 ~~with the state Attorney General of the an~~ election, accompanied
 693 by the proof of required consent. Thereafter the trust shall be
 694 subject to s. 736.1208(5).

695 Section 17. Except as otherwise provided in this act and
 696 except for this section, which shall take effect upon becoming a

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697 law, this act shall take effect July 1, 2017.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

1554

Bill Number (if applicable)

Topic Trusts

Amendment Barcode (if applicable)

Name Sarah Butters

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Tallahassee, FL 32301

City

State

Zip

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Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing The Real Property, Probate and Trust Law Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

SB 1554

Bill Number (if applicable)

Topic Trusts

Amendment Barcode (if applicable)

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Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Bankers Association

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1566

INTRODUCER: Senator Simmons

SUBJECT: Uniform Voidable Transactions Act

DATE: April 14, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Favorable</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1566 amends Florida’s version of the Uniform Fraudulent Transfer Act (UFTA). The UFTA, codified as ch. 726, F.S., provides a creditor with the means to reach assets that a debtor has transferred to another person to keep them from being used to satisfy a debt.

In 2014, the Uniform Law Commission adopted amendments and renamed the UFTA as the Uniform Voidable Transactions Act (UVTA). This bill adopts the UVTA in Florida. The bill:

- Provides that a creditor making a claim has the burden of proving the elements of their claim by a preponderance of the evidence;
- Changes the way partnerships are considered insolvent and subjects partnerships to the same solvency standard as other debtors; and
- Adds a choice of law provision by providing a claim for relief is governed by the claims law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred.

The bill also outlines how the UVTA applies to a business organization structured as a series organization, a form of business organization recognized in some other states.

The statute of limitations for filing an action to set aside a transfer or obligation is the later of 4 years from the transfer or obligation, or 1 year from when the transfer or obligation was or could have been discovered. The bill changes the 1 year provision to provide that it begins to run when the wrongful nature of the transfer or obligation was or could reasonably have been discovered.

II. Present Situation:

According to the National Conference of Commissioners on Uniform State Laws, 45 states and the U.S. Virgin Islands have adopted the Uniform Fraudulent Transfer Act (“UFTA”).¹ UFTA provides a creditor with the means to reach assets that a debtor has transferred to another person to keep them from being used to satisfy a debt. Florida enacted the UFTA in 1987² and codified it as ch. 726, F.S.

Chapter 726, F.S., provides redress to creditors by allowing them to recover assets from debtors, when the debtors have fraudulently transferred assets to third parties or incurred obligations before or after a creditor’s claim arises. For example, s. 726.105(1), F.S., provides that a transfer made is fraudulent as to a creditor if the debtor made the transfer:

- With actual intent to hinder, delay, or defraud any creditor of the debtor; or
- Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Section 726.105(2), F.S., provides factors that a court uses to determine whether actual intent exists.

Section 726.106, F.S., provides that a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Similar statutes have led to confusion in some courts in other jurisdictions that have adopted the UFTA. Courts have held that creditors must show intent to hinder, delay, or defraud by “clear and convincing evidence” or have shifted the burden to transferees to show a debtor is not insolvent.³

In either situation, the UFTA provides statutory remedies to creditors, most notably through a “clawback” action, whereby a prevailing creditor may have a debtor’s fraudulent transfer or obligation made to a third party voided and surrendered back to the creditor.⁴ These remedies are generally subject to a 4-year statute of limitations, unless otherwise specified in s. 726.110, F.S. The UFTA contains some exceptions to the clawback remedy, primarily for any “person who

¹ <http://www.uniformlaws.org/shared/docs/fraudulent%20transfer/UVTA%20-%20Summary.pdf> (last accessed April 13, 2017).

² Ch. 87-79, L.O.F.

³ http://www.americanbar.org/publications/probate_property_magazine_2012/2015/july_august_2015/2015_aba_rpte_pp_v29_3_article_foster_boughman_uniform_voidable_transactions_act.html (last accessed April 13, 2017).

⁴ s. 726.108, F.S.

took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.”⁵

In 2014, National Conference of Commissioners on Uniform State Laws amended the UFTA. The amendments included renaming the act as the “Uniform Voidable Transactions Act” (UVTA). A commenter argues that “the UVTA is not a new act; it is the UFTA, renamed and lightly amended.”⁶ The UVTA has been adopted in 11 states and is under consideration in 2017 in 10 other states, including Florida.⁷

III. Effect of Proposed Changes:

The bill makes changes to ch. 726, F.S., to adopt the UVTA in Florida. The UVTA includes numerous “Official Comments” from the drafters for use in interpreting the UVTA. Although this bill does not adopt the comments as Florida law, Florida courts have used comments from uniform acts as interpretative aids.⁸

Changes in Title and Style (Sections 1, 2, 5, and 6)

Section 2 changes the name of the “Uniform Fraudulent Transfer Act” to the “Uniform Voidable Transactions Act.” **Section 1** changes the chapter title from “Fraudulent Transfers” to “Voidable Transactions.” The bill replaces the word “fraudulent” with “voidable” in **sections 5 and 6** of the bill.

Definitions (Sections 3 and 7)

Section 3 amends s. 726.102, F.S, regarding definitions for ch. 726, F.S. The bill adds the following definitions:

- "Claims law" means a fraudulent conveyance, fraudulent transfer, or voidable transfer laws or other laws of similar effect.
- "Electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- "Organization" means a person other than an individual.
- "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- "Sign" means to execute or adopt a tangible symbol, or attach to or logically associate with the record an electronic symbol, sound, or process, with present intent to authenticate or adopt a record.

The bill amends the definition of person to include limited partnership, business corporation, nonprofit business corporation, public corporation, limited liability company, limited cooperative

⁵ s. 726.109(1), F.S.

⁶ Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, *The Business Lawyer*, Volume 70, Summer 2015 at p. 779.

⁷[http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable%20Transactions%20Act%20Amendments%20\(2014\)%20-%20Formerly%20Fraudulent%20Transfer%20Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)%20-%20Formerly%20Fraudulent%20Transfer%20Act) (last accessed April 14, 2017).

⁸ See, e.g., *Winner v. Cataldo*, 559 So.2d 696 (Fla. 3d DCA 1990).

association, unincorporated nonprofit association, common law business trust, statutory trust, and association joint venture.

Section 7 of the bill amends s. 726.107, F.S., to provide that an obligation is incurred evidenced by a “record” so that obligations can be evidenced by electronic or other records instead of just written documents.

Insolvency (Section 4)

Current law provides that a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at fair valuation.⁹ A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.¹⁰ The bill provides that the party against whom the presumption of insolvency is directed has the burden to prove that nonexistence of insolvency is more probable than the existence of insolvency.

Section 726.103(3), F.S., provides a different calculation of insolvency for partnerships than for other persons. A partnership is considered insolvent if the sum of the partnership's debts is greater than the aggregate, at fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

The bill amends s. 726.103, F.S., to remove the special definition of insolvency for partnerships and treats a partnership like a person. Thus, under the bill, a partnership is insolvent if, at a fair valuation, the sum of the partnership's debts is greater than the sum of the partnerships' assets.

Burden and Standard of Proof (Sections 5 and 6)

Section 5 and 6 amends ss. 726.105 and 726.106, F.S., to provide that a creditor has the burden of proof to prove the elements necessary to show a transfer is voidable. It sets the standard as preponderance of the evidence. This will make clear to Florida practitioners that the burden of proof is on the creditor and the standard of proof is preponderance of the evidence.

Defenses (Section 9)

Section 9 amends s. 726.109, F.S. Current law provides a defense to actions alleging actual intent to defraud the creditor if the person took in good faith and for a reasonably equivalent value. The bill requires that the reasonably equivalent value must be given to the debtor.

The bill provides that recovery pursuant to a judgment of the asset transferred or its proceeds is available only against the first transferee of the asset and an immediate transferee. It exempts transferees who took in good faith from having the judgment enforced against them.

Another defense provided in ch. 726, F.S., is that a transfer is not voidable if the transfer results from a termination of a lease upon default by the debtor when the termination is pursuant to the

⁹ s. 726.103(1), F.S.

¹⁰ s. 726.103(2), F.S.

lease terms or by enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The bill outlines who carries the burden of proving the defenses or right to attach judgments against transferees. Anyone seeking to invoke the defenses in s. 726.109, F.S., has the burden of proving the applicability of that defense. A creditor has the burden of proving applicability of judgments against a first transferee or an immediate transferee. A good faith transferee has the burden of proving they are a good faith transferee or a mediate good faith transferee. The standard of proof is a preponderance of the evidence.

Statute of Limitations (Section 10)

Under current law, a claim that a transaction is voidable is extinguished unless brought within 4 years or, if later, within 1 year after the transaction was or could have reasonably been discovered by the claimant. This bill amends the 1 year time period to within 1 year after the transaction and its wrongful nature was or could have reasonably been discovered by the claimant.

Choice of Law (Section 13)

The bill creates s. 726.113, F.S. It provides that a claim for relief is governed by the law of the jurisdiction where the debtor is located when the transfer is made or the obligation is incurred. The bill provides criteria for determining a debtor's physical location for purposes of ch. 726, F.S.:

- A debtor that is an individual is located at his or her principal residence.
- A debtor that is an organization and has only one place of business is located at its place of business.
- A debtor that is an organization and has more than one place of business is located at its chief executive office.

This provision only governs claims under ch. 726, F.S. The bill does not affect a debtor's entitlement to homestead protections under the Florida Constitution.

Series Organizations (Section 14)

A series mechanism "creates an elastic single vehicle for operating multiple businesses or owning multiple properties in a limited liability environment."¹¹ It allows, for example, a limited liability company to designate specific assets in a specific series. Once designated, creditors of one series cannot look to the assets of another series even if the series are owned by the same limited liability company. This emulates creating multiple limited liability companies without actually doing so.¹² The bill creates s. 726.114, F.S., to govern how ch. 726, F.S., applies to series organizations. It defines "series organization" as "an organization that, pursuant to the law under which it is organized, has the following characteristics:

¹¹ Adam Hiller, *But Series-ly, Folks – The Series Laws and How They (May) Intersect with Bankruptcy Law*, 20 Am. Bankr. Inst. L. Rev. 353, 354 (2012).

¹² *Id.* at 354-355.

- The organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of, or associated with, the protected series.
- Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of, or associated with, the protected series only, and not against the property of, or associated with, the organization or other protected series of the organization.
- Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of, or associated with, a protected series of the organization.”

The bill provides that a series organization and each protected series of the organization is a separate person for purposes of ch. 726, F.S.

One commenter argues that a state should adopt the series organization provision of the UVTA because the choice of law provision of the UVTA could result in a transfer made by a series organization of another state being governed by Florida’s voidable transfer law.¹³

Electronic Signatures (Section 15)

The Electronic Signatures in the Global and National Commerce Act of 2000 (E-Sign Act) provides that electronic signatures, contracts, and records with respect to a transaction are valid as a written document. The E-Sign Act does not require contracts, records, or signatures in electronic form. It also provides that if a statute requires a transaction to a consumer be made in writing, then the use of electronic record satisfies the requirement if the consumer consents or is informed of the right to have it in non-electronic form. Additionally, the E-Sign Act does not apply to court orders, notice of cancellation of utility services, foreclosure or eviction, cancellation of health insurance, or a recall of a product.

The bill provides ch. 726, F.S., modifies, limits, and supersedes the E-Sign Act but does not modify limit or supersede the portion of the Act regarding consumer disclosures, or authorize electronic delivery of any of the prohibited notices described in the E-Sign Act.

Technical Changes (Sections 8, 11, and 12)

Sections 8, 11, and 12 make technical changes.

Effective Date (Section 16)

Section 16 provides an effective date of July 1, 2017.

¹³ Kenneth C. Kettering, *The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act*, *The Business Lawyer*, Volume 70, Summer 2015 at p. 831-832.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

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

VI. Technical Deficiencies:

Line 508 contains a citation to 15 U.S.C. s. 7001(b). The citation in the UVTA is 15 U.S.C. s. 7003(b).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 726.101, 726.102, 726.103, 726.105, 726.106, 726.107, 726.108, 726.109, 726.110, 726.111, and 726.112.

This bill creates the following sections of the Florida Statutes: 726.113, 726.114, and 726.115.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

By Senator Simmons

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1 A bill to be entitled
 2 An act relating to the Uniform Voidable Transactions
 3 Act; providing a directive to the Division of Law
 4 Revision and Information; amending s. 726.101, F.S.;
 5 revising a short title; amending s. 726.102, F.S.;
 6 revising and providing definitions; amending s.
 7 726.103, F.S.; removing conditions under which a
 8 partnership is insolvent; imposing the burden of
 9 proving insolvency upon certain debtors; amending ss.
 10 726.105 and 726.106, F.S.; imposing the burden of
 11 proving elements of a claim for relief upon certain
 12 creditors; amending s. 726.107, F.S.; conforming
 13 provisions to changes made by the act; amending s.
 14 726.108, F.S.; providing conditions under which
 15 attachments or other provisional remedies are
 16 available to creditors; amending s. 726.109, F.S.;
 17 revising the parties subject to judgements for
 18 recovery of a creditor's claim; revising conditions
 19 under which a transfer is not voidable; imposing the
 20 burden of proving certain applicability, claim
 21 elements, and adjustments upon specified persons;
 22 providing requirements for standard of proof; amending
 23 ss. 726.110, 726.111, and 726.112, F.S.; conforming
 24 provisions to changes made by the act; creating s.
 25 726.113, F.S.; providing that claims for relief are
 26 governed by specified claims law; creating s. 726.114,
 27 F.S.; providing definitions; providing applicability
 28 of specified provisions for series organizations and
 29 the protected series of such organizations; creating

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

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30 s. 726.115, F.S.; providing applicability for a
 31 specified federal act; providing an effective date.
 32
 33 Be It Enacted by the Legislature of the State of Florida:
 34
 35 Section 1. The Division of Law Revision and Information is
 36 directed to rename chapter 726, Florida Statutes, entitled
 37 "FRAUDULENT TRANSFERS," as "VOIDABLE TRANSACTIONS."
 38 Section 2. Section 726.101, Florida Statutes, is amended to
 39 read:
 40 726.101 Short title.—This act may be cited as the "Uniform
 41 Voidable Transactions Fraudulent Transfer Act."
 42 Section 3. Section 726.102, Florida Statutes, is amended to
 43 read:
 44 726.102 Definitions.—As used in this chapter ~~ss. 726.101-~~
 45 ~~726.112~~:
 46 (1) "Affiliate" means:
 47 (a) A person that ~~who~~ directly or indirectly owns,
 48 controls, or holds with power to vote, 20 percent or more of the
 49 outstanding voting securities of the debtor, other than a person
 50 that ~~who~~ holds the securities:
 51 1. As a fiduciary or agent without sole discretionary power
 52 to vote the securities; or
 53 2. Solely to secure a debt, if the person has not in fact
 54 exercised the power to vote.
 55 (b) A corporation 20 percent or more of whose outstanding
 56 voting securities are directly or indirectly owned, controlled,
 57 or held with power to vote, by the debtor or a person that ~~who~~
 58 directly or indirectly owns, controls, or holds, with power to

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59 vote, 20 percent or more of the outstanding voting securities of
60 the debtor, other than a person that who holds the securities:

61 1. As a fiduciary or agent without sole discretionary power
62 to vote the securities; or

63 2. Solely to secure a debt, if the person has not in fact
64 exercised the power to vote.

65 (c) A person whose business is operated by the debtor under
66 a lease or other agreement, or a person substantially all of
67 whose assets are controlled by the debtor; or

68 (d) A person that who operates the debtor's business under
69 a lease or other agreement or controls substantially all of the
70 debtor's assets.

71 (2) "Asset" means property of a debtor, but the term does
72 not include:

73 (a) Property to the extent it is encumbered by a valid
74 lien;

75 (b) Property to the extent it is generally exempt under
76 nonbankruptcy law; or

77 (c) An interest in property held in tenancy by the
78 entireties to the extent it is not subject to process by a
79 creditor holding a claim against only one tenant.

80 (3) "Charitable contribution" means a charitable
81 contribution as that term is defined in s. 170(c) of the
82 Internal Revenue Code of 1986, if that contribution consists of:

83 (a) A financial instrument as defined in s. 731(c)(2)(C) of
84 the Internal Revenue Code of 1986; or

85 (b) Cash.

86 (4) "Claim," except as used in "claim for relief," means a
87 right to payment, whether or not the right is reduced to

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88 judgment, liquidated, unliquidated, fixed, contingent, matured,
89 unmatured, disputed, undisputed, legal, equitable, secured, or
90 unsecured.

91 (5) "Claims law" means fraudulent conveyance, fraudulent
92 transfer, or voidable transfer laws or other laws of similar
93 effect.

94 (6)-(5) "Creditor" means a person that who has a claim.

95 (7)-(6) "Debt" means liability on a claim.

96 (8)-(7) "Debtor" means a person that who is liable on a
97 claim.

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

101 (10)-(8) "Insider" includes:

102 (a) If the debtor is an individual:

103 1. A relative of the debtor or of a general partner of the
104 debtor;

105 2. A partnership in which the debtor is a general partner;

106 3. A general partner in a partnership described in
107 subparagraph 2.; or

108 4. A corporation of which the debtor is a director,
109 officer, or person in control;

110 (b) If the debtor is a corporation:

111 1. A director of the debtor;

112 2. An officer of the debtor;

113 3. A person in control of the debtor;

114 4. A partnership in which the debtor is a general partner;

115 5. A general partner in a partnership described in

116 subparagraph 4.; or

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117 6. A relative of a general partner, director, officer, or
 118 person in control of the debtor.

119 (c) If the debtor is a partnership:

120 1. A general partner in the debtor;

121 2. A relative of a general partner in, a general partner
 122 of, or a person in control of the debtor;

123 3. Another partnership in which the debtor is a general
 124 partner;

125 4. A general partner in a partnership described in this
 126 paragraph ~~subparagraph 3~~; or

127 5. A person in control of the debtor.

128 (d) An affiliate, or an insider of an affiliate as if the
 129 affiliate were the debtor.

130 (e) A managing agent of the debtor.

131 (11)(9) "Lien" means a charge against or an interest in
 132 property to secure payment of a debt or performance of an
 133 obligation, and includes a security interest created by
 134 agreement, a judicial lien obtained by legal or equitable
 135 process or proceedings, a common-law lien, or a statutory lien.

136 (12) "Organization" means a person other than an
 137 individual.

138 (13)(10) "Person" means an individual, partnership, limited
 139 partnership, business corporation, nonprofit business
 140 corporation, public corporation, limited liability company,
 141 limited cooperative association, unincorporated nonprofit
 142 association, organization, government or governmental
 143 subdivision, instrumentality, or agency, business trust, common
 144 law business trust, statutory trust, estate, trust, association,
 145 joint venture, or any other legal or commercial entity.

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146 (14)(11) "Property" means anything that may be the subject
 147 of ownership.

148 (15)(12) "Qualified religious or charitable entity or
 149 organization" means:

150 (a) An entity described in s. 170(c)(1) of the Internal
 151 Revenue Code of 1986; or

152 (b) An entity or organization described in s. 170(c)(2) of
 153 the Internal Revenue Code of 1986.

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

157 (17)(13) "Relative" means an individual related by
 158 consanguinity within the third degree as determined by the
 159 common law, a spouse, or an individual related to a spouse
 160 within the third degree as so determined, and includes an
 161 individual in an adoptive relationship within the third degree.

162 (18) "Sign" or "signed" means with present intent to
 163 authenticate or adopt a record to:

164 (a) Execute or adopt a tangible symbol; or

165 (b) Attach to or logically associate with the record an
 166 electronic symbol, sound, or process.

167 (19)(14) "Transfer" means every mode, direct or indirect,
 168 absolute or conditional, voluntary or involuntary, of disposing
 169 of or parting with an asset or an interest in an asset, and
 170 includes payment of money, release, lease, license, and creation
 171 of a lien or other encumbrance.

172 (20)(15) "Valid lien" means a lien that is effective
 173 against the holder of a judicial lien subsequently obtained by
 174 legal or equitable process or proceedings.

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175 Section 4. Section 726.103, Florida Statutes, is amended to
176 read:

177 726.103 Insolvency.—

178 (1) A debtor is insolvent if, at a fair valuation, the sum
179 of the debtor's debts is greater than the sum ~~all~~ of the
180 debtor's assets ~~at a fair valuation~~.

181 (2) A debtor that ~~who~~ is generally not paying its ~~his or~~
182 ~~her~~ debts as they become due, for reasons other than as a result
183 of a bona fide dispute, is presumed to be insolvent. The party
184 against which the presumption is directed has the burden of
185 proving that the nonexistence of insolvency is more probable
186 than its existence.

187 ~~(3) A partnership is insolvent under subsection (1) if the~~
188 ~~sum of the partnership's debts is greater than the aggregate, at~~
189 ~~a fair valuation, of all of the partnership's assets and the sum~~
190 ~~of the excess of the value of each general partner's~~
191 ~~nonpartnership assets over the partner's nonpartnership debts.~~

192 ~~(3)(4)~~ Assets under this section do not include property
193 that has been transferred, concealed, or removed with intent to
194 hinder, delay, or defraud creditors or that has been transferred
195 in a manner making the transfer voidable under this chapter ~~ss-~~
196 ~~726.101-726.112~~.

197 ~~(4)(5)~~ Debts under this section do not include an
198 obligation to the extent it is secured by a valid lien on
199 property of the debtor not included as an asset.

200 Section 5. Section 726.105, Florida Statutes, is amended to
201 read:

202 726.105 Transfers or obligations voidable fraudulent as to
203 present and future creditors.—

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204 (1) A transfer made or obligation incurred by a debtor is
205 voidable fraudulent as to a creditor, whether the creditor's
206 claim arose before or after the transfer was made or the
207 obligation was incurred, if the debtor made the transfer or
208 incurred the obligation:

209 (a) With actual intent to hinder, delay, or defraud any
210 creditor of the debtor; or

211 (b) Without receiving a reasonably equivalent value in
212 exchange for the transfer or obligation, and the debtor:

213 1. Was engaged or was about to engage in a business or a
214 transaction for which the remaining assets of the debtor were
215 unreasonably small in relation to the business or transaction;
216 or

217 2. Intended to incur, or believed or reasonably should have
218 believed that the debtor ~~he or she~~ would incur, debts beyond the
219 debtor's ~~his or her~~ ability to pay as they became due.

220 (2) In determining actual intent under paragraph (1)(a),
221 consideration may be given, among other factors, to whether:

222 (a) The transfer or obligation was to an insider.

223 (b) The debtor retained possession or control of the
224 property transferred after the transfer.

225 (c) The transfer or obligation was disclosed or concealed.

226 (d) Before the transfer was made or obligation was
227 incurred, the debtor had been sued or threatened with suit.

228 (e) The transfer was of substantially all the debtor's
229 assets.

230 (f) The debtor absconded.

231 (g) The debtor removed or concealed assets.

232 (h) The value of the consideration received by the debtor

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233 was reasonably equivalent to the value of the asset transferred
 234 or the amount of the obligation incurred.

235 (i) The debtor was insolvent or became insolvent shortly
 236 after the transfer was made or the obligation was incurred.

237 (j) The transfer occurred shortly before or shortly after a
 238 substantial debt was incurred.

239 (k) The debtor transferred the essential assets of the
 240 business to a lienor that ~~who~~ transferred the assets to an
 241 insider of the debtor.

242 (3) A creditor making a claim for relief under subsection
 243 (1) has the burden of proving the elements of the claim for
 244 relief by a preponderance of the evidence.

245 Section 6. Section 726.106, Florida Statutes, is amended to
 246 read:

247 726.106 Transfers or obligations voidable ~~fraudulent~~ as to
 248 present creditors.—

249 (1) A transfer made or obligation incurred by a debtor is
 250 voidable ~~fraudulent~~ as to a creditor whose claim arose before
 251 the transfer was made or the obligation was incurred if the
 252 debtor made the transfer or incurred the obligation without
 253 receiving a reasonably equivalent value in exchange for the
 254 transfer or obligation and the debtor was insolvent at that time
 255 or the debtor became insolvent as a result of the transfer or
 256 obligation.

257 (2) A transfer made by a debtor is voidable fraudulent as
 258 to a creditor whose claim arose before the transfer was made if
 259 the transfer was made to an insider for an antecedent debt, the
 260 debtor was insolvent at that time, and the insider had
 261 reasonable cause to believe that the debtor was insolvent.

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262 (3) Subject to s. 726.103(2), a creditor making a claim for
 263 relief under subsection (1) or subsection (2) has the burden of
 264 proving the elements of the claim for relief by a preponderance
 265 of the evidence.

266 Section 7. Section 726.107, Florida Statutes, is amended to
 267 read:

268 726.107 When transfer made or obligation incurred.—For the
 269 purposes of this chapter ~~ss. 726.101-726.112~~:

270 (1) A transfer is made:

271 (a) With respect to an asset that is real property other
 272 than a fixture, but including the interest of a seller or
 273 purchaser under a contract for the sale of the asset, when the
 274 transfer is so far perfected that a good faith purchaser of the
 275 asset from the debtor against which ~~whom~~ applicable law permits
 276 the transfer to be perfected cannot acquire an interest in the
 277 asset that is superior to the interest of the transferee.

278 (b) With respect to an asset that is not real property or
 279 that is a fixture, when the transfer is so far perfected that a
 280 creditor on a simple contract cannot acquire a judicial lien
 281 otherwise than under this chapter ~~ss. 726.101-726.112~~ that is
 282 superior to the interest of the transferee.

283 (2) If applicable law permits the transfer to be perfected
 284 as provided in subsection (1) and the transfer is not so
 285 perfected before the commencement of an action for relief under
 286 this chapter ~~ss. 726.101-726.112~~, the transfer is deemed made
 287 immediately before the commencement of the action.

288 (3) If applicable law does not permit the transfer to be
 289 perfected as provided in subsection (1), the transfer is made
 290 when it becomes effective between the debtor and the transferee.

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291 (4) A transfer is not made until the debtor has acquired
 292 rights in the asset transferred.

293 (5) An obligation is incurred:

294 (a) If oral, when it becomes effective between the parties;
 295 or

296 (b) If evidenced by a record writing, when the record
 297 signed writing executed by the obligor is delivered to or for
 298 the benefit of the obligee.

299 Section 8. Section 726.108, Florida Statutes, is amended to
 300 read:

301 726.108 Remedies of creditors.—

302 (1) In an action for relief against a transfer or
 303 obligation under this chapter ss. 726.101-726.112, a creditor,
 304 subject to the limitations in s. 726.109 may obtain:

305 (a) Avoidance of the transfer or obligation to the extent
 306 necessary to satisfy the creditor's claim;

307 (b) An attachment or other provisional remedy against the
 308 asset transferred or other property of the transferee if and to
 309 the extent available under in accordance with applicable law; or

310 (c) Subject to applicable principles of equity and in
 311 accordance with applicable rules of civil procedure:

312 1. An injunction against further disposition by the debtor
 313 or a transferee, or both, of the asset transferred or of other
 314 property;

315 2. Appointment of a receiver to take charge of the asset
 316 transferred or of other property of the transferee; or

317 3. Any other relief the circumstances may require.

318 (2) If a creditor has obtained a judgment on a claim
 319 against the debtor, the creditor, if the court so orders, may

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320 levy execution on the asset transferred or its proceeds.

321 Section 9. Section 726.109, Florida Statutes, is amended to
 322 read:

323 726.109 Defenses, liability, and protection of transferee
 324 or obligee.—

325 (1) A transfer or obligation is not voidable under s.
 326 726.105(1) (a) against a person that who took in good faith and
 327 for a reasonably equivalent value given the debtor or against
 328 any subsequent transferee or obligee.

329 (2) (a) Except as otherwise provided in this section, to the
 330 extent a transfer is voidable in an action by a creditor under
 331 s. 726.108(1) (a), the creditor may recover judgment for the
 332 value of the asset transferred, as adjusted under subsection
 333 (3), or the amount necessary to satisfy the creditor's claim,
 334 whichever is less. The judgment may be entered against:

335 1. (a) The first transferee of the asset or the person for
 336 whose benefit the transfer was made; or

337 2. (b) An immediate or mediate transferee of the first ~~any~~
 338 ~~subsequent~~ transferee other than:

339 a. A good faith transferee that who took for value; or
 340 b. An immediate or mediate good faith transferee of a
 341 person described in sub-subparagraph a from any subsequent
 342 transferee.

343 (b) Recovery pursuant to s. 726.108(1) (a) or (2) of or from
 344 the asset transferred or its proceeds, by levy or otherwise, is
 345 available only against a person described in subparagraph (a)1.
 346 or subparagraph (a)2.

347 (3) If the judgment under subsection (2) is based upon the
 348 value of the asset transferred, the judgment must be for an

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349 amount equal to the value of the asset at the time of the
 350 transfer, subject to adjustment as the equities may require.
 351 (4) Notwithstanding voidability of a transfer or an
 352 obligation under this chapter ~~ss. 726.101-726.112~~, a good faith
 353 transferee or obligee is entitled, to the extent of the value
 354 given the debtor for the transfer or obligation, to:
 355 (a) A lien on or a right to retain an ~~any~~ interest in the
 356 asset transferred;
 357 (b) Enforcement of an ~~any~~ obligation incurred; or
 358 (c) A reduction in the amount of the liability on the
 359 judgment.
 360 (5) A transfer is not voidable under s. 726.105(1) (b) or s.
 361 726.106 if the transfer results from:
 362 (a) Termination of a lease upon default by the debtor when
 363 the termination is pursuant to the lease and applicable law; or
 364 (b) Enforcement of a security interest in compliance with
 365 Article 9 of the Uniform Commercial Code other than acceptance
 366 of collateral in full or partial satisfaction of the obligation
 367 it secures.
 368 (6) A transfer is not voidable under s. 726.106(2):
 369 (a) To the extent the insider gave new value to or for the
 370 benefit of the debtor after the transfer was made, except to the
 371 extent unless the new value was secured by a valid lien;
 372 (b) If made in the ordinary course of business or financial
 373 affairs of the debtor and the insider; or
 374 (c) If made pursuant to a good faith effort to rehabilitate
 375 the debtor and the transfer secured present value given for that
 376 purpose as well as an antecedent debt of the debtor.
 377 (7) (a) The transfer of a charitable contribution that is

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378 received in good faith by a qualified religious or charitable
 379 entity or organization is not a fraudulent transfer under s.
 380 726.105(1) (b) or s. 726.106(1).
 381 (b) However, a charitable contribution from a natural
 382 person is a fraudulent transfer if the transfer was received on,
 383 or within 2 years before, the earlier of the date of
 384 commencement of an action under this chapter, the filing of a
 385 petition under the federal Bankruptcy Code, or the commencement
 386 of insolvency proceedings by or against the debtor under any
 387 state or federal law, including the filing of an assignment for
 388 the benefit of creditors or the appointment of a receiver,
 389 unless:
 390 1. The transfer was consistent with the practices of the
 391 debtor in making the charitable contribution; or
 392 2. The transfer was received in good faith and the amount
 393 of the charitable contribution did not exceed 15 percent of the
 394 gross annual income of the debtor for the year in which the
 395 transfer of the charitable contribution was made.
 396 (8) (a) A party that seeks to invoke subsection (1),
 397 subsection (4), subsection (5), or subsection (6) has the burden
 398 of proving the applicability of that subsection.
 399 (b) Except as otherwise provided in paragraphs (c) and (d),
 400 the creditor has the burden of proving each applicable element
 401 of subsection (2) or subsection (3).
 402 (c) The transferee has the burden of proving the
 403 applicability to the transferee under subparagraph (2) (a) 2.
 404 (d) A party that seeks adjustment under subsection (3) has
 405 the burden of proving the adjustment.
 406 (9) The standard of proof required to establish matters

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407 referred to in this section is preponderance of the evidence.

408 (10) The creditor has the burden of proving the requisite
 409 elements of any claim under this chapter, as set forth in ss.
 410 726.105(3) and 726.106(3).

411 Section 10. Section 726.110, Florida Statutes, is amended
 412 to read:

413 726.110 Extinguishment of claim for relief ~~cause of~~
 414 ~~action.~~-A claim for relief ~~cause of action~~ with respect to a
 415 ~~fraudulent~~ transfer or obligation under this chapter ~~ss.~~
 416 ~~726.101-726.112~~ is extinguished unless action is brought:

417 (1) Under s. 726.105(1)(a), within 4 years after the
 418 transfer was made or the obligation was incurred or, if later,
 419 within 1 year after the transfer or obligation and its wrongful
 420 nature was or could reasonably have been discovered by the
 421 claimant;

422 (2) Under s. 726.105(1)(b) or s. 726.106(1), within 4 years
 423 after the transfer was made or the obligation was incurred; or

424 (3) Under s. 726.106(2), within 1 year after the transfer
 425 was made or the obligation was incurred.

426 Section 11. Section 726.111, Florida Statutes, is amended
 427 to read:

428 726.111 Supplementary provisions.-Unless displaced by the
 429 provisions of this chapter ~~ss. 726.101-726.112~~, the principles
 430 of law and equity, including the law merchant and the law
 431 relating to principal and agent, estoppel, laches, fraud,
 432 misrepresentation, duress, coercion, mistake, insolvency, or
 433 other validating or invalidating cause, supplement those
 434 provisions.

435 Section 12. Section 726.112, Florida Statutes, is amended

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436 to read:

437 726.112 Uniformity of application and construction.-Chapter
 438 87-79, Laws of Florida, shall be applied and construed to
 439 effectuate its general purpose to make uniform the law with
 440 respect to the subject of the law among states enacting the law
 441 ~~it~~.

442 Section 13. Section 726.113, Florida Statutes, is created
 443 to read:

444 726.113 Governing law.-

445 (1) For the purposes of this section, the following
 446 provisions shall determine a debtor's physical location:

447 (a) A debtor that is an individual is located at his or her
 448 principal residence.

449 (b) A debtor that is an organization and has only one place
 450 of business is located at its place of business.

451 (c) A debtor that is an organization and has more than one
 452 place of business is located at its chief executive office.

453 (2) A claim for relief in the nature of a claim for relief
 454 under this chapter is governed by the claims law of the
 455 jurisdiction in which the debtor is located when the transfer is
 456 made or the obligation is incurred.

457 (3) This section does not affect the governing law for any
 458 other claims or issues between the parties arising outside of
 459 this chapter or other claims law. If this section requires the
 460 application of the claims law of a foreign jurisdiction, such a
 461 determination does not affect which jurisdiction's exemption
 462 laws apply, the availability of exemptions under applicable law,
 463 or the debtor's entitlement to any protections afforded to the
 464 debtor's homestead under the Florida Constitution.

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465 Section 14. Section 726.114, Florida Statutes, is created
466 to read:

467 726.114 Application to series organization.-

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

469 (a) "Protected series" means an arrangement, however
470 denominated, created by a series organization that, pursuant to
471 the law under which the series organization is organized, meets
472 the criteria set forth in paragraph (b).

473 (b) "Series organization" means an organization that,
474 pursuant to the law under which it is organized, has the
475 following characteristics:

476 1. The organic record of the organization provides for
477 creation by the organization of one or more protected series,
478 however denominated, with respect to specified property of the
479 organization, and for records to be maintained for each
480 protected series that identify the property of, or associated
481 with, the protected series.

482 2. Debt incurred or existing with respect to the activities
483 of, or property of or associated with, a particular protected
484 series is enforceable against the property of, or associated
485 with, the protected series only, and not against the property
486 of, or associated with, the organization or other protected
487 series of the organization.

488 3. Debt incurred or existing with respect to the activities
489 or property of the organization is enforceable against the
490 property of the organization only, and not against the property
491 of, or associated with, a protected series of the organization.

492 (2) A series organization and each protected series of the
493 organization is a separate person for purposes of this chapter,

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494 even if for other purposes a protected series is not a person
495 separate from the organization or other protected series of the
496 organization. Provisions of law other than this chapter
497 determine whether and to what extent a series organization and
498 each protected series of the organization is a separate person
499 for purposes other than the purposes of this chapter.

500 Section 15. Section 726.115, Florida Statutes, is created
501 to read:

502 726.115 Relation to Electronic Signatures in Global and
503 National Commerce Act.-This chapter modifies, limits, and
504 supersedes the federal Electronic Signatures in Global and
505 National Commerce Act, 15 U.S.C. ss. 7001, et seq., but does not
506 modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s.
507 7001(c), or authorize electronic delivery of any of the notices
508 described in s. 103(b) of that act, 15 U.S.C. s. 7001(b).

509 Section 16. This act shall take effect July 1, 2017.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

1566

Bill Number (if applicable)

Topic Uniform Voidable Transactions Act

Amendment Barcode (if applicable)

Name David Slenn

Job Title Attorney

Address 101 E. Kennedy Boulevard, Suite 2800

Phone 8132272247

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33602

City

State

Zip

Email dslenn@slk-law.com

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Business Law Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4-17-17

Meeting Date

1566

Bill Number (if applicable)

Topic Uniform Voidable Transactions Act

Amendment Barcode (if applicable)

Name Jason Unger

Job Title _____

Address 301 S. Bronough Street #600

Phone 577-9090

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Tallahassee

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32301

Email junger@gray-robinson.com

City

State

Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing Florida Bar, Tax Law Section

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/14/14)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

4/17/17

Meeting Date

1566

Bill Number (if applicable)

Topic Uniform Voidable Transfers Act

Amendment Barcode (if applicable)

Name Sarah Butters

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Tallahassee, FL 32301

Email sbutters@ausley.com

City

State

Zip

Speaking: For Against Information

Waive Speaking: In Support Against
(The Chair will read this information into the record.)

Representing The Real Property, Probate and Trust Law Section of the Florida Bar

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/14/14)

CourtSmart Tag Report

Room: EL 110 Case No.:
Caption: Senate Committee Banking and Insurance

Type:
Judge:

Started: 4/17/2017 4:06:11 PM
Ends: 4/17/2017 5:41:17 PM Length: 01:35:07

4:06:13 PM Meeting called to order by Chair
4:06:26 PM Quorum present.
4:06:53 PM TAB 1 CS/SB 206 by Passidomo - Electric Wills
4:07:16 PM Senator Passidomo recognized to present the bill.
4:09:00 PM Amd. 370522 taken up and Sen. Passidomo recognized to explain the amd.
4:11:44 PM Bruce Stone, Attorney - appearing as private citizen
4:24:21 PM Twyla Sketchley, Elder Law Section of the Florida Bar
4:25:22 PM Amd. 370522 - fwo - adopted
4:29:34 PM William Skler - FL BAR - Real Property Division
4:30:34 PM Sarah Butters, Real Property, Probate and Trust Law Section of the Florida Bar
4:36:40 PM Fletch Belcher, Probate Litigation Attorney
4:46:57 PM Michael Delgado, General Counsel, Willing.com
4:59:25 PM Sen. Passidomo recognized to close on bill.
5:00:26 PM Vote on CS/CS/SB 206 - Favorable
5:00:55 PM TAB 2 - CS/SB 830 by RI, Baxley - Mortgage Brokering
5:01:29 PM Sen. Baxley explains delete all amd. 333732 - Amd. adopted fwo
5:02:34 PM Vote on CS/CS/SB 830 - Favorable
5:03:02 PM TAB 4 - CS/SB 1554 by JU, Young - Trusts
5:03:27 PM Sen. Young recognized to explain the bill
5:03:41 PM Amd. 939788 - fwo - adopted
5:04:28 PM Vote on CS/CS/SB 1554 - Favorable
5:05:01 PM TAB 3 - SB 1088 by Torres - Workers' Coomp for First Responders
5:05:32 PM Sen. Torres recognized to explain the bill
5:08:55 PM Kraig Conn, FL League of Cities
5:15:08 PM Amanda Murdock, Financial Advisor, representing self
5:16:09 PM Jessica Realin, representing self
5:21:15 PM Mieah Vandegritx, Family of 1st responder dealing with PTSD
5:23:36 PM Jim Tolley, FL Professional Firefighters
5:26:29 PM Sen. Torres recognized to close on bill.
5:27:50 PM Vote on SB 1088 - Favorable
5:28:21 PM Informal Recess by Chair
5:28:34 PM TAB 5 - SB 1566 by Simmons - Uniform Voidable Transactions Act
5:29:07 PM Senator Simmons recognized to explain the bill.
5:33:32 PM David Slenn, Attorney, Business Law Section of the Florida Bar
5:35:59 PM Jason Unger, Florida Bar, Tax Law Section
5:38:01 PM Sarah Butters, The Real Property, Probate and Trust Law Section of FL Bar
5:38:53 PM Senator Simmons recognized to close on bill.
5:39:50 PM Vote on SB 1566 - Favorable
5:40:09 PM Motion to adjourn - Sen. Gainer