Tab 1	**SB 266** by **Passidomo**; (Identical to H 00617) Covenants and Restrictions

Tab 2	**SB 676** by **Passidomo**; (Identical to H 00639) Equitable Distribution of Marital Assets and Liabilities

~~209094~~	A	S	WD	JU, Steube	btw L.98 - 99:	01/10 04:07 PM

Tab 3	**SB 804** by **Passidomo**; (Similar to CS/H 00631) Possession of Real Property

Tab 4	**SB 1002** by **Passidomo**; (Identical to H 01187) Guardianship

Tab 5	**SB 478** by **Hukill**; (Identical to H 00413) Trusts

Tab 6	**SB 566** by **Young**; (Similar to CS/H 00385) Unlawful Detention by a Transient Occupant

260152	A	S	RCS	JU, Young	Delete L.32 - 159:	01/10 04:43 PM

Tab 7	**SB 1216** by **Book**; (Similar to H 07019) Public Records/Videotaped Statement of a Minor

771212	A	S	RCS	JU, Book	Delete L.102:	01/10 04:43 PM

Tab 8	**SB 52** by **Mayfield**; (Similar to CS/H 06515) Relief of Cathleen Smiley by Brevard County

279020	A	S	RCS	JU, Mayfield	Delete L.85 - 86:	01/10 04:43 PM

Tab 9	**SB 1022** by **Steube**; (Similar to H 00549) Determination of Parentage

Tab 10	**SB 1034** by **Steube**; (Similar to H 01043) Mediation

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The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Steube, Chair
Senator Benacquisto, Vice Chair

MEETING DATE: Wednesday, January 10, 2018
TIME: 2:00—3:30 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Steube, Chair; Senator Benacquisto, Vice Chair; Senators Bracy, Bradley, Flores, Garcia, Gibson, Mayfield, Powell, and Thurston

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 266** Passidomo (Identical H 617)	Covenants and Restrictions; Designating the "Marketable Record Title Act"; revising the notice filing requirements for a person claiming an interest in land and other rights; exempting a specified summary notice and amendment from certain notice content requirements; authorizing the parcel owners of a community not subject to a homeowners' association to use specified procedures to revive certain covenants or restrictions, subject to certain exceptions and requirements, etc. CA 12/05/2017 Favorable JU 01/10/2018 Favorable RC	Favorable Yeas 10 Nays 0
2	**SB 676** Passidomo (Identical H 639)	Equitable Distribution of Marital Assets and Liabilities; Redefining the term "marital assets and liabilities" for purposes of equitable distribution in dissolution of marriage actions; providing that the term includes the paydown of principal of notes and mortgages secured by nonmarital real property and certain passive appreciation in such property under certain circumstances, etc. JU 01/10/2018 Favorable BI RC	Favorable Yeas 10 Nays 0
3	**SB 804** Passidomo (Similar H 631)	Possession of Real Property; Authorizing a person with a superior right to possession of real property to recover possession by ejectment; providing that a person entitled to possession of real property has a cause of action to regain possession from another person who obtained possession of real property by forcible entry, unlawful entry, or unlawful detainer; requiring that the court determine the right of possession and damages, etc. JU 01/10/2018 Favorable CA RC	Favorable Yeas 7 Nays 3

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**SB 1002** Passidomo (Identical H 1187)	Guardianship; Requiring certain medical, financial, or mental health records or financial audits that are necessary as part of an investigation of a guardian as a result of a complaint filed for certain purposes with a designee of the Office of Public and Professional Guardians to be provided to the Office of Public and Professional Guardians upon that office's request; providing that any such clerk or Office of Public and Professional Guardians investigator has a duty to maintain the confidentiality of such information, etc. JU 01/10/2018 Favorable ACJ AP	Favorable Yeas 10 Nays 0
5	**SB 478** Hukill (Identical H 413)	Trusts; Deleting a requirement that a trust and its terms be for the benefit of the trust's beneficiaries; revising provisions relating to notice or sending of trust documents to include posting on a secure electronic account or website; authorizing an authorized trustee to appoint all or part of the principal of a trust to a second trust under certain circumstances; clarifying that certain knowledge by a beneficiary does not cause a claim to accrue for breach of trust or commence the running of a period of limitations or laches, etc. JU 01/10/2018 Favorable BI RC	Favorable Yeas 10 Nays 0
6	**SB 566** Young (Similar CS/H 385)	Unlawful Detention by a Transient Occupant; Revising factors that establish a person as a transient occupant of residential property; authorizing a former transient occupant, under certain circumstances, to bring a civil action for damages or recovery of personal belongings, etc. CM 12/04/2017 Favorable JU 01/10/2018 Fav/CS RC	Fav/CS Yeas 10 Nays 0
7	**SB 1216** Book (Similar H 7019, Compare H 7017, Linked S 1214)	Public Records/Videotaped Statement of a Minor ; Expanding the exemption from public records requirements for any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct; providing for future review and repeal of the exemption; providing a statement of public necessity, etc. JU 01/10/2018 Fav/CS GO RC	Fav/CS Yeas 10 Nays 0

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	**SB 52** Mayfield (Similar CS/H 6515)	Relief of Cathleen Smiley by Brevard County; Providing for the relief of Cathleen Smiley by Brevard County; providing for an appropriation to compensate Cathleen Smiley for personal injuries and damages sustained in an automobile accident caused by a Brevard County employee, etc. SM JU 01/10/2018 Fav/CS GO RC	Fav/CS Yeas 10 Nays 0
9	**SB 1022** Steube (Similar H 549)	Determination of Parentage; Authorizing a child, the child's mother, or the child's alleged parent to file a petition in circuit court to rebut the presumption of legal parentage and establish actual legal parentage; requiring the court to appoint a guardian ad litem or an attorney ad litem under certain conditions; specifying that a statistical probability of parentage of 95 percent or more creates a rebuttable presumption that the alleged parent is a biological parent, etc. JU 01/10/2018 Favorable CF RC	Favorable Yeas 10 Nays 0
10	**SB 1034** Steube (Similar H 1043)	Mediation; Requiring that insurance carrier representatives who attend circuit court mediation have specified settlement authority and the ability to immediately consult by specified means with persons having certain additional settlement authority; limiting the information that may be included in the mediator's report to the court, etc. JU 01/10/2018 Temporarily Postponed BI	Temporarily Postponed
	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 Judiciary

BILL:	SB 266
INTRODUCER:	Senator Passidomo
SUBJECT:	Covenants and Restrictions
DATE:	January 9, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cochran	Yeatman	CA	**Favorable**
2.	Davis	Cibula	JU	**Favorable**
3.			RC	

I. Summary:

SB 266 addresses the covenants and restrictions of property owners' associations and makes the following changes:

- Extends statutes authorizing the preservation and revival of covenants and restrictions to a broader range of associations, notably commercial property owners' associations;
- Allows a homeowners' association to file a form notice with the clerk of court which preserves the association's covenants and restrictions;
- Repeals language that requires a two-thirds vote of the members of the board of directors to preserve existing covenants and restrictions;
- Authorizes parcel owners who were subject to covenants and restrictions, but who do not have a homeowners' association, to use the same mechanisms as a homeowners' association to revitalize extinguished covenants and restrictions; and
- Requires a homeowners' association to annually consider preservation of the covenants and restrictions and requires that the association file a summary preservation every 5 years.

II. Present Situation:

The Marketable Record Title Act

The Marketable Record Title Act (MRTA) was enacted in 1963 to simplify and facilitate land transactions.[1] In general terms, MRTA provides that any person who has been vested with any estate in land of record for 30 years or more has a marketable record title, free and clear of most claims or encumbrances against the land. In essence, MRTA serves as the ultimate land statute of limitations by eliminating older, unpreserved rights to an interest in real property.[2]

[1] *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1227 (Fla. 2004).
[2] Gregory M. Cook, *The Marketable Record Title Act Made Easy*, The Florida Bar Journal, (Oct. 1992) available at https://www.floridabar.org/news/tfb-

One unintended effect of MRTA, however, is that covenants and restrictions are extinguished 30 years after their creation. Therefore, homeowner associations' covenants and restrictions can expire and become unenforceable. In order to protect the covenants, MRTA has long provided a method for renewing the covenants. Even so, many homeowners' associations still fail to timely file a renewal of their covenants. In 2004, laws were enacted to provide a method for reviving the covenants and restrictions of a mandatory homeowners' association.[3] In 2007, nonmandatory homeowners' associations became eligible for revitalization.[4] Revitalization requires the creation of an organizing committee, notice to all affected property owners, approval by a majority of the homeowners, approval by the Department of Economic Opportunity, and the recording of notice in the public records.[5]

Two categories of property impacted by MRTA have not been included in the laws permitting renewal or revival of their covenants and restrictions: commercial land in office parks, industrial parks, and other commercial districts and neighborhoods having enforceable covenants but no formal homeowners' association. Owners of these properties, like the owners of property within a homeowners' association, enact and enforce covenants and restrictions regarding their property and that of their neighbors.

Due to the disparate issues in the bill, the present situation for each section is discussed in more detail below in conjunction with the Effect of Proposed Changes.

III. Effect of Proposed Changes:

Preservation of Existing Covenants

Present Situation

Sections 712.05 and 712.06, F.S., provide that a homeowners' association may timely preserve its covenants by complying with the following conditions:

- The board must give written notice to every parcel owner of the impending preservation of the covenants;[6]
- The board must give written notice to every parcel owner of a meeting of the board of directors where the directors will decide whether to preserve the covenants;[7]
- The board of directors of the association must approve the renewal by a two-thirds vote;[8] and
- Notice of the renewal must be recorded in the official records of the county.[9]

Sections 3 and 4 of the bill change this procedure to:

- Provide that compliance by a homeowners' association with newly created s. 720.3032, F.S. (see discussion below) may substitute for the requirements of ss. 712.05 and 712.06, F.S.;

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[3] Ch. 2004-345, s. 11, Laws of Fla.
[4] Ch. 2007-173, s. 1, Laws of Fla.
[5] Sections 720.403, 720.404, 720.405, 720.406, and 720.407, F.S.
[6] Section 712.06(1)(b), F.S.
[7] Section 712.05(1), F.S.
[8] *Id.*
[9] Section 712.06(2), F.S.

- Provide that an amendment to a covenant or restriction indexed under the legal name of the property owners' association may also substitute for the requirements of ss. 712.05 and 712.06, F.S.;
- Repeal the requirement that a decision to preserve covenants be approved a two-thirds vote of the board; and
- Repeal the requirement that affected property owners be furnished notice of the board meeting to vote on preservation.

Preservation and Revitalization of Covenants by a Commercial Property Owners' Association

Present Situation

Current law provides for the preservation and revitalization of covenants by a homeowners' association.

Effect of the Bill

Section 2 provides a definition for the term "community covenant or restriction" and substitutes the term "property owners' association" for "homeowners' association." A property owners' association includes a homeowners' association as defined in s. 720.301, F.S., a corporation or entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, as well as an association of parcel owners authorized to enforce a community covenant or restriction. The bill also makes conforming changes for these new terms.

The bill replaces all uses of the term "homeowners' association" found in chapter 712, F.S., with the term "property owners' association." The effect is to expand MRTA laws on preservation and revitalization of covenants or restrictions to cover commercial associations.

Section 12 inserts language to provide that covenant revitalization, is intended to provide mechanisms for revitalization of covenants or restrictions by all types of communities and property associations, not just residential communities.

Revitalization by an Owner Not Subject to Homeowners' Association

Present Situation

Some residential communities have recorded covenants and restrictions similar to those found in a homeowners' association, but never created an association. Current law permits individual owners to file a notice of preservation of covenants before they expire,[10] but there are no means of revitalizing those covenants and restrictions.

[10] See sections 712.05 and 712.06, F.S.

Effect of the Bill

Section 6 provides for covenant or restriction revitalization by parcel owners of a community who are not subject to a homeowners' association.

Under this section, parcel owners may use the process available to a homeowners' association[11] to revive covenants or restrictions that have lapsed under MRTA. The parcel owners do not need to provide articles of incorporation or bylaws to revive the covenants or restrictions and only need the approval of a majority of the affected parcel owners in writing. The organizing committee of the community may execute the revived covenants or restrictions in the name of the community and the community name can be indexed as the grantee of the covenants with the parcel owners listed as grantors.

A parcel owner who has ceased to be subject to covenants or restrictions as of October 1, 2018, may commence an action by October 1, 2019, to determine if revitalization would unconstitutionally deprive the parcel owner of right or property. Revived covenants or restrictions do not affect the rights of a parcel owner that are recognized by a court order in an action commenced by October 1, 2019, and may not be subsequently altered without the consent of the affected parcel owner. Although a parcel owner has from October 1, 2018, to October 1, 2019, to file a legal action objecting to the revitalization of a covenant or restriction, the bill does not provide any mechanism to inform parcel owners of this right. Moreover, the bill allows parcel owners seeking to revitalize an extinguished covenant or restriction to proceed after October 1, 2019.

Requirements on the Board of Directors of a Homeowners' Association

Present Situation

While it is probably good practice for a homeowners' association to regularly consider the need for preservation of the covenants and restrictions of their neighborhood, there is no statutory requirement that a board of directors of a homeowners' association do so.

Effect of the Bill

Section 7 amends s. 720.303(2), F.S., to require that the board of directors for a homeowners' association consider whether to file a notice to preserve the covenants and restrictions affecting the community from extinguishment pursuant to MRTA. This must be considered at the first board meeting after the annual meeting of the members.

Section 8 creates s. 720.3032, F.S., which specifies procedures that any property owners' association may use to preserve its covenants from termination. Using these procedures, the association must file in the official records of the county in which it is located a notice detailing:

- The legal name of the association;
- The mailing and physical addresses of the association;
- The names of the affected subdivision plats and condominiums, or the common name of the community;

[11] See sections 720.403- 720.407, F.S.

- The name, address, and telephone number for the current community association management company or manager, if any;
- An indication as to whether the association desires to preserve the covenants or restrictions affecting the community from extinguishment pursuant to MRTA;
- The name and recording information of those covenants or restrictions affecting the community which the association wishes to preserve;
- A legal description of the community affected by the covenants or restrictions; and
- The signature of a duly authorized officer of the association.

The section creates a statutory form for the notice. The bill further provides that the filing of the completed form is considered a substitute for the notice required for preservation of the covenants pursuant to ss. 712.05 and 712.06, F.S. As such, every 5-year filing of the form will have the effect of starting the MRTA 30-year period anew.

A copy of this notice to preserve covenants or restrictions must be included as a part of the next notice of meeting or other mailing sent to all members of the association. The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

Other Changes Made by the Bill

Section 1 provides a short title of the "Marketable Record Title Act" for chapter 712, F.S.

Sections 5, 9, 10, 11, 13, 14, and 15 make changes to conform various statutory and definitional cross-references to the substantive changes made by the bill.

Section 16 provides an effective date of October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The State Constitution addresses the property rights of citizens in two pertinent provisions. Article 1, section 2 provides that all natural persons have the right to acquire, possess and protect property. Article 1, section 9 provides that "No person shall be deprived of life, liberty or property without due process of law . . . ." Additionally, the

State Constitution, in Article 1, section 10, also prohibits any law that impairs the obligation of contracts.

Because of these constitutional property rights protections, two issues arise from the bill. The first is whether the expiration of covenants and restrictions vests additional property rights in the owner of a property. A vested right is defined as "an immediate, fixed right of present or future enjoyment."[12] For example, the expiration of covenants and restrictions might allow a property owner to build a nonconforming structure on the property or to use the property in a manner not allowed under the covenants and restrictions. The second issue is whether the bill, by allowing the reinstatement of expired covenants and restrictions, allows property rights to be taken in violation of the State Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A person who believes that the revitalization of an expired covenant or restriction is a taking of a vested property right or other constitutional violation may be required to spend substantial funds to vindicate his or her rights in court.

Section 8 of the bill requires associations to prepare and record a notice every 5 years. The recording fee is nominal ($10 for the first page, $8.50 for additional pages). Because the form is in statute, associations may be able to complete the task without assistance, or a community association manager can assist an association with preparation and filing without reference to a licensed attorney.

Providing mechanisms to preserve and revitalize covenants and restrictions may have a positive impact on property values in affected areas or communities.

C. Government Sector Impact:

The bill requires the recording of documents in the public records of the county. Recording is subject to a fee of $10.00 for the first page and $8.50 for every subsequent page, payable to the recording department (in most counties, the clerk of the court).[13] The net revenues to county recorders, after deductions for incremental costs of recording and indexing documents, are unknown.

VI. Technical Deficiencies:

None.

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[12] *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.*, 30 So. 3d 579, 583 (Fla. 2nd DCA 2010) (*quoting Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 673, (1896)).

[13] Section 28.24(12), F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 712.01, 712.05, 712.06, 712.11, 720.303, 702.09, 702.10, 712.095, 720.403, 720.404, 720.405, and 720.407.

This bill creates the following sections of the Florida Statutes: 712.001, 712.12, and 720.3032.

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.

By Senator Passidomo

28-00026A-18 2018266__

A bill to be entitled

An act relating to covenants and restrictions; creating s. 712.001, F.S.; providing a short title; amending s. 712.01, F.S.; defining and redefining terms; amending s. 712.05, F.S.; revising the notice filing requirements for a person claiming an interest in land and other rights; authorizing a property owners' association to preserve and protect certain covenants or restrictions from extinguishment, subject to specified requirements; providing that a failure in indexing does not affect the validity of the notice; extending the length of time certain covenants or restrictions are preserved; deleting a provision requiring a two-thirds vote by members of an incorporated homeowners' association to file certain notices; providing that a property owners' association or clerk of the circuit court is not required to provide certain additional notice for a specified notice that is filed; conforming provisions to changes made by the act; amending s. 712.06, F.S.; exempting a specified summary notice and amendment from certain notice content requirements; revising the contents required to be specified by certain notices; conforming provisions to changes made by the act; amending s. 712.11, F.S.; conforming provisions to changes made by the act; creating s. 712.12, F.S.; defining terms; authorizing the parcel owners of a community not subject to a homeowners' association to use specified procedures to revive certain covenants

28-00026A-18 2018266__

or restrictions, subject to certain exceptions and requirements; authorizing a parcel owner to commence an action by a specified date under certain circumstances for a judicial determination that the covenants or restrictions did not govern that parcel as of a specified date and that any revitalization of such covenants or restrictions as to that parcel would unconstitutionally deprive the parcel owner of rights or property; providing applicability; amending s. 720.303, F.S.; requiring a board to take up certain provisions relating to notice filings at the first board meeting; creating s. 720.3032, F.S.; requiring any property owners' association desiring to preserve covenants from potential termination after a specified period by certain operation to record in the official records of each county in which the community is located a notice subject to certain requirements; providing a document form for recording by an association to preserve certain covenants or restrictions; requiring a copy of the filed notice to be sent to all members; requiring the original signed notice to be recorded with the clerk of the circuit court or other recorder; amending ss. 702.09 and 702.10, F.S.; conforming provisions to changes made by the act; amending s. 712.095, F.S.; conforming a cross-reference; amending ss. 720.403, 720.404, 720.405, and 720.407, F.S.; conforming provisions to changes made by the act; providing an effective date.

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

Section 1. Section 712.001, Florida Statutes, is created to read:

712.001 Short title.—This chapter may be cited as the "Marketable Record Title Act."

Section 2. Section 712.01, Florida Statutes, is reordered and amended to read:

712.01 Definitions.—As used in this chapter, the term ~~law~~:

(1) "Community covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which a parcel is located which:

(a) Subjects the parcel to any use restriction that may be enforced by a property owners' association; or

(b) Authorizes a property owners' association to impose a charge or assessment against the parcel or the parcel owner.

(4)~~(1)~~ ~~The term~~ "Person" includes the ~~as used herein denotes~~ singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof as the context for the use thereof requires or denotes and including any property owners' ~~homeowners'~~ association.

(6)~~(2)~~ "Root of title" means any title transaction purporting to create or transfer the estate claimed by any person ~~and~~ which is the last title transaction to have been recorded at least 30 years before ~~prior to~~ the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.

(7)~~(3)~~ "Title transaction" means any recorded instrument or

court proceeding that ~~which~~ affects title to any estate or interest in land and that ~~which~~ describes the land sufficiently to identify its location and boundaries.

(5)~~(4)~~ "Property owners' association" ~~The term "homeowners' association"~~ means a homeowners' association as defined in s. 720.301, a corporation or other entity responsible for the operation of property in which the voting membership is made up of the owners of the property or their agents, or a combination thereof, and in which membership is a mandatory condition of property ownership, or an association of parcel owners which is authorized to enforce a community covenant or restriction ~~use restrictions~~ that is ~~are~~ imposed on the parcels.

(3)~~(5)~~ ~~The term~~ "Parcel" means any real property that ~~which is used for residential purposes that is subject to exclusive ownership and which~~ is subject to any covenant or restriction of a property owners' ~~homeowners'~~ association.

(2)~~(6)~~ ~~The term~~ "Covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which a parcel is located which subjects the parcel to any use or other restriction or obligation ~~which may be enforced by a homeowners' association or which authorizes a homeowners' association to impose a charge or assessment against the parcel or the owner of the parcel or which may be enforced by the Florida Department of Environmental Protection pursuant to chapter 376 or chapter 403~~.

Section 3. Section 712.05, Florida Statutes, is amended to read:

712.05 Effect of filing notice.—

(1) A person claiming an interest in land or other right

subject to extinguishment under this chapter ~~a homeowners' association desiring to preserve a covenant or restriction~~ may preserve and protect such interest or right ~~the same~~ from extinguishment by the operation of this chapter ~~act~~ by filing for record, at any time during the 30-year period immediately following the effective date of the root of title, a written notice in accordance with s. 712.06 ~~this chapter~~.

(2) A property owners' association may preserve and protect a community covenant or restriction from extinguishment by the operation of this chapter by filing for record, at any time during the 30-year period immediately following the effective date of the root of title:

(a) A written notice in accordance with s. 712.06; or

(b) A summary notice in substantial form and content as required under s. 720.3032(2); or an amendment to a covenant or restriction that is indexed under the legal name of the property owners' association and references the recording information of the covenant or restriction to be preserved. Failure of a summary notice or amendment to be indexed to the current owners of the affected property does not affect the validity of the notice or vitiate the effect of the filing of such notice.

(3) A ~~Such~~ notice under subsection (1) or subsection (2) preserves an interest in land or other ~~such claim of~~ right subject to extinguishment under this chapter, or a ~~such~~ covenant or restriction or portion of such covenant or restriction, for not less than ~~up to~~ 30 years after filing the notice unless the notice is filed again as required in this chapter. A person's disability or lack of knowledge of any kind may not delay the commencement of or suspend the running of the 30-year period.

Such notice may be filed for record by the claimant or by any other person acting on behalf of a claimant who is:

(a) Under a disability;

(b) Unable to assert a claim on his or her behalf; or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

~~Such notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds of the members of the board of directors of an incorporated homeowners' association at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in s. 712.06(1)(b), was mailed or hand delivered to members of the homeowners' association at least 7 days before such meeting.~~ The property owners' ~~homeowners'~~ association or clerk of the circuit court is not required to provide additional notice pursuant to s. 712.06(3) for a notice filed under subsection (2). The preceding sentence is intended to clarify existing law.

(4) ~~(2)~~ It is ~~shall~~ not ~~be~~ necessary for the owner of the marketable record title, as described in s. 712.02 ~~herein defined~~, to file a notice to protect his or her marketable record title.

Section 4. Subsections (1) and (3) of section 712.06, Florida Statutes, are amended to read:

712.06 Contents of notice; recording and indexing.—

(1) To be effective, the notice referred to in s. 712.05,

other than the summary notice and the amendment referred to in s. 712.05(2)(b), must ~~shall~~ contain:

(a) The name or description and mailing address of the claimant or the property owners' ~~homeowners'~~ association desiring to preserve any covenant or restriction ~~and the name and particular post office address of the person filing the claim or the homeowners' association~~.

(b) The name and mailing ~~post office~~ address of an owner, or the name and mailing ~~post office~~ address of the person in whose name the ~~said~~ property is assessed on the last completed tax assessment roll of the county at the time of filing, who, for purpose of such notice, shall be deemed to be an owner; ~~provided,~~ however, if a property owners' ~~homeowners'~~ association is filing the notice, ~~then~~ the requirements of this paragraph may be satisfied by attaching to and recording with the notice an affidavit executed by the appropriate member of the board of directors of the property owners' ~~homeowners'~~ association affirming that the board of directors of the property owners' ~~homeowners'~~ association caused a statement in substantially the following form to be mailed or hand delivered to the members of that property owners' ~~homeowners'~~ association:

STATEMENT OF MARKETABLE TITLE ACTION

The [name of property owners' ~~homeowners'~~ association] (the "Association") has taken action to ensure that the [name of declaration, covenant, or restriction], recorded in Official Records Book ...., Page ...., of the public records of .... County, Florida, as may be amended from time to time, currently

burdening the property of each and every member of the Association, retains its status ~~as the source of marketable title~~ with regard to the affected real property ~~the transfer of a member's residence~~. To this end, the Association shall cause the notice required by chapter 712, Florida Statutes, to be recorded in the public records of .... County, Florida. Copies of this notice and its attachments are available through the Association pursuant to the Association's governing documents regarding official records of the Association.

(c) A full and complete description of all land affected by such notice, which description shall be set forth in particular terms and not by general reference, but if said claim is founded upon a recorded instrument or a covenant or a restriction, ~~then~~ the description in such notice may be the same as that contained in such recorded instrument or covenant or restriction, provided the same shall be sufficient to identify the property.

(d) A statement of the claim showing the nature, description, and extent of such claim or other right subject to extinguishment under this chapter or, in the case of a covenant or restriction, a copy of the covenant or restriction or a reference to the book and page or instrument number in which the same is recorded, except that it is ~~shall~~ not ~~be~~ necessary to show the amount of any claim for money or the terms of payment.

(e) If such claim or other right subject to extinguishment under this chapter is based upon an instrument of record or a recorded covenant or restriction, such instrument of record or recorded covenant or restriction shall be deemed sufficiently described to identify the same if the notice includes a

reference to the book and page in which the same is recorded.

(f) Such notice shall be acknowledged in the same manner as deeds are acknowledged for record.

(3) The person providing the notice referred to in s. 712.05, other than a notice for preservation of a community covenant or restriction, shall:

(a) Cause the clerk of the circuit court to mail by registered or certified mail to the purported owner of said property, as stated in such notice, a copy thereof and shall enter on the original, before recording the same, a certificate showing such mailing. For preparing the certificate, the claimant shall pay to the clerk the service charge as prescribed in s. 28.24(8) and the necessary costs of mailing, in addition to the recording charges as prescribed in s. 28.24(12). If the notice names purported owners having more than one address, the person filing the same shall furnish a true copy for each of the several addresses stated, and the clerk shall send one such copy to the purported owners named at each respective address. Such certificate shall be sufficient if the same reads substantially as follows:

I hereby certify that I did on this ...., mail by registered (or certified) mail a copy of the foregoing notice to each of the following at the address stated:

...(Clerk of the circuit court)...
of .... County, Florida,
By...(Deputy clerk)...

The clerk of the circuit court is not required to mail to the purported owner of such property any such notice that pertains solely to the preserving of any covenant or restriction or any portion of a covenant or restriction; or

(b) Publish once a week, for 2 consecutive weeks, the notice referred to in s. 712.05, with the official record book and page number in which such notice was recorded, in a newspaper as defined in chapter 50 in the county in which the property is located.

Section 5. Section 712.11, Florida Statutes, is amended to read:

712.11 Covenant revitalization.—A property owners' ~~homeowners'~~ association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

Section 6. Section 712.12, Florida Statutes, is created to read:

712.12 Covenant or restriction revitalization by parcel owners not subject to a homeowners' association.—

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

(a) "Community" means the real property that is subject to a covenant or restriction that is recorded in the county where the property is located.

(b) "Covenant or restriction" means any agreement or limitation imposed by a private party and not required by a governmental agency as a condition of a development permit, as defined in s. 163.3164, which is contained in a document recorded in the public records of the county in which a parcel is located and which subjects the parcel to any use restriction

that may be enforced by a parcel owner.

(c) "Parcel" means real property that is used for residential purposes and that is subject to exclusive ownership and any covenant or restriction that may be enforced by a parcel owner.

(d) "Parcel owner" means the record owner of legal title to a parcel.

(2) The parcel owners of a community not subject to a homeowners' association may use the procedures set forth in ss. 720.403-720.407 to revive covenants or restrictions that have lapsed under the terms of this chapter, except:

(a) A reference to a homeowners' association or articles of incorporation or bylaws of a homeowners' association under ss. 720.403-720.407 is not required to revive the covenants or restrictions.

(b) The approval required under s. 720.405(6) must be in writing, and not at a meeting.

(c) The requirements under s. 720.407(2) may be satisfied by having the organizing committee execute the revived covenants or restrictions in the name of the community.

(d) The indexing requirements under s. 720.407(3) may be satisfied by indexing the community name in the covenants or restrictions as the grantee and the parcel owners as the grantors.

(3) With respect to any parcel that has ceased to be governed by covenants or restrictions as of October 1, 2018, the parcel owner may commence an action by October 1, 2019, for a judicial determination that the covenants or restrictions did not govern that parcel as of October 1, 2018, and that any

revitalization of such covenants or restrictions as to that parcel would unconstitutionally deprive the parcel owner of rights or property.

(4) Revived covenants or restrictions that are implemented pursuant to this section do not apply to or affect the rights of the parcel owner which are recognized by any court order or judgment in any action commenced by October 1, 2019, and any such rights so recognized may not be subsequently altered by revived covenants or restrictions implemented under this section without the consent of the affected parcel owner.

Section 7. Paragraph (e) is added to subsection (2) of section 720.303, Florida Statutes, to read:

720.303 Association powers and duties; meetings of board; official records; budgets; financial reporting; association funds; recalls.—

(2) BOARD MEETINGS.—

(e) At the first board meeting, excluding the organizational meeting, which follows the annual meeting of the members, the board shall consider the desirability of filing notices to preserve the covenants or restrictions affecting the community or association from extinguishment under the Marketable Record Title Act, chapter 712, and to authorize and direct the appropriate officer to file notice in accordance with s. 720.3032.

Section 8. Section 720.3032, Florida Statutes, is created to read:

720.3032 Notice of association information; preservation from Marketable Record Title Act.—

(1) Any property owners' association desiring to preserve

covenants from potential termination after 30 years by operation of chapter 712 may record in the official records of each county in which the community is located a notice specifying:

(a) The legal name of the association.

(b) The mailing and physical addresses of the association.

(c) The names of the affected subdivision plats and condominiums or, if not applicable, the common name of the community.

(d) The name, address, and telephone number for the current community association management company or community association manager, if any.

(e) Indication as to whether the association desires to preserve the covenants or restrictions affecting the community or association from extinguishment under the Marketable Record Title Act, chapter 712.

(f) A listing by name and recording information of those covenants or restrictions affecting the community which the association desires to be preserved from extinguishment.

(g) The legal description of the community affected by the covenants or restrictions, which may be satisfied by a reference to a recorded plat.

(h) The signature of a duly authorized officer of the association, acknowledged in the same manner as deeds are acknowledged for record.

(2) Recording a document in substantially the following form satisfies the notice obligation and constitutes a summary notice as specified in s. 712.05(2)(b) sufficient to preserve and protect the referenced covenants and restrictions from extinguishment under the Marketable Record Title Act, chapter

712.

Notice of ...(name of association)... under s. 720.3032, Florida Statutes, and notice to preserve and protect covenants and restrictions from extinguishment under the Marketable Record Title Act, chapter 712, Florida Statutes.

Instructions to recorder: Please index both the legal name of the association and the names shown in item 3.

1. Legal name of association: ....

2. Mailing and physical addresses of association: ....

3. Names of the subdivision plats, or, if none, common name of community: ....

4. Name, address, and telephone number for management company, if any: .....

5. This notice does .... does not .... constitute a notice to preserve and protect covenants or restrictions from extinguishment under the Marketable Record Title Act.

6. The following covenants or restrictions affecting the community which the association desires to be preserved from extinguishment:

...(Name of instrument)...

...(Official Records Book where recorded & page)...

...(List of instruments)...

...(List of recording information)...

7. The legal description of the community affected by the listed covenants or restrictions is: ...(Legal description, which may be satisfied by reference to a recorded plat)...

This notice is filed on behalf of ...(Name of

association)... as of ...(Date)....

...(Name of association)...

By: ....

...(Name of individual officer)...

...(Title of officer)...

...(Notary acknowledgment)...

(3) A copy of the notice, as filed, must be included as part of the next notice of meeting or other mailing sent to all members.

(4) The original signed notice must be recorded in the official records of the clerk of the circuit court or other recorder for the county.

Section 9. Section 702.09, Florida Statutes, is amended to read:

702.09 Definitions.—For the purposes of ss. 702.07 and 702.08, the words "decree of foreclosure" shall include a judgment or order rendered or passed in the foreclosure proceedings in which the decree of foreclosure shall be rescinded, vacated, and set aside; the word "mortgage" shall mean any written instrument securing the payment of money or advances and includes liens to secure payment of assessments arising under chapters 718 and 719 and liens created pursuant to the recorded covenants of a property owners' ~~homeowners'~~ association as defined in s. 712.01; the word "debt" shall include promissory notes, bonds, and all other written obligations given for the payment of money; the words "foreclosure proceedings" shall embrace every action in the

circuit or county courts of this state wherein it is sought to foreclose a mortgage and sell the property covered by the same; and the word "property" shall mean and include both real and personal property.

Section 10. Subsection (1) of section 702.10, Florida Statutes, is amended to read:

702.10 Order to show cause; entry of final judgment of foreclosure; payment during foreclosure.—

(1) A lienholder may request an order to show cause for the entry of final judgment in a foreclosure action. For purposes of this section, the term "lienholder" includes the plaintiff and a defendant to the action who holds a lien encumbering the property or a defendant who, by virtue of its status as a condominium association, cooperative association, or property owners' ~~homeowners'~~ association, may file a lien against the real property subject to foreclosure. Upon filing, the court shall immediately review the request and the court file in chambers and without a hearing. If, upon examination of the court file, the court finds that the complaint is verified, complies with s. 702.015, and alleges a cause of action to foreclose on real property, the court shall promptly issue an order directed to the other parties named in the action to show cause why a final judgment of foreclosure should not be entered.

(a) The order shall:

1. Set the date and time for a hearing to show cause. The date for the hearing may not occur sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint. When service is obtained by publication, the date for the hearing may not be set sooner than

30 days after the first publication.

2. Direct the time within which service of the order to show cause and the complaint must be made upon the defendant.

3. State that the filing of defenses by a motion, a responsive pleading, an affidavit, or other papers before the hearing to show cause that raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure shall constitute cause for the court not to enter final judgment.

4. State that a defendant has the right to file affidavits or other papers before the time of the hearing to show cause and may appear personally or by way of an attorney at the hearing.

5. State that, if a defendant files defenses by a motion, a verified or sworn answer, affidavits, or other papers or appears personally or by way of an attorney at the time of the hearing, the hearing time will be used to hear and consider whether the defendant's motion, answer, affidavits, other papers, and other evidence and argument as may be presented by the defendant or the defendant's attorney raise a genuine issue of material fact which would preclude the entry of summary judgment or otherwise constitute a legal defense to foreclosure. The order shall also state that the court may enter an order of final judgment of foreclosure at the hearing and order the clerk of the court to conduct a foreclosure sale.

6. State that, if a defendant fails to appear at the hearing to show cause or fails to file defenses by a motion or by a verified or sworn answer or files an answer not contesting the foreclosure, such defendant may be considered to have waived the right to a hearing, and in such case, the court may enter a

default against such defendant and, if appropriate, a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale.

7. State that if the mortgage provides for reasonable attorney fees and the requested attorney fees do not exceed 3 percent of the principal amount owed at the time of filing the complaint, it is unnecessary for the court to hold a hearing or adjudge the requested attorney fees to be reasonable.

8. Attach the form of the proposed final judgment of foreclosure which the movant requests the court to enter at the hearing on the order to show cause.

9. Require the party seeking final judgment to serve a copy of the order to show cause on the other parties in the following manner:

a. If a party has been served pursuant to chapter 48 with the complaint and original process, or the other party is the plaintiff in the action, service of the order to show cause on that party may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If a defendant has not been served pursuant to chapter 48 with the complaint and original process, the order to show cause, together with the summons and a copy of the complaint, shall be served on the party in the same manner as provided by law for original process.

Any final judgment of foreclosure entered under this subsection is for in rem relief only. This subsection does not preclude the entry of a deficiency judgment where otherwise allowed by law. The Legislature intends that this alternative procedure may run

simultaneously with other court procedures.

(b) The right to be heard at the hearing to show cause is waived if a defendant, after being served as provided by law with an order to show cause, engages in conduct that clearly shows that the defendant has relinquished the right to be heard on that order. The defendant's failure to file defenses by a motion or by a sworn or verified answer, affidavits, or other papers or to appear personally or by way of an attorney at the hearing duly scheduled on the order to show cause presumptively constitutes conduct that clearly shows that the defendant has relinquished the right to be heard. If a defendant files defenses by a motion, a verified answer, affidavits, or other papers or presents evidence at or before the hearing which raise a genuine issue of material fact which would preclude entry of summary judgment or otherwise constitute a legal defense to foreclosure, such action constitutes cause and precludes the entry of a final judgment at the hearing to show cause.

(c) In a mortgage foreclosure proceeding, when a final judgment of foreclosure has been entered against the mortgagor and the note or mortgage provides for the award of reasonable attorney fees, it is unnecessary for the court to hold a hearing or adjudge the requested attorney fees to be reasonable if the fees do not exceed 3 percent of the principal amount owed on the note or mortgage at the time of filing, even if the note or mortgage does not specify the percentage of the original amount that would be paid as liquidated damages.

(d) If the court finds that all defendants have waived the right to be heard as provided in paragraph (b), the court shall promptly enter a final judgment of foreclosure without the need

for further hearing if the plaintiff has shown entitlement to a final judgment and upon the filing with the court of the original note, satisfaction of the conditions for establishment of a lost note, or upon a showing to the court that the obligation to be foreclosed is not evidenced by a promissory note or other negotiable instrument. If the court finds that a defendant has not waived the right to be heard on the order to show cause, the court shall determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that the defendant has not shown cause, the court shall promptly enter a judgment of foreclosure. If the time allotted for the hearing is insufficient, the court may announce at the hearing a date and time for the continued hearing. Only the parties who appear, individually or through an attorney, at the initial hearing must be notified of the date and time of the continued hearing.

Section 11. Section 712.095, Florida Statutes, is amended to read:

712.095 Notice required by July 1, 1983.—Any person whose interest in land is derived from an instrument or court proceeding recorded subsequent to the root of title, which instrument or proceeding did not contain a description of the land as specified by s. 712.01(7) ~~s. 712.01(3)~~, and whose interest had not been extinguished prior to July 1, 1981, shall have until July 1, 1983, to file a notice in accordance with s. 712.06 to preserve the interest.

Section 12. Section 720.403, Florida Statutes, is amended to read:

720.403 Preservation of ~~residential~~ communities; revival of

declaration of covenants.—

(1) Consistent with required and optional elements of local comprehensive plans and other applicable provisions of the Community Planning Act, property owners ~~homeowners~~ are encouraged to preserve existing residential and other communities, promote available and affordable housing, protect structural and aesthetic elements of their ~~residential~~ community, and, as applicable, maintain roads and streets, easements, water and sewer systems, utilities, drainage improvements, conservation and open areas, recreational amenities, and other infrastructure and common areas that serve and support the ~~residential~~ community by the revival of a previous declaration of covenants and other governing documents that may have ceased to govern some or all parcels in the community.

(2) In order to preserve a ~~residential~~ community and the associated infrastructure and common areas for the purposes described in this section, the parcel owners in a community that was previously subject to a declaration of covenants that has ceased to govern one or more parcels in the community may revive the declaration and the ~~homeowners'~~ association for the community upon approval by the parcel owners to be governed thereby as provided in this act, and upon approval of the declaration and the other governing documents for the association by the Department of Economic Opportunity in a manner consistent with this act.

(3) Part III of this chapter is intended to provide mechanisms for the revitalization of covenants or restrictions for all types of communities and property associations and is

not limited to residential communities.

Section 13. Section 720.404, Florida Statutes, is amended to read:

720.404 Eligible ~~residential~~ communities; requirements for revival of declaration.—Parcel owners in a community are eligible to seek approval from the Department of Economic Opportunity to revive a declaration of covenants under this act if all of the following requirements are met:

(1) All parcels to be governed by the revived declaration must have been once governed by a previous declaration that has ceased to govern some or all of the parcels in the community;

(2) The revived declaration must be approved in the manner provided in s. 720.405(6); and

(3) The revived declaration may not contain covenants that are more restrictive on the parcel owners than the covenants contained in the previous declaration, except that the declaration may:

(a) Have an effective term of longer duration than the term of the previous declaration;

(b) Omit restrictions contained in the previous declaration;

(c) Govern fewer than all of the parcels governed by the previous declaration;

(d) Provide for amendments to the declaration and other governing documents; and

(e) Contain provisions required by this chapter for new declarations that were not contained in the previous declaration.

Section 14. Subsections (1), (3), (5), and (6) of section

720.405, Florida Statutes, are amended to read:

720.405 Organizing committee; parcel owner approval.—

(1) The proposal to revive a declaration of covenants and an ~~a homeowners'~~ association for a community under the terms of this act shall be initiated by an organizing committee consisting of not less than three parcel owners located in the community that is proposed to be governed by the revived declaration. The name, address, and telephone number of each member of the organizing committee must be included in any notice or other document provided by the committee to parcel owners to be affected by the proposed revived declaration.

(3) The organizing committee shall prepare the full text of the proposed articles of incorporation and bylaws of the revived ~~homeowners'~~ association to be submitted to the parcel owners for approval, unless the association is then an existing corporation, in which case the organizing committee shall prepare the existing articles of incorporation and bylaws to be submitted to the parcel owners.

(5) A copy of the complete text of the proposed revised declaration of covenants, the proposed new or existing articles of incorporation and bylaws of the ~~homeowners'~~ association, and a graphic depiction of the property to be governed by the revived declaration shall be presented to all of the affected parcel owners by mail or hand delivery not less than 14 days before the time that the consent of the affected parcel owners to the proposed governing documents is sought by the organizing committee.

(6) A majority of the affected parcel owners must agree in writing to the revived declaration of covenants and governing

documents of the ~~homeowners'~~ association or approve the revived declaration and governing documents by a vote at a meeting of the affected parcel owners noticed and conducted in the manner prescribed by s. 720.306. Proof of notice of the meeting to all affected owners of the meeting and the minutes of the meeting recording the votes of the property owners shall be certified by a court reporter or an attorney licensed to practice in the state.

Section 15. Subsection (3) of section 720.407, Florida Statutes, is amended to read:

720.407 Recording; notice of recording; applicability and effective date.—

(3) The recorded documents shall include the full text of the approved declaration of covenants, the articles of incorporation and bylaws of the ~~homeowners'~~ association, the letter of approval by the department, and the legal description of each affected parcel of property. For purposes of chapter 712, the association is deemed to be and shall be indexed as the grantee in a title transaction and the parcel owners named in the revived declaration are deemed to be and shall be indexed as the grantors in the title transaction.

Section 16. This act shall take effect October 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: December 5, 2017

I respectfully request that **Senate Bill #266**, relating to Covenants and Restrictions, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

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

1-10-2018
Meeting Date

SB 266
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name Pete Dunbar

Job Title _____

Address 215 S. Monroe
Street

Phone 999-4100

Tallahassee 32312
City *State* *Zip*

Email pdunbar@deenmead.com

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

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

Representing Real Property Section

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

Lobbyist registered with Legislature: [X] 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)

1/10/18
Meeting Date

266
Bill Number (if applicable)

Topic Covenants & Restrictions (MRTA)

Amendment Barcode (if applicable)

Name Travis Moore

Job Title

Address P.O. Box 2020
Street

Phone 727.421.6902

St. Petersburg FL 33731
City *State* *Zip*

Email travis@moore-relations.com

Speaking: ☑ For ☐ Against ☐ Information

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

Representing Community Associations Institute (CAI)

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 Judiciary

BILL:	SB 676
INTRODUCER:	Senator Passidomo
SUBJECT:	Equitable Distribution of Marital Assets and Liabilities
DATE:	January 9, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Favorable**
2.			BI	
3.			RC	

I. Summary:

SB 676 amends the categories of "marital assets and liabilities" that may be equitably distributed during divorce proceedings in response to the Florida Supreme Court's 2010 decision in *Kaaa v. Kaaa*. The bill partially codifies the *Kaaa* decision by expressly including the passive appreciation of real property owned by only one spouse as an asset that may be distributed between the spouses if marital funds are used to pay down the property's mortgage principal.

However, the bill partially overrules the *Kaaa* decision in two ways. First, the bill provides that a nonowner spouse does not also have to actively contribute to the appreciation of the home in order to be entitled to passive appreciation. Rather, it is sufficient that martial funds are used to pay down the mortgage. Second, the bill replaces the calculation method set out in *Kaaa* with a three-step calculation method incorporating a "coverture fraction" designed to measure the parties' actual martial contributions in paying down the mortgage.

Finally, with respect to any marital property that is equitably distributed, the bill authorizes the courts to recognize the time value of money in determining the amount of installment payments to be paid by one party to another. This may include requiring the party responsible for payments to provide security and a reasonable rate of interest or something similar.

II. Present Situation:

Statutory Framework for the Equitable Distribution of Marital Assets and Liabilities

When a couple divorces in Florida, assets (i.e., property) and liabilities (i.e., debts) acquired by the couple during the marriage are subject to "equitable distribution."[1] Equitable distribution is

[1] Section 61.075, F.S.

based on the premise that "marriage is a partnership"[2] and the assets and liabilities acquired *during* the marriage belong to both spouses equally. Thus, Florida courts "must begin with the premise that the distribution" of marital assets and liabilities to divorcing spouses "should be equal."[3]

Under Florida law, "martial assets and liabilities" generally include:

- Assets and liabilities acquired or incurred by either spouse during the marriage.[4]
- The appreciation in value of a nonmarital asset as a result of "either" the efforts or marital labor "of either party during the marriage" or from the contribution of marital funds, "or both."[5]
- Gifts from one spouse to the other during the marriage.[6]
- Vested and non-vested retirement and insurance benefits that accrued during the marriage.[7]
- Real property held as tenants by the entirety during the marriage.[8]
- Jointly titled personal property held as tenants by the entirety during the marriage.[9]

However, Florida has a dual-property system, meaning "[t]he property of the parties is categorized either as 'marital property,' which can be equitably divided by the court at divorce, or 'separate property,' which is not subject to division."[10] Florida law refers to separate property as "nonmarital assets and liabilities."[11]

Nonmartial assets and liabilities generally include:

- Assets (property) or liabilities (debts) acquired *prior* to the marriage.[12]
- Gifts or an inheritance received separately by one spouse from a third party.[13]
- All income from nonmartial assets during the marriage (for example, income derived from renting a nonmarital home when deposited into a separate bank account) unless the income was treated as or relied on as a marital asset by the parties (for example, the income derived from renting a nonmarital home is deposited into a joint bank account and relied upon by both spouses as income).[14]

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[2] Emily Osborn, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 Wis. L. Rev. 903, 909 (1990) (noting Florida enacted uniform model legislation).
[3] Section 61.075(1), F.S.; *see also* Osborn, *supra* note 1, at 909-10 & n. 32.
[4] Section 61.075(6)(a)1.a., F.S. *See also Rosenfeld v. Rosenfeld*, 597 So. 2d 835, 837 (Fla. 3d DCA 1992) (stating that once the spouses married, "each spouse's income during the marriage was marital income.").
[5] Section 61.075(6)(a)1.b., F.S.
[6] Section 61.075(6)(a)1.c., F.S.
[7] Section 61.075(6)(a)1.d., F.S.
[8] Section 61.075(6)(a)2., F.S.
[9] Section 61.075(6)(a)3., F.S. The presumption that gifts and jointly held real and personal property are martial assets may be rebutted by the spouse claiming they are not marital property. s. 61.075(6)(a)2.-4., F.S.
[10] Osborn, *supra* note 1, at 910.
[11] Section 61.075(6)(b), F.S.
[12] Section 61.075(6)(b)1., F.S. If the asset or liability is exchanged to acquire a new asset or incur a new liability, the new asset or liability will also be deemed nonmarital. *Id.*
[13] Section 61.075(6)(b)2., F.S. If the gift or bequest is exchanged to acquire a new asset, the asset will be deemed nonmarital property. *Id.*
[14] Section 61.075(b)(b)3., F.S.

- Assets and liabilities excluded from martial property by agreement (for example, a prenuptial agreement).[15]
- Any liability incurred where one spouse forges the signature of the other spouse without authorization.[16]

Equitable Distribution of Passive Home Value Appreciation to the Nonowner Spouse under *Kaaa*[17]

In the case of *Kaaa v. Kaaa*, the Florida Supreme Court addressed how to calculate one specific type of marital asset: the appreciation of a nonmartial real property through either martial funds or marital effort or both.[18] The *Kaaa* Court held that, when martial funds are used to pay the mortgage on a home, a nonowner spouse may be entitled to half of not only the active appreciation in value of the home, but also the *passive* appreciation in the value of the home during the marriage.[19] Passive appreciation of a home is the increase in the value of the home caused by market forces (such as inflation),[20] whereas the active appreciation of a home is caused by the actions of the owner or nonowner spouse (such as reducing the mortgage principal, renovating a kitchen, or adding a carport).[21]

The Facts of Kaaa

Mr. and Mrs. Kaaa were married for 27 years. They lived in a home purchased only six months prior to the marriage by the former husband, Mr. Kaaa.[22] During those 27 years, the home had passively increased in value from its original purchase price of $36,500 in 1980, to $225,000 in 2007. When he purchased the home, Mr. Kaaa made a $2,000 down payment and secured a mortgage to finance the rest of the purchase price. The mortgage was paid by martial funds throughout the marriage, and at the time of divorce, the mortgage principal had been reduced by $22,279, leaving a $12,871 balance. Additionally, marital funds were used to add a carport, which increased the value of the home by $14,400. However, Mrs. Kaaa, the former wife, was never granted any legal interest in the home even though the home was refinanced several times during the marriage. Thus, because the home was titled only to Mr. Kaaa, the home was determined to be his separate, nonmarital property.[23]

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[15] Section 61.075(b)(b)4., F.S. If the excluded asset or liability is exchanged to acquire a new asset or incur a new liability, the new asset or liability is likewise excluded as marital property.
[16] Section 61.075(b)(b)5., F.S.
[17] 58 So. 2d 867 (Fla. 2010).
[18] *Kaaa*, 58 So. 2d at 872 (addressing how to determine an award of passive appreciation). The applicable provision was renumbered after *Kaaa* from s. 61.075(5)(a)(2), F.S. to s. 61.075(6)(a)1.b., F.S.
[19] *Id.* at 870-71 ("we conclude that the passive appreciation of a nonmarital asset, such as the Kaaa's marital home, is properly considered a martial asset where martial funds or the efforts of either party contributed to the appreciation . . . We agree with the reasoning in *Stevens* to the extent that it concludes that the payment of the *mortgage* with marital funds subjected the passive appreciation to equitable distribution. However, we emphasize here that it is the passive appreciation in the value of the home that is the martial asset, not the home itself.")
[20] *Id.* at 869-70.
[21] *See generally Mitchell v. Mitchell*, 841 So. 2d 564, 567 (Fla. 2d DCA 2003) ("the enhancement in value of a nonmarital asset resulting from either party's nonpassive efforts or the expenditure of marital funds is a marital asset") (*overruled sub silento by Kaaa*, 58 So. 2d at 870).
[22] *Kaaa*, 58 So. 2d at 869.
[23] *Id.*

During the divorce proceedings, the nonowner spouse, Mrs. Kaaa, argued that she was entitled not only to half of the active appreciation in the value of the home (pay down of the mortgage principal and addition of the carport), but also the passive appreciation of the home during the 27-year marriage (increase from $36,500 to $225,000). However, the trial court held that she was only entitled to half of the active appreciation. The active appreciation was only $36,679 ($22,279 mortgage amount paid + $14,400 for carport), so Mrs. Kaaa's half share was only $18,339.50.[24]

Mrs. Kaaa appealed. On appeal, the Second District Court of Appeal affirmed the trial court's order awarding Mrs. Kaaa only active appreciation. [25] But the Second District certified conflict with a decision of the First District Court of Appeal, *Stevens v. Stevens*,[26] which held that passive appreciation may be treated as a marital asset subject to distribution.[27] The *Stevens* case also set out a fraction to calculate each former spouses' portion of the home's passive appreciation.[28]

Calculating Passive Appreciation under Kaaa

On review by the Florida Supreme Court, first, the Court reversed the Second District's *Kaaa* decision[29] and approved the holding in *Stevens*, that a nonowner spouse may be entitled to a portion of the value of passive appreciation of a home when marital funds paid the mortgage.[30] Second, the Court explained how to calculate the amount of passive appreciation to be equitably distributed and set out the following steps the trial court must take, which incorporates a fraction set out in *Stevens*:

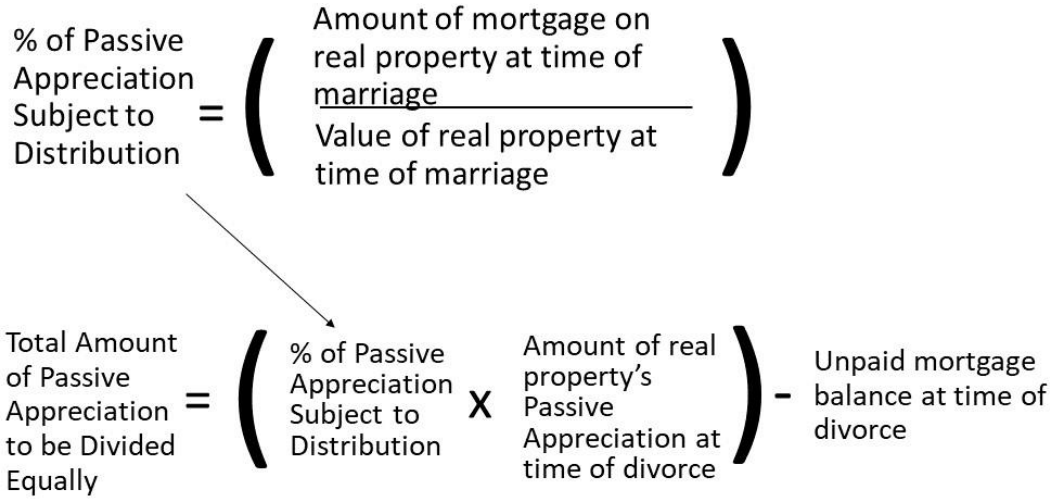
1.) Determine the overall fair market value of the home.

2.) Determine whether there is passive appreciation in the home's value.

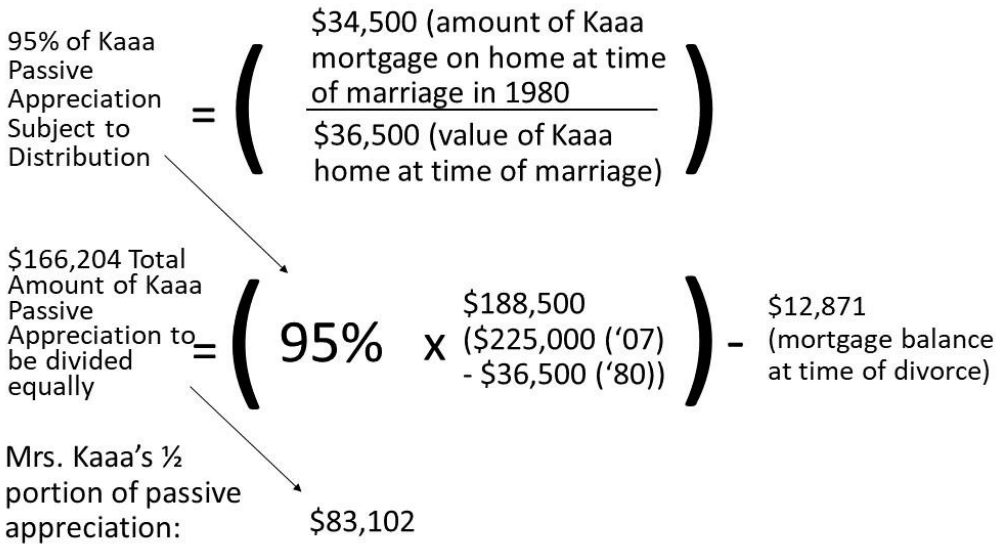
3.) Determine whether the passive appreciation is a marital asset. The *Kaaa* Court further announced that the trial court must make the following factual findings under this step:
(a) whether marital funds were used to pay the mortgage;
(b) whether the nonowner spouse made contributions to the property; and
(c) the extent to which the contributions of the nonowner spouse affected the appreciation of the property.[31]

4.) Determine the value of the passive appreciation subject to equitable distribution. Under this step, the *Kaaa* Court announced that courts should utilize the fraction set out in *Stevens* to allocate the value of passive appreciation when the mortgage on nonmarital real property is repaid entirely by marital funds:[32]

[24] *Id.*
[25] *Kaaa v. Kaaa,* 9 So. 3d 756, 757 (Fla. 2d DCA 2009).
[26] *Id.; Stevens v. Stevens*, 651 So. 2d 1306 (Fla. 1st DCA 1995).
[27] *Id.* at 1307.
[28] *Id.*
[29] *Kaaa v. Kaaa,* 9 So. 3d 756, 757 (Fla. 2d DCA 2009).
[30] *Kaaa*, 58 So. 2d at 871.
[31] *Id.* at 872.
[32] *Id.*



The Florida Supreme Court remanded the case to the trial court to do the math, so the ultimate result is unknown. But applying the fraction above to the known numbers in the *Kaaa* case, the result appears to be that Mrs. Kaaa would have been entitled to $83,102 for passive appreciation:



Adding together Mrs. Kaaa's share of the passive appreciation ($83,102) to her share of the active appreciation based on the pay down of the mortgage and the carport renovation ($18,339.50), Mrs. Kaaa's share of the home value appreciation may have been around $101,441.50. This combined total amount of appreciation is approximately 45% of the home's fair market value.

The Florida Bar Family Law Section's Concern with the *Kaaa*[33] Formulation

While The Florida Bar Family Law Section (Section) agrees with *Kaaa*'s holding that a nonowner spouse should be entitled to some portion of the passive appreciation value when the mortgage on a real property is paid down with marital funds, the Section is concerned about the

[33] 58 So. 2d 867 (Fla. 2010).

formula set out in *Kaaa*. The Section views the *Kaaa* formula as arbitrary because it fails to take into account the actual contributions of each party in paying down the mortgage during the marriage. The Section proposes, instead, that a "coverture fraction" be utilized in place of the *Stevens* fraction adopted by *Kaaa*, which replaces the numerator (top number) with the amount of mortgage principal paid down *during* the marriage.[34]

$$\text{\% of Passive Appreciation Subject to Distribution} = \left(\frac{\text{Total payment of mortgage principal from marital funds during marriage}}{\text{Value of real property at time of marriage or of mortgage}} \right)$$

In Florida, coverture[35] fractions are often used in determining a spouse's marital share of military and pension or retirement benefits, which are viewed as moving targets since these benefits may increase or decrease based on the markets.[36] In the retirement context, "[t]he coverture fraction is the proportion of years worked during the marriage to total number of years worked."[37] "The numerator [top number] represents that portion of the benefit, enhanced or not, that was legally and beneficially acquired during the marriage."[38] "The denominator [bottom number] is the total number of years worked up to retirement."[39] "The longer the employee spouse works, the larger the denominator [of the coverture fraction], thus reducing the non-employee spouse's percentage share and assuring the employee spouse the benefits of his or her post-divorce labors."[40]

A coverture fraction generally works the same outside the retirement context. It is a specifically tailored fraction based on the divorcing couple's particular circumstances that aims to insure "that the equitable distribution pot includes only that portion of the working spouse's labor which constitutes a 'shared enterprise.'"[41] Generally, large denominators [bottom numbers] favor the owner spouse, whereas large numerators [top numbers] favor nonowner spouses.[42]

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[34] Conversation with David Manz, The Florida Bar Family Law Section (Nov. 16, 2017); Family Law Section of The Florida Bar, *Proposed Equitable Distribution Legislation* (2017) (on file with the Senate Judiciary Committee).

[35] "*Coverture* is by law applied to the state and condition of a married woman, who is *sub potestati viri*, (under the power of her husband) and therefore unable to contract with any to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof." BLACK'S LAW DICTIONARY (10th ed. 2014) (citing *The Pocket Lawyer and Family Conveyancer* 96 (3d ed. 1833)).

[36] *See Parry v. Parry*, 933 So. 2d 9, 14 (Fla. 2d DCA 2006); *In re Marriage of Hug*, 201 Cal. Rptr. 676, 681 (Ct. App. 1984). *See also* JERRY REISS & KDOUGLAS H. REYNOLDS, *The Not-So-Simple Coverture Fraction: Do Attorneys Risk More Than Embittered Clients?*, Fla. B.J., MAY 1996, at 62, 63

[37] *Eisenhardt v. Eisenhardt*, 740 A.2d 164, 166 (App. Div. 1999).

[38] *Id.* (citations and internal quotation marks omitted).

[39] *Id.*

[40] *Barr v. Barr*, 11 A.3d 875, 884 (App. Div. 2011). (quoting *Reinbold v Reinbold*, 710 A.2d 556 (App. Div.1998)).

[41] *Id.* (quoting *Eisenhardt* at 581).

[42] David Clayton Conrad, *The Complete QDRO Handbook, Dividing ERISA, Military, and Civil Service Pensions and Collecting Child Support from Employee Benefit Plans*, p. 53, American Bar Association, Section of Family Law, (3d ed. 2009), available at https://books.google.com/books?id=huTtOPnR318C&pg=PA57&lpg=PA57&dq=simple+definition+coverture+fraction&source=bl&ots=cj8On51Qu7&sig=9oaLHheB_HQ7Fa7-O4gtZf6I6aA&hl=en&sa=X&ved=0ahUKEwiH9euM5qrYAhXLS98KHZVJAeY4ChDoAQhEMAU#v=onepage&q=simple%20definition%20coverture%20fraction&f=false (last visited Dec. 27, 2017).

According to the Section, the proposed coverture fraction is designed to measure the actual martial contributions of each party in paying down the mortgage during the marriage when measuring passive appreciation. The Section believes the formula is more fair and equitable to the owner spouse. While the nonowner spouse may receive much less under the coverture formula than the *Kaaa* formula, the Section notes that the coverture formula *only* applies to passive appreciation (market forces and inflation), and that the nonowner spouse is still entitled to a 50 percent share of active appreciation.[43]

Additionally, the Section notes that the removal of the word "either" in the current statutory definition of "marital assets and liabilities" further ensures that a nonowner spouse does not *actively* have to contribute anything financially to be entitled to passive appreciation, as suggested by *Kaaa*.[44] Rather, all income earned *during* the marriage, even if earned by only one spouse, is martial income, and all contributions towards the home during the marriage, even if contributed by only one spouse, are deemed marital labor.[45]

III. Effect of Proposed Changes:

The bill amends the categories of "marital assets and liabilities" that may be divided between divorcing spouses to partially codify the Florida Supreme Court's 2010 *Kaaa* decision, by specifically including the situation addressed in *Kaaa*—where "marital funds" were used to help pay down the mortgage principal on a separate, nonmartial home.

The bill also partially overrules the *Kaaa* decision in two ways. First, the bill removes the word "either" in defining appreciation as a marital asset to clarify that a nonowner spouse does not have to actively contribute to the appreciation of the home in order to be entitled to passive appreciation. Second, to determine the amount of passive appreciation subject to distribution, the bill replaces the calculation method and *Stevens* fraction set out in *Kaaa* with a three-step calculation method incorporating a "coverture fraction."

[43] Conversation with David Manz, The Florida Bar Family Law Section (Nov. 16, 2017); Family Law Section of the Florida Bar, *Proposed Equitable Distribution Legislation* (2017) (on file with the Senate Judiciary Committee).
[44] *Kaaa v. Kaaa*, 58 So. 3d at 872 ("Third, the court must determine whether the passive appreciation is a marital asset under section 61.075(5)(a)(2). This step must include findings of fact by the trial court that marital funds were used to pay the mortgage *and* that the nonowner spouse made contributions to the property.") (emphasis added).
[45] Conversation with David Manz, The Florida Bar Family Law Section (Nov. 16, 2017); Family Law Section of the Florida Bar, *Proposed Equitable Distribution Legislation* (2017) (on file with the Senate Judiciary Committee).

The calculation set out in the bill consists of three steps:

Proposed Bill: Step 1 – Determine Amount of Passive Appreciation

Property Value on divorce date
(– Active appreciation)
(– Additional encumbrances)
– Gross Value on Date of Marriage
= *Amount of Passive Appreciation

Proposed Bill: Step 2 –Use Coverture Formula to Find % of Real Property's Passive Appreciation Value Accrued During Marriage, Subject to Equitable Distribution

$$\text{\% of Passive Appreciation Subject to Distribution} = \left(\frac{\text{Total payment of mortgage principal from marital funds during marriage}}{\text{Value of real property at time of marriage or of mortgage}} \right)$$

Proposed Bill: Step 3 – Multiply Step 1 Answer and Step 2 Answer to Determine Amount of Passive Appreciation to be Divided Equally Among Spouses

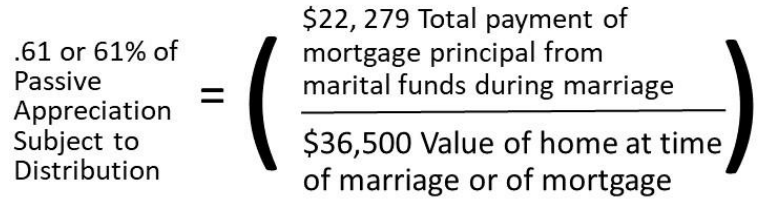
$$\text{Value of Passive Appreciation Divided 50/50 between Spouses} = \left(\text{\% of Value of Passive Appreciation} \times \text{*Amount of Real Property's Passive Appreciation} \right)$$

For example, applying the three-step calculation above to the *Kaaa* numbers, Mrs. Kaaa would have been entitled to 50% less passive appreciation:

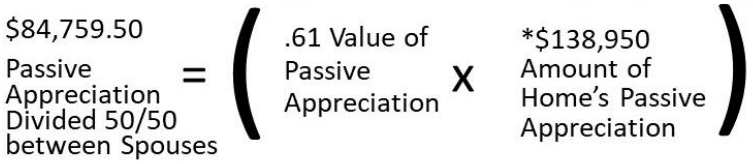
Step 1:

$225,000 Property Value on divorce date
(– $36,679 Active appreciation)
(– $12,871 Additional encumbrances (mortgage balance))
– $36,500 Gross Value on Date of Marriage
= $138,950 *Amount of Passive Appreciation

Step 2:



Step 3:



Thus, Mrs. Kaaa was entitled to $83,102 under *Kaaa* but only $42,379.75 under the new calculation method and coverture formula.

The bill also provides that the courts must apply the new calculation method and coverture formula *unless* a party makes a showing that it would be inequitable to apply the calculation under the circumstances. Thus, returning to the *Kaaa* case by way of example, Mrs. Kaaa could argue that the result of applying the new calculation method and coverture formula would be inequitable in light of her 27-year marriage and loss of her marital home, and the court could agree and equitably distribute the home's appreciation value in a different way.

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of any marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. The bill does not preclude the intended recipient of the installment payments from taking action under the procedures to enforce a judgment, in chapter 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

The bill takes effect July 1, 2018.

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 is likely to have limited impact since it only applies in cases where one spouse owns a separate piece of property that has both appreciated in value and has a mortgage paid down by marital funds. In those limited cases, it appears that nonowner spouse will receive a much smaller percentage of the passive appreciation under the new calculation method and coverture fraction. However, the bill entitles more nonowner spouses to a portion of the passive appreciation by no longer requiring the nonowner spouse to make active contributions to the property as a prerequisite. Additionally, if a party shows that application of the coverture formula would be inequitable under the circumstances, a court may decide to allocate the passive appreciation differently.

C. Government Sector Impact:

The state court system has not provided information on the fiscal impact of the bill to committee staff. However, the bill appears unlikely to add significantly to the workload of the courts because the courts already calculate and allocate any passive appreciation in divorce cases under the *Kaaa* formulation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 61.075 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.

209094

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
01/10/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Steube) recommended the following:

Senate Amendment (with title amendment)

Between lines 98 and 99
insert:
Section 2. Present paragraphs (b), (c), and (d) of subsection (1) of section 61.14, Florida Statutes, are redesignated as paragraphs (c), (d), and (e), respectively, and a new paragraph (b) is added to that subsection, to read:
61.14 Enforcement and modification of support, maintenance, or alimony agreements or orders.—
(1)

209094

(b) A party may file a petition to modify an order for support, maintenance, or alimony at any time. If an appeal of the order is also pending, the court must stay all proceedings on the petition for modification to the extent that the petition overlaps with any issue on appeal.

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

And the title is amended as follows:

Delete lines 2 - 14

and insert:

An act relating to family law; amending s. 61.075, F.S.; redefining the term "marital assets and liabilities" for purposes of equitable distribution in dissolution of marriage actions; providing that the term includes the paydown of principal of notes and mortgages secured by nonmarital real property and certain passive appreciation in such property under certain circumstances; providing formulas and guidelines for determining the amount of such passive appreciation; authorizing the court to require security and interest when installment payments are ordered in the division of assets; providing applicability; amending s. 61.14, F.S.; specifying that a party may file a petition to modify certain orders for support, maintenance, or alimony at any time; requiring a court to stay all proceedings on such petitions if an appeal on the order is also pending to the extent that the petition overlaps with any issue on appeal; providing an

By Senator Passidomo

28-00819-18 2018676__

A bill to be entitled

An act relating to equitable distribution of marital assets and liabilities; amending s. 61.075, F.S.; redefining the term "marital assets and liabilities" for purposes of equitable distribution in dissolution of marriage actions; providing that the term includes the paydown of principal of notes and mortgages secured by nonmarital real property and certain passive appreciation in such property under certain circumstances; providing formulas and guidelines for determining the amount of such passive appreciation; authorizing the court to require security and interest when installment payments are ordered in the division of assets; providing applicability; providing an effective date.

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

Section 1. Paragraph (a) of subsection (6) and subsection (10) of section 61.075, Florida Statutes, are amended to read:

61.075 Equitable distribution of marital assets and liabilities.—

(6) As used in this section:

(a)1. "Marital assets and liabilities" include:

a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.

b. The enhancement in value and appreciation of nonmarital assets resulting ~~either~~ from the efforts of either party during the marriage or from the contribution to or expenditure thereon

28-00819-18 2018676__

of marital funds or other forms of marital assets, or both.

c. The paydown of principal of a note and mortgage secured by nonmarital real property and a portion of any passive appreciation in the property, if the note and mortgage secured by the property are paid down from marital funds during the marriage. The portion of passive appreciation in the property characterized as marital and subject to equitable distribution is determined by multiplying a coverture fraction by the passive appreciation in the property during the marriage.

(I) The passive appreciation is determined by subtracting the gross value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage as described in sub-subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.

(II) The coverture fraction must consist of a numerator, defined as the total payment of principal from marital funds of all notes and mortgages secured by the property during the marriage, and a denominator, defined as the value of the subject real property on the date of the marriage, the date of acquisition of the property, or the date the property was encumbered by the first note and mortgage on which principal was paid from marital funds, whichever is later.

(III) The passive appreciation must be multiplied by the coverture fraction to determine the marital portion of the passive appreciation of the property.

(IV) The total marital portion of the property consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property as described in sub-subparagraph b., not to exceed the total net equity in the property at the date of valuation.

(V) The court shall apply the formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

d.~~c.~~ Interspousal gifts during the marriage.

e.~~d.~~ All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.

2. All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

3. All personal property titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

4. The burden of proof to overcome the gift presumption shall be by clear and convincing evidence.

(10)(a) To do equity between the parties, the court may, in lieu of or to supplement, facilitate, or effectuate the equitable division of marital assets and liabilities, order a monetary payment in a lump sum or in installments paid over a fixed period of time.

(b) If installment payments are ordered, the court may require security and a reasonable rate of interest or may otherwise recognize the time value of the money to be paid in the judgment or order.

(c) This subsection does not preclude the application of chapter 55 to any subsequent default.

Section 2. This act shall take effect July 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: November 21, 2017

I respectfully request that **Senate Bill #676**, relating to Equitable Distribution of Marital Assets and Liabilities, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

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

JAN 10 2018
Meeting Date

676
Bill Number (if applicable)

Topic EQUITABLE DISTRIBUTION

Amendment Barcode (if applicable)

Name DAVID L. MANZ

Job Title MANZ LAW FIRM OWNER/ATTORNEY

Address 5701 OVERSEAS Highway Suite 7
Street

Phone 305.743.2357

Email dlm@gmpalaw.com

City *State* *Zip*

Speaking: ☑ For ☐ Against ☐ Information

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

Representing THE FLORIDA BAR FAMILY 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.

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 Judiciary

BILL:	SB 804
INTRODUCER:	Senator Passidomo
SUBJECT:	Possession of Real Property
DATE:	January 9, 2018
REVISED:	01/10/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Favorable**
2.			CA	
3.			RC	

I. Summary:

SB 804 amends and modernizes real property provisions controlling ejectment, unlawful and forcible entry, and unlawful detainer actions. The bill also creates a section of statute governing the "customary use" of private property for public use.

Ejectment, unlawful and forcible entry, and unlawful detainer actions all involve a person entitled to possession of real property who is wrongfully removed but seeks to recover possession of the property. The current statutes are amended in this bill to:

- Create new definitions,
- Clarify which courts have jurisdiction,
- Modernize statutory pleading requirements, and
- Provide remedies.

A final section of the bill addresses the common law doctrine of customary use, or the general right of the public to use and access the dry sand area of a beach on private property. The bill creates a section stating that a common law claim of customary use must apply to a particular parcel and must be determined by a court. This change effectively precludes the use of local government ordinances to establish broad rights to access private property with little notice to affected property owners.

II. Present Situation:

Ejectment Actions

An ejectment action is a legal proceeding in which a person who is wrongfully ejected from real property seeks to recover possession of that property as well as damages and costs. In these actions, the plaintiff must allege that he or she has:

- Title to the land,

- Been wrongfully deprived or dispossessed, and
- Suffered damages.[1]

Chapter 66, Ejectment, provides little statutory framework for ejectment actions. The little statutory framework that exists provides that the common law practice of naming fictitious parties is abolished and establishes some minor procedural, verdict, and judgment requirements. The chapter, however, does not provide for basic elements of ejectment actions such as a definition of "ejectment" or establish which trial court maintains jurisdiction or address whether presuit notice[2] is necessary in beginning an action. While some of these provisions are established in case law, it would be helpful to practitioners if these items were set forth in the ejectment chapter.

Forcible Entry and Unlawful Detainer Actions

Chapter 82, which addresses Forcible Entry and Unlawful Detainer, is intended to provide a peaceful and efficient process for someone to recover possession of real property that is unlawfully taken from them.

Unlawful Entry and Forcible Entry

The "unlawful entry and forcible entry" statute prohibits a person from entering any lands or tenements, except when that entry is permitted by law, and prohibits a person when entry is permitted from entering with "strong hand or with multitude of people." The statute permits entry only in "a peaceable, easy and open manner."[3]

Unlawful Entry and Unlawful Detention

The "unlawful entry and unlawful detention" statute states that no person who enters without consent into any lands or tenements "in a peaceable, easy and open manner" may "hold them afterwards against the consent of" someone who is entitled to possess them. This action does not apply to residential tenancies, which are governed by the Landlord and Tenant Act.[4]

Remedies, Summary Procedure, and Time Limit for an Action

The next section of the statutes relating to unlawful detention provides a remedy for the party who is turned out or deprived of possession by "unlawful entry or forcible entry" and states that he or she is entitled to the summary procedure[5] for the expeditious resolution of the action within 3 years afterwards.[6]

[1] BLACK'S LAW DICTIONARY (10th ed. 2014).
[2] Several provisions in statute require a plaintiff to notify prospective defendants before filing a lawsuit. See, for example, ss. 70.001, 400.0233, 429.293, and 766.106.
[3] Section 82.01, F.S.
[4] Section 82.02, F.S.
[5] Summary procedure is set forth in s. 51.01, F.S. A summary procedure is a non-jury proceeding designed to settle a matter in a relatively prompt and simple manner. BLACK'S LAW DICTIONARY (10th ed. 2014).
[6] Section 82.03, F.S.

Title Questions

An action for forcible entry and unlawful detainer may only address the right of possession and damages. No question of title is involved in the action.

Presuit Notice

This chapter does not require presuit notice by a plaintiff. However, because the chapter is silent, it may lead to confusion as to whether presuit notice is required.

Customary Use

Florida Constitution

In Florida, the public has the right to access shorelines and beaches that are located below what is referred to as the "mean high tide line." The State Constitution, in Article X, section 11, provides that "title to the lands under navigable waters, within the boundaries of the state . . . including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people."[7] This is known as the common law public trust doctrine.

State Statute

The beaches of the state include additional land beyond what is described in the public trust doctrine. The dry sands above the mean high water line may be owned privately, as recognized by statute.[8] Additionally, the Legislature has noted in its State Comprehensive Plan, Coastal and Marine Resources, that it is a policy to "Ensure the public's right to reasonable access to beaches."[9]

Florida Supreme Court

The courts have recognized the public's ability to acquire rights to the dry sand areas of privately owned sections of a beach but have not rendered many decisions in the area. In 1974, the Florida Supreme Court generally established the customary use doctrine in Florida when it held:

> If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.[10]

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[7] Sea Grant Florida, the University of Florida, *Common Law Tools to Promote Beach Access*, https://www.flseagrant.org/wateraccess/common-law-statutes/ (last visited Jan. 8, 2018).
[8] Section 177.28, F.S.
[9] Section 187.201(8)(b)2., F.S.
[10] *City of Daytona Beach v. Tona-Rama, Inc*., 294 So. 2d 73, 78 (1974).

Attorney General Opinion

The Florida Attorney General issued an opinion in 2002[11] addressing the regulation of the dry sand portion of beaches. The City of Destin adopted a beach management ordinance to provide for the regulation of public use and conduct on the beach. The Sheriff of Okaloosa County and the mayor of Destin inquired about the regulation. The Attorney General issued three findings in its opinion:

- The City may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
- The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*
- Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.[12]

District Court of Appeal

The customary use doctrine articulated by the Florida Supreme Court was limited in 2007 with a 5th District Court of Appeal decision, *Trepanier v. County of Volusia*.[13] The court noted

> While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.[14]

It should be noted that the court also held that a determination of customary use "requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subject to . . . ."[15]

[11] Op.Att'y Gen. Fla. 2002-38 (2002).
[12] *Id*.
[13] *Trepanier v. County of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007).
[14] *Id*. at 289.
[15] *Id*. at 288 quoting *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995).

Federal Court Decision

The most recent decision published on the customary use doctrine was issued by the U.S. District Court for the Northern District of Florida, in Pensacola, in November, 2017.[16] The Court was asked to decide whether a Walton County customary use ordinance was enacted *ultra vires* or beyond the scope of the county's authority. In its ordinance, Walton County declared that the county's dry sand areas were subject to the customary use doctrine. Accordingly, the ordinance prohibited certain signs, ropes, fences, or chains in the dry sand portion of a beach which were designed to exclude the public from the dry sand area. Violators were subject to a $500 fine.

In its lengthy decision, the Court held that Walton County did not act outside its authority in adopting the ordinance that recognized and regulated customary use.[17] The Court did note, however, that "property owners have a right under Florida law to *de novo* as-applied judicial review and a determination of the existence of customary use rights."[18] The decision was recently appealed to the United States Court of Appeals for the Eleventh Circuit in Atlanta.[19]

It is apparent from these opinions that private individuals and governmental entities are challenged when trying to understand the scope of the customary use doctrine when it affects private property rights.

III. Effect of Proposed Changes:

Ejectment (Section 1)

Three subsections are added to the beginning of chapter 66, F.S., to define ejectment, clarify which court has jurisdiction, and address pre-suit notification.

Definition

The bill adds a "right of action" provision which states that a person with a superior title to possess real property may maintain an ejectment action to recover possession of the property. This addition clarifies what an ejectment action is and reduces confusion to both lay people and practitioners as to when an ejectment action is the appropriate remedy when seeking to recover real property. The absence of a current definition may create confusion as to whether an ejectment action in chapter 82, F.S., or a landlord and tenant action in chapter 83, F.S., is proper.

Jurisdiction

Circuit courts possess exclusive original jurisdiction "in actions of ejectment"[20] as provided in chapter 26, F.S. The addition of this language in the ejectment chapter eliminates any confusion as to where these actions are maintained.

[16] *Alford, et al., v. Walton County*, 3:16-cv-00362-MCR-CJK, Order filed Nov. 22, 2017.
[17] *Id*. at 45.
[18] *Id*.
[19] The case was docketed for appeal on December 27, 2017, and is case 17-15741.
[20] Section 26.012(2)(f), F.S.

Presuit Notice

Language is added which states that a plaintiff is not required to provide any presuit notice or demand to a defendant before an action may be begun. While some civil actions do require presuit notice and demands, this clarifies that ejectment actions do not. The additional language is essentially the codification of case law.

Statutory Pleading Requirements

The bill modernizes and simplifies the statutory language of existing pleading requirements for ejectment actions. However, the pleading requirements are not substantially changed by the bill.

Operation

A new "operation" subsection is added to provide that the ejectment section is "cumulative to other existing remedies and may not be construed to limit other remedies . . . ." This language or similar language is found in other statutes. According to Black's Law Dictionary, a cumulative remedy is a remedy that is "available to a party in addition to another remedy that still remains in force."[21] This additional language is also consistent with case law on ejectment actions.

Forcible Entry and Unlawful Detainer (Sections 2-9)

Definitions

The bill deletes the current definitions of "unlawful entry and forcible entry" and "unlawful entry and unlawful detention" and replaces them with modernized definitions of forcible entry, unlawful detention, and unlawful entry.

A definition of real property is added and means land or any existing permanent or temporary building or structure on the land and any attachments generally held out for the use of persons in possession of the real property. The term "real property" is then used for consistency throughout the section and replaces the term "dwelling" in the remedy for unlawful detention by a transient occupant of residential property. This change in terminology appears to allow for the use of unlawful detainer actions to regain possession of a broader array of properties.

A definition of record titleholder is supplied and means someone who holds title to real property as evidenced by an instrument recorded in the public records of the county where the real property is located.

Applicability

A new section is added to explain when these provisions apply. They do not apply to residential tenancies in the Landlord and Tenant chapter nor do they apply to the possession of real property in the Mobile Home and Recreational Vehicle Parks chapter or the Mobile Park Lot Tenancies chapter.

[21] BLACK'S LAW DICTIONARY (10th ed. 2014).

Remedies, Summary Procedure, and Time Limit for an Action

The bill, consistent with existing statutes and case law, establishes that a person entitled to possession of the real property has a cause of action against someone who obtained possession by forcible entry, unlawful entry, or unlawful detention and may recover possession and damages. However, the bill reorganizes and rewords many of the related statutory requirements and makes few substantive changes. If a court determines that the defendant entered or detained the property in a willful and knowingly wrongful manner, the bill provides that a plaintiff may receive damages that are double the reasonable rental value of the property from the beginning of the wrongful entry or detention until the plaintiff receives possession of the property. This measure of damages is a restatement of existing law. In addition, the bill allows a plaintiff to recover other damages which may include, but are not limited to, damages for waste. Finally, the bill provides that actions for possession and damages may be bifurcated by the court.

The reorganized and reworded statutory provisions continue to provide for the use of the summary judicial procedures to expeditiously resolve forcible entry, unlawful entry, and unlawful detainer actions.

The bill deletes language requiring that summary procedure actions for forcible entry, unlawful entry, and unlawful detainer actions be brought within 3 years after possession has been withheld from the plaintiff.

Advancing the Cause on the Calendar

Language is added in the bill to require a court to "advance the cause of action [for forcible entry, unlawful entry, or unlawful detention] on the calendar." This is a new provision not found in the existing statutes, however, identical language is found in the Landlord and Tenant Act in s. 83.59, F.S., regarding an action for possession after a rental agreement is terminated and a tenant does not vacate the premises. The effect of the language may be to emphasize that courts must ensure that actions using the summary procedure are resolved expeditiously.

Presuit Notice

With respect to notice required before bringing an action for forcible entry, unlawful entry, or unlawful detention, the bill states that no presuit notice is required. This language is consistent with case law and removes any doubt as to whether the presuit notice must be served before bring an action.

Service of Process

The current statute regulating service of process provides that when a defendant cannot be found at his or her usual place of residence, a summons may be served by posting a copy of the summons in a conspicuous place on the property described in the complaint and summons. The bill provides a simplified process to provide notice by posting if personal service on the defendant cannot be obtained. The bill provides that if, after at least two attempts to obtain personal service, a defendant cannot be found in the county where the action is pending and the defendant does not have a usual place of abode in the county or there is no one 15 years old or older residing at that usual place in the county, then the sheriff must serve the summons and

complaint by attaching it to a conspicuous part of the real property involved in the proceeding. At least 6 hours must elapse between the two attempts to obtain personal service.

If the plaintiff anticipates to provide notice using the attachment method described above, the plaintiff must provide the clerk of the court with two additional copies of the summons and complaint and two prestamped envelopes addressed to the defendant. One of the envelopes must be addressed to the defendant's residence, if it is known. The other envelope must be addressed to the defendant's last know business address, if it is known. The clerk must then immediately mail the copies of the summons and complaint by first-class mail, note in the docket that the mailing has occurred, and file a certificate in the court file noting the fact of the mailing and date. The clerk must then file a certificate in the court file noting the fact and date of the mailing. Service is effective on the date of posting or mailing, whichever is later, and at least 5 days must have elapsed after the date of service before a final judgment for removal of the defendant may be entered.[22]

Effect of Judgment

While chapter 82, F.S., currently provides that no judgment for a plaintiff or defendant bars an action of trespass for injury to property or ejectment between the parties regarding the same real property, the bill adds more language. The bill provides that a judgment is not conclusive as to the facts in any future action for ejectment or quiet title. It also states that a judgment rendered pursuant to chapter 82, F.S., may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties with respect to the same real property.

Sections Repealed

The bill repeals s. 82.061, F.S., relating to service of process, s. 82.071, F.S., relating to trials and evidence as to damages, and s. 82.081, F.S., relating to trial and verdict forms. The first two sections are contained in other provisions of the bill and the third section is removed because the forms are outdated.

Customary Use for the Public use of Private Property (Section 10)

The bill states that a common law claim of customary use for the public use of private property must:

- Apply to a particular parcel, and
- Be determined by the court.

This language makes clear that a court, or judicial forum, is the proper place to determine a common law customary use claim and it must be done on a parcel by parcel basis.

The bill takes effect July 1, 2018.

[22] This language is very similar to that found in s. 48.031, F.S., Service of process generally; service of witness subpoenas and s. 48.183, F.S., Service of process in action for possession of premises.

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:

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: 66.021, 82.01, 82.02, 82.03, 82.045, 82.035, 82.04, 82.05, 82.091, and 82.101.
This bill creates section 704.09 of the Florida Statutes.
This bill repeals the following sections of the Florida Statutes: 82.061, 82.071, and 82.081.

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.

By Senator Passidomo

28-00413A-18 2018804__

A bill to be entitled

An act relating to the possession of real property; amending s. 66.021. F.S.; authorizing a person with a superior right to possession of real property to recover possession by ejectment; declaring that circuit courts have exclusive jurisdiction; providing that a plaintiff is not required to provide any presuit notice or demand to a defendant; requiring that copies of instruments be attached to a complaint or answer under certain circumstances; requiring a statement to list certain details; providing for construction; amending s. 82.01, F.S.; redefining the terms "unlawful entry" and "forcible entry"; defining the terms "real property," "record titleholder," and "unlawful detention"; amending s. 82.02, F.S.; exempting possession of real property under part II of ch. 83, F.S., and under chs. 513 and 723, F.S.; amending s. 82.03, F.S.; providing that a person entitled to possession of real property has a cause of action to regain possession from another person who obtained possession of real property by forcible entry, unlawful entry, or unlawful detainer; providing that a person entitled to possession is not required to give a defendant presuit notice; requiring the court to award plaintiff extra damages if a defendant acted in a willful and knowingly wrongful manner; authorizing bifurcation of actions for possession and damages; requiring that an action be brought by summary procedure; requiring the court to advance the

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cause on the calendar; renumbering and amending s. 82.045, F.S.; conforming provisions to changes made by the act; amending s. 82.04, F.S.; requiring that the court determine the right of possession and damages; prohibiting the court from determining question of title unless necessary; amending s. 82.05, F.S.; requiring that the summons and complaint be attached to the real property after two unsuccessful attempts to serve a defendant; requiring a plaintiff to provide the clerk of the court with prestamped envelopes and additional copies of the summons and complaint if the defendant is served by attaching the summons and complaint to the real property; requiring the clerk to immediately mail copies of the summons and complaint and note the fact of mailing in the docket; specifying that service is effective on the date of posting or mailing; requiring that 5 days elapse from the date of service before the entry of a judgment; amending s. 82.091, F.S.; providing requirements after a judgment is entered for the plaintiff or the defendant; amending s. 82.101, F.S.; adding quiet title to the types of future actions for which a judgment is not conclusive as to certain facts; providing that the judgment may be superseded by a subsequent judgment; creating s. 704.09, F.S.; requiring that a claim of customary use for the public use of private property be applied to a particular parcel; providing for judicial determination of claims; repealing s. 82.061, F.S., relating to service of process; repealing s.

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

82.071, F.S., relating to evidence at trial as to damages; repealing s. 82.081, F.S., relating to trial verdict forms; providing an effective date.

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

Section 1. Section 66.021, Florida Statutes, is amended to read:

66.021 Ejectment ~~Procedure~~.—

(1) RIGHT OF ACTION.—A person with a superior right to possession of real property may maintain an action of ejectment to recover possession of the property.

(2) JURISDICTION.—Circuit courts have exclusive jurisdiction in an action of ejectment.

(3) NOTICE.—A plaintiff may not be required to provide any presuit notice or presuit demand to a defendant as a condition to maintaining an action under this section.

(4) ~~(1)~~ LANDLORD NOT A DEFENDANT.—When it appears before trial that a defendant in an action of ejectment is in possession as a tenant and that his or her landlord is not a party, the landlord must ~~shall~~ be made a party before further proceeding unless otherwise ordered by the court.

(5) ~~(2)~~ DEFENSE MAY BE LIMITED.—A defendant in an action of ejectment may limit his or her defense to a part of the property mentioned in the complaint, describing such part with reasonable certainty.

(6) ~~(3)~~ WRIT OF POSSESSION; EXECUTION TO BE JOINT OR SEVERAL.—When plaintiff recovers in an action of ejectment, he or she may have one writ for possession and for~~,~~ damages and

costs or, at his or her election ~~if the plaintiff elects~~, may have separate writs for possession and for damages and costs.

(7) ~~(4)~~ CHAIN OF TITLE.—The ~~Plaintiff with his or her~~ complaint and the ~~defendant with his or her~~ answer must include ~~shall serve~~ a statement setting forth, chronologically, the chain of title upon which the party ~~on which he or she~~ will rely at trial. Copies of each instrument identified in the statement must be attached to the complaint or answer. ~~If any part of the chain of title is recorded,~~ The statement must include ~~shall set forth~~ the names of the grantors and the grantees, the date that each instrument was recorded, and the book and page or the instrument number for each recorded instrument ~~of the record thereof; if an unrecorded instrument is relied on, a copy shall be attached. The court may require the original to be submitted to the opposite party for inspection~~. If a ~~the~~ party relies on a claim or right without color of title, the statement must ~~shall~~ specify how and when the claim originated and the facts on which the claim is based. If defendant and plaintiff claim under a common source, the statement need not deraign title before the common source.

(8) ~~(5)~~ TESTING SUFFICIENCY.—If either party seeks ~~wants~~ to test the legal sufficiency of any instrument or court proceeding in the chain of title of the opposite party, the party must ~~shall~~ do so before trial by motion setting up his or her objections with a copy of the instrument or court proceedings attached. The motion must ~~shall~~ be disposed of before trial. If either party determines that he or she will be unable to maintain his or her claim by reason of the order, that party may so state in the record and final judgment shall be entered for

the opposing ~~opposite~~ party.

(9) OPERATION.—This section is cumulative to other existing remedies and may not be construed to limit other remedies that are available under the laws of this state.

Section 2. Section 82.01, Florida Statutes, is amended to read:

82.01 Definitions ~~"Unlawful entry and forcible entry" defined~~.—As used in this chapter, the term:

(1) "Forcible entry" means entering into and taking possession of real property with force, in a manner that is not peaceable, easy, or open, even if such entry is authorized by a person entitled to possession of the real property and the possession is only temporary or applies only to a portion of the real property.

(2) "Real property" means land or any existing permanent or temporary building or structure thereon, and any attachments generally held out for the use of persons in possession of the real property.

(3) "Record titleholder" means a person who holds title to real property as evidenced by an instrument recorded in the public records of the county in which the real property is located.

(4) "Unlawful detention" means possessing real property, even if the possession is temporary or applies only to a portion of the real property, without the consent of a person entitled to possession of the real property or after the withdrawal of consent by such person.

(5) "Unlawful entry" means the entry into and possessing of real property, even if the possession is temporary or for a

portion of the real property, when such entry is not authorized by law or consented to by a person entitled to possession of the real property ~~No person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner~~.

Section 3. Section 82.02, Florida Statutes, is amended to read:

82.02 Applicability ~~"Unlawful entry and unlawful detention" defined~~.—

(1) This chapter does not apply to residential tenancies under part II of chapter 83 ~~No person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession~~.

(2) This chapter does not apply to the possession of real property under chapter 513 or chapter 723 ~~This section shall not apply with regard to residential tenancies~~.

Section 4. Section 82.03, Florida Statutes, is amended to read:

82.03 Remedies ~~Remedy for unlawful entry and forcible entry~~.—

(1) A person entitled to possession of real property, including constructive possession by a record titleholder, has a cause of action against a person who obtained possession of that real property by forcible entry, unlawful entry, or unlawful detention and may recover possession and damages. The person entitled to possession is not required to notify the prospective defendant before filing the action.

(2) If the court finds that the entry or detention by the defendant is willful and knowingly wrongful, the court must award the plaintiff damages equal to double the reasonable rental value of the real property from the beginning of the forcible entry, unlawful entry, or unlawful detention until possession is delivered to the plaintiff. The plaintiff may also recover other damages, including, but not limited to, damages for waste.

(3) Actions for possession and damages may be bifurcated.

(4) All actions under this chapter must be brought by summary procedure as provided in s. 51.011, and the court shall advance the cause on the calendar ~~If any person enters or has entered into lands or tenements when entry is not given by law, or if any person enters or has entered into any lands or tenements with strong hand or with multitude of people, even when entry is given by law, the party turned out or deprived of possession by the unlawful or forcible entry, by whatever right or title the party held possession, or whatever estate the party held or claimed in the lands or tenements of which he or she was so dispossessed, is entitled to the summary procedure under s. 51.011 within 3 years thereafter~~.

Section 5. Section 82.045, Florida Statutes, is redesignated as section 82.035, Florida Statutes, and amended to read:

82.035 ~~82.045~~ Remedy for unlawful detention by a transient occupant of residential property.—

(1) As used in this section, the term "transient occupant" means a person whose residency in real property ~~a dwelling~~ intended for residential use has occurred for a brief length of

time, is not pursuant to a lease, and whose occupancy was intended as transient in nature.

(a) Factors that establish that a person is a transient occupant include, but are not limited to:

1. The person does not have an ownership interest, financial interest, or leasehold interest in the property entitling him or her to occupancy of the property.

2. The person does not have any property utility subscriptions.

3. The person does not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections.

4. The person does not receive mail at the property.

5. The person pays minimal or no rent for his or her stay at the property.

6. The person does not have a designated space of his or her own, such as a room, at the property.

7. The person has minimal, if any, personal belongings at the property.

8. The person has an apparent permanent residence elsewhere.

(b) Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses, do not establish residency.

(2) A transient occupant unlawfully detains a residential property if the transient occupant remains in occupancy of the residential property after the party entitled to possession of the property has directed the transient occupant to leave.

(3) Any law enforcement officer may, upon receipt of a sworn affidavit of the party entitled to possession that a person who is a transient occupant is unlawfully detaining residential property, direct a transient occupant to surrender possession of residential property. The sworn affidavit must set forth the facts, including the applicable factors listed in paragraph (1)(a), which establish that a transient occupant is unlawfully detaining residential property.

(a) A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense.

(b) A person wrongfully removed pursuant to this subsection has a cause of action for wrongful removal against the person who requested the removal, and may recover injunctive relief and compensatory damages. However, a wrongfully removed person does not have a cause of action against the law enforcement officer or the agency employing the law enforcement officer absent a showing of bad faith by the law enforcement officer.

(4) A party entitled to possession of real property ~~a dwelling~~ has a cause of action for unlawful detainer against a transient occupant pursuant to s. 82.03 ~~s. 82.04~~. The party entitled to possession is not required to notify the transient occupant before filing the action. If the court finds that the defendant is not a transient occupant but is instead a tenant of

residential property governed by part II of chapter 83, the court may not dismiss the action without first allowing the plaintiff to give the transient occupant the notice required by that part and to thereafter amend the complaint to pursue eviction under that part.

Section 6. Section 82.04, Florida Statutes, is amended to read:

82.04 Questions involved in this proceeding ~~Remedy for unlawful detention~~.—The court shall determine only the right of possession and any damages. Unless it is necessary to determine the right of possession or the record titleholder, the court may not determine the question of title.

~~(1) If any person enters or has entered in a peaceable manner into any lands or tenements when the entry is lawful and after the expiration of the person's right continues to hold them against the consent of the party entitled to possession, the party so entitled to possession is entitled to the summary procedure under s. 51.011, at any time within 3 years after the possession has been withheld from the party against his or her consent.~~

~~(2) This section shall not apply with regard to residential tenancies.~~

Section 7. Section 82.05, Florida Statutes, is amended to read:

82.05 Service of process ~~Questions involved in this proceeding~~.—

(1) After at least two attempts to obtain service as provided by law, if the defendant cannot be found in the county in which the action is pending and either the defendant does not

have a usual place of abode in the county or there is no person 15 years of age or older residing at the defendant's usual place of abode in the county, the sheriff must serve the summons and complaint by attaching it to some conspicuous part of the real property involved in the proceeding. The minimum amount of time allowed between the two attempts to obtain service is 6 hours.

(2) If a plaintiff causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of real property involved in the proceeding, the plaintiff must provide the clerk of the court with two additional copies of the summons and the complaint and two prestamped envelopes addressed to the defendant. One envelope must be addressed to the defendant's residence, if known. The second envelope must be addressed to the defendant's last known business address, if known. The clerk of the court shall immediately mail the copies of the summons and complaint by first-class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service is effective on the date of posting or mailing, whichever occurs later, and at least 5 days must have elapsed after the date of service before a final judgment for removal of the defendant may be entered ~~No question of title, but only right of possession and damages, is involved in the action~~.

Section 8. Section 82.091, Florida Statutes, is amended to read:

82.091 Judgment and execution.—

(1) If the court enters a judgment for the plaintiff, the ~~verdict is in favor of plaintiff, the court shall enter judgment~~

~~that~~ plaintiff shall recover possession of the real property that he or she is entitled to and ~~described in the complaint with his or her~~ damages and costs. The court~~, and~~ shall award a writ of possession to be executed without delay and execution for the plaintiff's damages and costs.

(2) If the court enters a judgment for the defendant, the court shall ~~verdict is for defendant, the court shall enter judgment against plaintiff dismissing the complaint and~~ order that the defendant recover costs.

Section 9. Section 82.101, Florida Statutes, is amended to read:

82.101 Effect of judgment.—No judgment rendered either for the plaintiff or the defendant bars any action of trespass for injury to the real property or ejectment between the same parties respecting the same real property. A judgment is not conclusive as to ~~No verdict is conclusive of~~ the facts therein ~~found~~ in any future action for ~~of~~ trespass, ejectment, or quiet title. A judgment rendered either for the plaintiff or the defendant pursuant to this chapter may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties with respect to the same real property ~~or ejectment~~.

Section 10. Section 704.09, Florida Statutes, is created to read:

704.09 Judicial determination; customary use.—A common law claim of customary use for the public use of private property must apply to a particular parcel and must be determined by the court.

Section 11. Section 82.061, Florida Statutes, is repealed.

Section 12. Section 82.071, Florida Statutes, is repealed.

Section 13. Section 82.081, Florida Statutes, is repealed.

Section 14. This act shall take effect July 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: November 21, 2017

I respectfully request that **Senate Bill #804**, relating to Posession of Real Property, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

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

1-10-18
Meeting Date

804
Bill Number (if applicable)

Topic Sec. 10 customary use

Amendment Barcode (if applicable)

Name Jay Liles

Job Title Policy Consultant

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Street

tallahassee fl 32314
City *State* *Zip*

Phone 850-294-5004

Email jliles@fwfonline.org

Speaking: ☐ For ☑ Against ☐ Information

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

Representing Florida Wildlife Federation

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)

1/10/18
Meeting Date

SB 804
Bill Number (if applicable)

Topic Customary Use

Amendment Barcode (if applicable)

Name David A. Theriaque

Job Title Attorney

Address 433 N. Magnolia Drive
Street

Phone 850/224-7332

Tallahassee FL 32308
City *State* *Zip*

Email DAT E THERIABU&LAW.COM

Speaking: ☐ For ☒ Against ☐ Information

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

Representing Special Land Use Counsel for Walton County, FL

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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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)

1/10/19
Meeting Date

804
Bill Number (if applicable)

Topic CUSTOMARY USE

Amendment Barcode (if applicable)

Name TONY ANDERSON

Job Title WALTON COUNTY COMMISSIONER

Address 195 VIA LARGO
Street

SANTA ROSA BCH, FL 32459
City *State* *Zip*

Phone 850/231 2979

Email

Speaking: ☐ For ☒ Against ☐ Information

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

Representing

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

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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)

1/10/18
Meeting Date

804
Bill Number (if applicable)

Topic Customary Right of Use

Amendment Barcode (if applicable)

Name Arlene Smith

Job Title Legislative Affairs

Address 123 W Indiana Ave
Street
DeLand, FL 32720
City *State* *Zip*

Phone 386-405-1552

Email asmith@volusia.org

Speaking: ☐ For ☐ Against ☑ Information

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

Representing

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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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)

1/10/18
Meeting Date

804
Bill Number (if applicable)

Topic "Possession of REAL Property" - custom use

Amendment Barcode (if applicable)

Name Holly Parker Curry

Job Title FL Regional Manager

Address 1229 Mitchell Ave
Street

Tallahassee FL 32303
City *State* *Zip*

Phone 850-567-3393

Email hparker@surfrider.org

Speaking: ☐ For ☒ Against ☐ Information

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

Representing Surfrider Foundation

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

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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)

Meeting Date	Bill Number (if applicable)
	804

Topic _____ Amendment Barcode (if applicable)

Name Pete Dunbar

Job Title _____

Address 215 S. Monroe (Street) Phone 999-4100

Tallahasse (City) 32312 (Zip) Email pdunbar@deanmead.com

Speaking: ☒ For ☐ Against ☐ Information

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

Representing _____

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

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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)

1/10/18
Meeting Date

804
Bill Number (if applicable)

Topic _____

Amendment Barcode (if applicable)

Name DAVID CULLEN

Job Title _____

Address 1674 UNIVERSITY PKWY 296
Street

SARASOTA FL 34243
City *State* *Zip*

Phone 941-323-2404

Email _____

Speaking: ☐ For ☑ Against ☐ Information

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

Representing SIERRA CLUB FL

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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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)

1/10/18
Meeting Date

804
Bill Number (if applicable)

Topic SB 804

Amendment Barcode (if applicable)

Name Gary Hunter

Job Title Attorney

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Street

Tallahassee FL 32301
City *State* *Zip*

Phone 850 222-7500

Email garyh@hgslaw.com

Speaking: ☑ For ☐ Against ☐ Information

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

Representing Walton County Gulf Front Landowners / Stop the Beach Renourishment

Appearing at request of Chair: ☐ Yes ☑ No

Lobbyist registered with Legislature: ☑ Yes ☐ No

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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)

1/10/18
Meeting Date

SB 804
Bill Number (if applicable)

Topic Possession of Real Property

Amendment Barcode (if applicable)

Name Don Book

Job Title

Address 104 W. Jefferson
Street

TLH 32301
City *State* *Zip*

Phone 80-224-3427

Email DonD@RCBookPA.com

Speaking: ☑ For ☐ Against ☐ Information

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

Representing Town of Rosemary Beach

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)

1/10/18
Meeting Date

804
Bill Number (if applicable)

Topic CUSTOMARY USE

Amendment Barcode (if applicable)

Name DOUG RUSSELL

Job Title

Address
Street

Phone 850 445 0206

City *State* *Zip*

Email

Speaking: ☑ For ☐ Against ☐ Information

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

Representing MYSELF

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.

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 Judiciary

BILL:	SB 1002
INTRODUCER:	Senator Passidomo
SUBJECT:	Guardianship
DATE:	January 9, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	**Favorable**
2.			ACJ	
3.			AP	

I. Summary:

SB 1002 identifies several specific actions that circuit court clerks may take when reviewing guardianships. The bill also expressly authorizes designees in the Office of Public and Professional Guardians to receive otherwise confidential documents when investigating guardianships. The circuit court clerks serve as the custodians of guardianship files and must review certain reports to ensure that guardians are correctly performing their responsibilities. The Office of Public and Professional Guardians is authorized to appoint certain types of guardians and investigate and, when appropriate, discipline guardians who violate their statutory duties.

The bill amends provisions in chapter 744, Guardianship, to:

- Expressly authorize the investigative units employed by the Office of Public and Professional Guardians to receive records held by the court or its agencies when investigating a guardian.
- Authorize clerks, when conducting a more involved review of guardianship assets, to conduct audits and cause initial and annual guardianship reports to be audited. The clerk must advise the court of the results of the audit. If the guardian incurs fees or costs when responding to the review or audit and is found guilty of wrongdoing, those expenses may not be paid or reimbursed from the ward's assets. The clerk's advice to the court regarding the audit may not be considered an ex parte communication.
- Permit the clerk to disclose confidential information to the Department of Children and Families or law enforcement agencies which is learned from inspections and audits, but a court order is required to do so.
- Expand the power of a guardian to disclose to the court clerk or an investigator of the Office of Public and Professional Guardians confidential information about a ward which is related to a review of records and documents involving assets, the beginning inventory balance, and fees charged to the guardianship. The clerk or investigator must maintain the confidentiality of the disclosed information.

II. Present Situation:

Guardians

A guardian may be described as someone who has been given the legal duty and authority to care for another person or his or her property because of that person's infancy, disability, or incapacity.[1] Guardianships are trust relationships designed to protect vulnerable members of society who do not have the ability to protect themselves. The person for whom a guardian is appointed is called a "ward."[2] Once a guardian is appointed by the court, the guardian serves as a surrogate decision-maker and makes personal or financial decisions, or both, for the ward.[3] In Florida, guardianship matters are governed and controlled exclusively by statute.[4]

Annual Accounting

Each guardian of the property of a ward must file an annual accounting with the court.[5] The annual accounting must include a full and correct account of the receipts and disbursements of all of the ward's property over which the guardian has control and a statement of the ward's property on hand at the end of the accounting period. However, the requirement for an accounting does not apply to any property or trust of which the ward is a beneficiary but which is not under the control or administration of the guardian.[6] The guardian must obtain a receipt, cancelled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward. The guardian must preserve all evidence of payment, together with any substantiating papers, for 3 years after his or her discharge as a guardian. These items do not need to be filed with the court but must be made available for inspection and review as the court may order.[7]

Responsibilities of the Clerk of the Court to Review Guardianship Reports

The State Constitution establishes the office of clerk of the circuit court in each county. This provision is contained in Article 5, section 16, the article that establishes the Judiciary. The duties of the clerk may be detailed by special or general law.

In addition to the duty to serve as the custodian of the guardianship files, the clerk must review each initial and annual guardianship report to ensure it contains information about the ward that addresses mental and physical health care, physical and mental health examinations, personal and social services, residential setting, the application of insurance, private and government benefits, and the initial verified inventory or the annual accounting.[8]

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[1] BLACK'S LAW DICTIONARY, 10th edition, 2014.
[2] Section 744.102(22), F.S.
[3] Section 744.102(9), F.S.
[4] *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla. 2d DCA 1966); *Hughes v. Bunker*, 76 So. 2d 474, 476 (1954).
[5] Section 744.3678(1), F.S.
[6] Section 744.3678(2)(a), F.S.
[7] Section 744.3678(3), F.S.
[8] Section 744.368(1), F.S.

The clerk has 30 days after the initial or annual reports are filed to complete a review of the report. He or she has 90 days after the verified inventory and accounts are filed to audit those submissions. The clerk must advise the court of the results of the audit and report to the court when a report is not timely filed.[9]

In 2014, the Legislature expanded the authority and responsibilities of the clerk as auditor of guardianship reports.[10] The statutes now provide that if the clerk believes that a further review is appropriate, he or she may request and review records and documents that reasonably impact the guardianship assets. These records and documents may include but are not limited to, the beginning inventory balance and any fees charged to the guardianship.[11] If a guardian does not produce records and documents to the clerk upon request, the clerk may request the court to enter an order by filing an affidavit that identifies the records and documents requested and shows good cause as to why those items requested are needed to complete the audit.[12]

The clerk may, upon application to the court and with a supporting affidavit, issue subpoenas to nonparties to compel the production of books, papers, and other documentary evidence. Before issuing a subpoena by affidavit, the clerk must serve notice on the guardian and the ward, unless the ward is a minor or totally incapacitated, of the intent to serve subpoenas to nonparties.[13]

The Office of Public and Professional Guardians, Investigations, and Specialized Units

The Office of Public and Professional Guardians (OPPG) is situated within the Department of Elder Affairs. It is responsible for appointing local public guardians to provide services to people who do not have enough income or assets to afford a private guardian and no family member or friend is willing to serve. The Office contracts with 17 local offices of public guardians and is responsible for registering and educating professional guardians in the state. In 2016, the Office's responsibilities were increased to include regulating professional guardians which involves investigating, and if appropriate, disciplining guardians who violate the law.[14] As part of its investigative responsibilities, OPPG is authorized to request and be provided records held by an agency, the court and its agencies, or financial audits prepared by a clerk and held by the court which are necessary as part of an investigation when a complaint is filed against a guardian.[15] If confidential or exempt information is provided to OPPG, it continues its status as confidential or exempt.[16]

Since OPPG began receiving complaints on October 1, 2017, it has referred 83 legally sufficient complaints for further investigation. In 30 of those cases, letters of concern were issued or

[9] Section 744.368(2), (3), and (4), F.S.
[10] Ch. 2014-124, Laws of Fla.
[11] Section 744.368(5), F.S.
[12] Section 744.368(6), F.S.
[13] Section 744.368(7), F.S.
[14] Office of Public & Professional Guardians, Department of Elder Affairs, *Office of Public & Professional Guardians: Who We Are* http://elderaffairs.state.fl.us/doea/spgo.php (last visited Jan. 6, 2018).
[15] Section 744.2104(1), F.S.
[16] *Id*.

discipline was imposed or the cases were determined to be unfounded. The remaining 53 cases are still open and ongoing.[17]

Seven clerk offices around the state have specialized units that are trained to provide independent investigative services of professional guardianships. The Office of Public and Professional Guardians has contracted with these accredited units to perform investigations of legally sufficient complaints regarding the conduct of professional guardians. These investigations are performed using professional investigative standards. The clerk investigative units compare professional guardians' conduct to Florida Guardianship Law, the Florida Criminal Code, and Standards of Practice for Professional Guardians. All facts and findings are reported to the OPPG for administrative complaints, and if necessary, a referral to a criminal justice agency. The Palm Beach County Clerk serves as the administrative coordinator and chief investigator. The remaining clerk offices are Pinellas County, Polk County, Okaloosa County, Lake County, Lee County, and Sarasota County.

Statistics of the Elderly in Florida

According to statistics compiled for the State of Florida, 3,259,602 Floridians were age 65 and older in 2010. This number is projected to reach 4,390,788 by 2020, and 5,916,832 by 2030. Between 2010 and 2020, Florida's population age 85 and older is expected to increase by 36.1 percent.[18] These numbers indicate that there will likely be a significant increase in guardianships in the coming years.

Ex Parte Communications

An ex parte communication is a one-sided communication that occurs between counsel and the court when the opposing counsel is not present. This form of communication is generally prohibited[19] because it removes the appearance of the court's impartiality in a proceeding and may likely prejudice a pending matter against the party not represented.

The Power of a Guardian to Act Without Court Approval

Two types of guardians may act without court approval when dealing with the property of a ward.[20] Those types are a plenary guardian of the property or a limited guardian of the property.[21] As specified in statute, the guardian does not need court approval to conduct a list of

[17] Telephone conversation with Carol Berkowitz, Executive Director of the Office of Public and Professional Guardians, Tallahassee, Fla. (Jan. 4, 2018).

[18] Florida Demographic Estimating Conference, February 2017 and the University of Florida, Bureau of Economic and Business Research, Florida Population Studies, Bulletin 178, June 2017. Available at http://edr.state.fl.us/Content/population-demographics/data/pop_census_day-2016.pdf and http://edr.state.fl.us/Content/population-demographics/data/index-floridaproducts.cfm.

[19] BLACK'S LAW DICTIONARY (10th ed. 2014).

[20] Section 744.444, F.S.

[21] A plenary guardian is a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court finds that the ward lacks the capacity to perform all of the necessary tasks to care for his or her person or property. Section 744.102(9)(b), F.S. A limited guardian is a guardian appointed by the court to exercise the legal rights and powers specifically designated by the court after the court finds that the ward lacks the capacity to do some, but not all tasks,

activities,[22] including the authority to provide confidential information about a ward to a local or state ombudsman member conducting an investigation involving a long-term care facility.

III. Effect of Proposed Changes:

This bill identifies specific actions that the circuit court clerks may take when reviewing guardianships. The bill also expressly authorizes designees of the Office of Public and Professional Guardians to receive otherwise confidential documents when investigating guardianships.

Section 1 amends s. 744.2104(1), F.S., which addresses the OPPG's ability to access records when a complaint is filed against a guardian and an investigation is initiated. In adding the words "or its designee," the bill clarifies that the seven specialized units that perform investigations of complaints at the direction of the OPPG are authorized to receive records held by the court or its agencies which are necessary as part of an investigation of a guardian.

Section 2 amends s. 744.368, F.S., which addresses the responsibilities of the clerk of the circuit court to review guardianship reports. The language added to the statute expressly authorizes clerks, when conducting a further review of inventories and accountings, to conduct audits and cause initial and annual guardianship reports to be audited. The clerk must advise the court of the results of the audit. If a fee or cost is incurred by the guardian when he or she responds to the review or audit, it may not be paid or reimbursed using the ward's assets if the court finds an act of wrongdoing on the part of the guardian. The clerk's advice to the court regarding the audit may not be considered an ex parte communication, which is discussed in the Present Situation.

Section 3 amends s. 744.3701, F.S., which pertains to the disclosure and confidentiality of guardianship inspections and reports. The bill provides that the clerk may disclose confidential information to the Department of Children and Families or law enforcement agencies "for other purposes," as provided by a court order. The confidential information described in s. 744.3701(3), F.S., which may not be disclosed unless specifically authorized, is a court record pertaining to the settlement of a ward's or minor's claim, including a petition for approval of a settlement, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf a ward of minor. What the "other purposes" are is not explained in the bill.

Section 4 amends s. 744.444, F.S., which addresses the power of a guardian to act without court approval regarding the property of a ward. The bill expands the authority of a guardian to disclose confidential information about a ward to additional investigative entities. Specifically, the guardian is authorized to provide the confidential information to the court clerk or an investigator with the OPPG for investigations that arise under a review of records and documents

necessary to care for his or her person or property, or after he or she voluntarily petitions the court for appointment of a limited guardian.

[22] Those enumerated activities include the ability to: retain or receive assets, vote or not vote stocks or other securities, insure assets and himself or herself against liability, execute instruments, pay taxes, assessments, certain encumbrances, and reasonable living expenses, elect to dissent from a will, make an election, or assert certain rights, deposit or invest certain assets, pay incidental expenses for the administration of the estate, sell or exercise stock rights and consent to activities of a business enterprise, employ necessary persons to advise or assist in performing the guardian's duties, execute and deliver certain instruments to carry out court order, hold securities, and pay or reimburse costs incurred.

involving assets, the beginning inventory balance, and fees charged to the guardianship. The clerk or investigator has a duty to maintain the confidentiality of that disclosed information.

The bill takes effect July 1, 2018.

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:

If the court finds a guardian guilty or wrongdoing in a report or audit, those costs or fees incurred by the guardian in responding must be borne by the guardian. The ward's assets may not be used for payment or reimbursement of the guardian.

C. Government Sector Impact:

The disclosure of confidential information about a ward to additional investigative entities may result in additional costs to those entities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 744.2104, 744.368, 744.3701, and 744.444.

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.

By Senator Passidomo

28-01378-18 20181002__

A bill to be entitled

An act relating to guardianship; amending s. 744.2104, F.S.; requiring certain medical, financial, or mental health records or financial audits that are necessary as part of an investigation of a guardian as a result of a complaint filed for certain purposes with a designee of the Office of Public and Professional Guardians to be provided to the Office of Public and Professional Guardians upon that office's request; amending s. 744.368, F.S.; authorizing the clerk of the court to conduct audits and cause the initial and annual guardianship reports to be audited under certain circumstances; requiring the clerk to advise the court of the results of any such audit; prohibiting any fee or cost incurred by the guardian in responding to the review or audit from being paid or reimbursed by the ward's assets if there is a finding of wrongdoing by the court; prohibiting the clerk's advice to the court from being considered an ex parte communication; amending s. 744.3701, F.S.; authorizing the clerk to disclose confidential information to the Department of Children and Families or law enforcement agencies for certain purposes as provided by court order; amending s. 744.444, F.S.; authorizing certain guardians of property to provide confidential information about a ward which is related to an investigation arising under specified provisions to a clerk or to an Office of Public and Professional Guardians investigator conducting such an

28-01378-18 20181002__

investigation; providing that any such clerk or Office of Public and Professional Guardians investigator has a duty to maintain the confidentiality of such information; providing an effective date.

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

Section 1. Subsection (1) of section 744.2104, Florida Statutes, is amended to read:

744.2104 Access to records by the Office of Public and Professional Guardians; confidentiality.—

(1) Notwithstanding any other provision of law to the contrary, any medical, financial, or mental health records held by an agency, or the court and its agencies, or financial audits prepared by the clerk of the court pursuant to s. 744.368 and held by the court, which are necessary as part of an investigation of a guardian as a result of a complaint filed with the Office of Public and Professional Guardians or its designee to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports, shall be provided to the Office of Public and Professional Guardians upon that office's request. Any confidential or exempt information provided to the Office of Public and Professional Guardians shall continue to be held confidential or exempt as otherwise provided by law.

Section 2. Subsection (5) of section 744.368, Florida Statutes, is amended, and subsection (8) is added to that section, to read:

744.368 Responsibilities of the clerk of the circuit

court.—

(5) If the clerk has reason to believe further review is appropriate, the clerk may request and review records and documents that reasonably impact guardianship assets, including, but not limited to, the beginning inventory balance and any fees charged to the guardianship. As a part of this review, the clerk may conduct audits and may cause the initial and annual guardianship reports to be audited. The clerk shall advise the court of the results of any such audit. Any fee or cost incurred by the guardian in responding to the review or audit may not be paid or reimbursed by the ward's assets if there is a finding of wrongdoing by the court.

(8) The clerk's advice to the court may not be considered an ex parte communication.

Section 3. Subsection (4) is added to section 744.3701, Florida Statutes, to read:

744.3701 Confidentiality.—

(4) The clerk may disclose confidential information to the Department of Children and Families or law enforcement agencies for other purposes as provided by court order.

Section 4. Subsection (17) of section 744.444, Florida Statutes, is amended to read:

744.444 Power of guardian without court approval.—Without obtaining court approval, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(17) Provide confidential information about a ward which ~~that~~ is related to an investigation arising under s. 744.368 to

the clerk, part II of this chapter to an Office of Public and Professional Guardians investigator, or part I of chapter 400 to a local or state ombudsman council member conducting such an investigation. Any such clerk, Office of Public and Professional Guardians investigator, or ombudsman shall have a duty to maintain the confidentiality of such information.

Section 5. This act shall take effect July 1, 2018.

The Florida Senate

Committee Agenda Request

To: Senator Greg Steube, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: December 14, 2017

I respectfully request that **Senate Bill #1002**, relating to Guardianship, be placed on the:

☐ committee agenda at your earliest possible convenience.

☒ next committee agenda.

Senator Kathleen Passidomo
Florida Senate, District 28

File signed original with committee office

S-020 (03/2004)

THE FLORIDA SENATE

APPEARANCE RECORD

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

Jan 10, 2018
Meeting Date

SB 1002
Bill Number (if applicable)

Topic Guardianship

Amendment Barcode (if applicable)

Name Dorene Barker

Job Title Associate State Director

Address 200 W. College Ave
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City *State* *Zip*

Phone 850 228 6387

Email dobarker@aarp.org

Speaking: ☑ For ☐ Against ☐ Information

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

Representing AARP Florida

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)

1/10/2018
Meeting Date

1002
Bill Number (if applicable)

Topic GUARDIANSHIP AUDITING

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

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

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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 Judiciary

BILL:	SB 478
INTRODUCER:	Senator Hukill
SUBJECT:	Trusts
DATE:	January 9, 2018
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Favorable**
2.			BI	
3.			RC	

I. Summary:

SB 478 amends the Florida Trust Code to incorporate recommendations of the Real Property, Probate, and Trust Law Section of the Florida Bar.[1] These changes ensure that the trust creator's or "settlor's" intent is paramount in trust interpretation, expand certain trustees' ability to place the principal of the "first trust" into one or more second trusts in order to protect and maximize the beneficiaries' interests, further regulate the electronic provision of important trust documents, and counter what some regard as problematic case law.

By statute, a trust must be created "for the benefit of the trust's beneficiaries." The bill deletes this language from the law. The Section is concerned that this core requirement of trusts might be misused by courts as a principle for interpreting trusts, thus rivaling or replacing the "settlor's-intent" principle. Under common law, the settlor's intent is the "polestar" of trust interpretation.

Additionally, the bill counters a district court of appeal case which some believe to have misanalysed the question of whether a beneficiary's actual knowledge that he or she is a beneficiary and has not received a trust accounting is sufficient to trigger a 4-year limitations period for bring an action for the trustee's failure to provide an accounting. The bill makes it clear that a beneficiary's actual knowledge that he or she has not received a trust accounting is not sufficient to begin the running of any limitations or laches period. Thus, the bill provides a longer period during which a beneficiary may hold a trustee responsible for a past-due accounting.

[1] The Section produced a series of white papers in which it advocates for the changes set forth in the bill. The Section actually provided these white papers to the Committee on Judiciary relative to SB 1554 (2017), which is very similar to SB 478 (2018).

Finally, the bill includes several provisions to further regulate a trustee's providing documents to a beneficiary *solely* by posting them to a website or electronic account. These provisions include a requirement that the authorization signed by the recipient allowing documents to be electronically delivered specifically indicate whether a trust accounting, trust disclosure statement, or limitation notice will be posted in this way. Also, the bill lengthens the timeframe during which a document provided solely through electronic posting must remain accessible to the recipient at the website or electronic account.

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 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.

Interpretive Principles for Trusts

A trust, like any other legal document, may be ambiguous at one or more points. And ambiguous trust language can lead to lawsuits where two persons with an interest in the trust interpret the language differently. 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."[2]

However, two statutes require trusts to be "for the benefit of the trust's beneficiaries."[3] These statutory provisions are not set forth as interpretive principles, but as basic requirements for trusts. Nonetheless, members of the Real Property, Probate, and Trust Law Section of the Florida Bar are concerned that courts, influenced by relevant law review articles, might appropriate these statutory provisions as an interpretive principle.[4] Thus, the concern is that the settlor's-intent principle of trust interpretation might be moderated or even replaced by a benefit-of-the-beneficiaries principle.

Trust "Decanting"

Under certain circumstances, a trustee may invade the corpus, or principal, of a trust to make distributions to a person. Similarly, under certain circumstances a trustee may instead place trust principal into another trust, which is often called "decanting."[5] A trustee who has been granted the "absolute power" to invade the principal of a trust in order to give it to one or more persons may instead place the trust principal into a second trust if:[6]

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[2] *E.g.*, *L'Argent v. Barnett Bank, N.A*., 730 So. 2d 395, 397 (Fla. 2d DCA 1999).
[3] Sections 736.0105(2)(c) and 736.0404, F.S.
[4] Trust Law Committee, Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed Revisions to §§736.0103, 736.0105 and 736.0404, Florida Statutes* (2017) (on file with the Senate Committee on Judiciary)
[5] "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.
[6] Section 736.04117(1)(a), F.S.

- 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 decant only 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.[7]

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

Statute of Limitations on Actions Against a Trustee

The law requires a trustee to give an accounting for the trust to its beneficiaries.[8] Failure to give an accounting constitutes an actionable breach of trust.[9] Current law, however, is not perfectly clear as to when the statute of limitations begins to run on a claim for a failure to account when the beneficiary is aware of the failure. Moreover, some believe that a 2015 appellate court opinion improperly truncated the period of limitations for bringing an action by a beneficiary for a trustee's failure to provide an accounting.[10]

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 requirements.[11] These requirements appear to be intended to place recipients on clear notice of what specific documents will be provided electronically, how the recipient will be able to access the documents, and the time period in which the documents will be electronically accessible.

III. Effect of Proposed Changes:

Protecting Settlors' Intent

The bill deletes provisions of the Florida Trust Code which require that every trust and trust term be for the "benefit of the trust's beneficiaries." The Real Property, Probate, and Trust Law Section of The Florida Bar has recommended this change to ensure that courts will not look to this language as setting forth an interpretive principle for ambiguous trust terms.

The Florida Supreme Court in interpreting the effect of statutory changes has said that "[w]hen the legislature amends a statute by omitting words, we presume it intends the statute to have a

[7] Section 736.04117(1)(a)3., F.S.
[8] Section 736.0813, F.S.
[9] *See* s. 735.1001(1)-(2), F.S.
[10] The 2015 Opinion is that in *Corya v. Sanders*, 155 So.3d 1279 (Fla. 4th DCA 2015).
[11] *See* s. 736.0109(3), F.S.

different meaning than that accorded it before the amendment."[12] But the Court also acknowledges that "[t]he mere change of language does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law."[13] Whether the courts will interpret the deletion of the requirement that trusts be for the benefit of beneficiaries as a substantive or clarifying change is unknown. There are three remaining core requirements for a trust's purpose set forth in the Florida Statutes. A trust must have a purpose that is "lawful, not contrary to public policy, and possible to achieve."[14]

Trust "Decanting"

The bill extensively amends s. 736.04117, F.S., pertaining to the decanting of trusts. Decanting a trust, in very general terms, involves a trustee taking the principal of a trust and putting it into one or more other trusts.

"Absolute Power" Not Necessary to Decant

Under current law, decanting may only be done by one who is expressly given "absolute power" in the first trust. Under the bill, this grant of authority remains sufficient, but it is not always necessary. The bill creates a new type of trustee, called an "authorized trustee," who may invade trust assets or decant under the conditions set forth in the bill.

General Authority of Authorized Trustee to Decant

An authorized trustee who has nonabsolute 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; and
- The term of the second trust may extend beyond the term of the first trust.

Authority of Authorized Trustee to Decant to Special Needs Trust

Even if an authorized trustee does not have absolute authority or does not have general authority to decant, the authorized trustee may be able to decant trust principal to a special needs trust. A special needs trust, very generally, is a one into which money can be placed for the benefit of a disabled person, permitting the person to maintain welfare eligibility, which might be lost if he or she were to hold the money outright.

Notice of Decanting

Under current law, a trustee who intends to decant must first give notice to the persons specified in statute. 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.

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[12] *Capella v. City of Gainesville*, 377 So. 2d 658, 660 (Fla. 1979) (citing *Carlisle v. Game and Fresh Water Fish Commission*, 354 So. 2d 362 (Fla. 1977); *Arnold v. Shumpert*, 217 So. 2d 116 (Fla.1968)).
[13] *State ex re. Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So. 2d 529 (Fla. 1973) (citing *Helvering v. New York Trust Co.*, 292 U.S. 455 (1934)).
[14] Sections 736.0105(2)(c) and 736.0404, F.S.

Statute of Limitations on Actions Against Trustee

Current law requires a trustee to give an accounting for the trust to the beneficiaries.[15] Failure to give an account constitutes an actionable breach of trust.[16] In an action for a breach of trust based on the failure to provide an accounting, an issue that may arise is the applicable limitations period for bringing the action. The bill amends s. 736.1008(3), F.S., to state that a beneficiary's actual knowledge that he or she has not received a trust accounting is not sufficient to begin the running of the limitations period, which under current law would be 4 years from the date the beneficiary acquired the actual knowledge in question. Thus, the limitations periods set forth in existing s. 736.1008(6), F.S., which depending upon the circumstances may span several decades, would appear to govern how long a beneficiary has to bring such an action.

The Real Property, Probate, and Trust Law Section asserts in its white paper that this change is needed to counter a 2015 district court of appeal decision that essentially held that a person's actual knowledge merely that he or she is a beneficiary and that he or she has not received an accounting is sufficient to begin the running of the 4-year limitations period.[17] The white paper does not clearly articulate that the court's legal analysis erred in such a way that caused it to reach a result that was clearly wrong as a matter of law. Instead, the white paper asserts that the decision was in conflict with what the paper describes as better-reasoned decisions of other district courts of appeal, and that the decision made for bad public policy.

Providing Documents and Notices Electronically

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 requirements under the law.[18] 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 of notice.[19]

One new requirement is that the authorization that must be signed by the recipient to allow the sender to electronically send these documents must specifically indicate whether a trust accounting, trust disclosure statement, or limitation notice will be posted in this manner. The authorization must also "generally enumerate" the other types of documents that may be posted in this manner.

Also, the bill modifies the timeframe during which a document provided solely through electronic posting must remain accessible to the recipient at the website or electronic account. Under current law, the period is 4 years from the date on which the document is deemed

[15] Section 736.0813, F.S.
[16] *See* s. 736.1001(1)-(2), F.S.
[17] Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed amendments of §§ 736.08135 and 736.1008 to clarify the period for which beneficiaries may compel trust accountings* (2017) (on file with the Senate Committee on Judiciary)
[18] *See* s. 736.0109(3), F.S.
[19] Section 736.0109, F.S.

received. Under the bill, the recipient must be able to access and print or download these documents until the earlier of this date or 4 years after the date on which the recipient's access is terminated.[20]

Finally, if any recipient's access to the electronic account or website is terminated by the sender less than 4 years after the date the document was deemed received, the specified limitations periods in the trust limitations statute[21] are tolled for any information "adequately disclosed in a document sent solely by electronic posting." Particularly, this tolling begins on the date the recipient's access was terminated by the sender and continues until 45 days after the sender provides notice of the termination by means other than electronic posting. The limitations periods are further tolled if after the electronic access is terminated, the person entitled to documents makes a request for documents to be provided by means other than electronic means. These provisions appear designed to mitigate the negative effect that the termination of access may have on the recipient's interests.

Effective Date

The bill takes effect July 1, 2018.

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.

D. Other Constitutional Issues:

Section 8 of the bill states:

> The changes to ss. 736.08135 and 736.1008, Florida Statutes, made by this act are intended to clarify existing law, are remedial in nature, and apply retroactively to all cases pending or commenced on or after July 1, 2018.

[20] The termination of access does not invalidate the notice of sending of any document previously posted in accordance with s. 736.0109, F.S.
[21] Section 736.1008(1),(2), F.S.

However, the Supreme Court has found that "[j]ust because the Legislature labels something as remedial . . . does not make it so."[22] Accordingly, legislation that is labeled as remedial or procedural may instead be substantive. Regardless, legislation may not be applied retroactively if it "impairs vested rights, creates new obligations, or imposes new penalties."[23] Therefore, if a court found that sections 6 or 7 of the bill did any of these prohibited things, the court would have to reject any retroactive application of these provisions.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Under the bill, beneficiaries will have more time to file legal actions against trustees. Also, those entitled to receive trust documents electronically will have longer time periods to file legal actions related to those documents. Accordingly, the bill appears to increase the risk, and thus the associated potential costs, taken on by trustees.

C. Government Sector Impact:

By increasing various limitations periods for filing trust litigation, the bill may result in increased workloads for the judicial branch. The Office of the State Courts Administrator, however, has not provided its analysis of the impact of the bill on judicial workloads.

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, 736.0404, 736.04117, 736.08135, and 736.1008.

IX. Additional Information:

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

None.

[22] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1955).
[23] *See id*.

B. Amendments:

None.

By Senator Hukill

14-00174B-18 2018478__

A bill to be entitled

An act relating to trusts; amending s. 736.0103, F.S.; redefining the term "interests of the beneficiaries"; amending s. 736.0105, F.S.; deleting a requirement that a trust and its terms be for the benefit of the trust's beneficiaries; amending s. 736.0109, F.S.; revising provisions relating to notice or sending of trust documents to include posting on a secure electronic account or website; providing requirements for such documents to be deemed sent; requiring a certain authorization to specify documents subject to electronic posting; revising requirements for a recipient to electronically access such documents; prohibiting the termination of a recipient's electronic access to such documents from invalidating certain notice or sending of electronic trust documents; tolling specified limitations periods under certain circumstances; providing requirements for electronic access to such documents to be deemed terminated by a sender; providing construction; providing applicability; amending s. 736.0404, F.S.; deleting a restriction on the purpose for which a trust is created; amending s. 736.04117, F.S.; defining and redefining terms; authorizing an authorized trustee to appoint all or part of the principal of a trust to a second trust under certain circumstances; providing requirements for the second trust and its beneficiaries; authorizing the second trust to retain, omit, or create or modify specified

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powers; authorizing the term of the second trust to extend beyond the term of the first trust; authorizing the class of permissible appointees to the second trust to differ from the class identified in the first trust under certain circumstances; providing requirements for distributions to a second trust when the authorized trustee does not have absolute power; providing requirements for such second trust; providing requirements for grants of power of appointment by the second trust; authorizing a second trust created by an authorized trustee without absolute power to grant specified powers under certain circumstances; authorizing an authorized trustee to appoint the principal of a first trust to a supplemental needs trust under certain circumstances; providing requirements for such supplemental needs trust; prohibiting an authorized trustee from distributing the principal of a trust in a manner that would reduce specified tax benefits; prohibiting the distribution of S corporation stock from a first trust to a second trust under certain circumstances; prohibiting a settlor from being treated as the owner of a second trust if he or she was not treated as the owner of the first trust; prohibiting an authorized trustee from distributing a trust's interest in property to a second trust if the interest is subject to specified rules of the Internal Revenue Code; authorizing the exercise of power to invade a trust's principal to apply to a second trust created or

administered under the law of any jurisdiction; prohibiting the exercise of power to invade a trust's principal to increase an authorized trustee's compensation or relieve him or her from certain liability; specifying who an authorized trustee must notify when he or she exercises his or her power to invade the trust's principal; specifying the documents that the authorized trustee must provide with such notice; amending s. 736.08135, F.S.; revising applicability; amending s. 736.1008, F.S.; clarifying that certain knowledge by a beneficiary does not cause a claim to accrue for breach of trust or commence the running of a period of limitations or laches; providing legislative intent; providing retroactive application; providing effective dates.

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

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

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

(11) "Interests of the beneficiaries" means the beneficial interests intended by the settlor as provided in the terms of a ~~the~~ trust.

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

736.0105 Default and mandatory rules.—

(2) The terms of a trust prevail over any provision of this

code except:

(c) The 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.

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

736.0109 Methods and waiver of notice.—

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

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

(a) ~~Before a document may be posted to an electronic account or website,~~ The recipient must sign a separate written authorization solely for the purpose of authorizing the sender to post documents on an electronic account or website before

such posting. The written authorization must:

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

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

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

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

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

(b) Once the recipient signs the written authorization, the sender must provide a separate notice to the recipient when a document is posted on ~~to~~ the electronic account or website. As used in this subsection, the term "separate notice" means a notice sent to the recipient by means other than electronic

posting, which identifies each document posted to the electronic account or website and provides instructions for accessing the ~~posted~~ document. The separate notice requirement is deemed satisfied if the recipient accesses the document on the electronic account or website.

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

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

(e) The notice required in paragraph (d) may be in substantially the following form: "You have authorized the receipt of documents through posting on ~~to~~ an electronic account or website on which ~~where~~ the documents can be accessed. This notice is being sent to advise you that a limitations period,

which may be as short as 6 months, may be running as to matters disclosed in a trust accounting or other written report of a trustee posted to the electronic account or website even if you never actually access the electronic account or website or the documents. You may amend or revoke the authorization to receive documents by electronic posting at any time. If you have any questions, please consult your attorney."

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

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

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

2. If the recipient's access to the electronic account or

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

a. 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

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

Any applicable limitations period is further tolled from the date on which any request is made pursuant to sub-subparagraph 2.a. until 20 days after the date on which the requested documents are provided to the recipient by means other than electronic posting ~~The electronic account or website must allow the recipient to download or print the document~~. ~~This subsection does not affect or alter the duties of a trustee to keep clear, distinct, and accurate records pursuant to s. 736.0810 or affect or alter the time periods for which the trustee must maintain those records.~~

(h) For purposes of this subsection, access to an

electronic account or website is terminated by the sender when the sender unilaterally terminates the recipient's ability to access the electronic website or account or to download or print any document posted on such website or account. Access is not terminated by the sender when access is terminated by an action of the recipient or by an action of the sender in response to the recipient's request to terminate access. The recipient's revocation of authorization pursuant to paragraph (f) is not considered a request to terminate access ~~To be effective, the posting of a document to an electronic account or website must be done in accordance with this subsection. The sender has the burden of establishing compliance with this subsection~~.

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

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

Section 4. Section 736.0404, Florida Statutes, is amended to read:

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

Section 5. Effective upon becoming a law, section 736.04117, Florida Statutes, is amended to read:

736.04117 Trustee's power to invade principal in trust.—

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

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

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

~~2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and~~

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

~~(b) For purposes of this subsection, 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, regardless of whether ~~or not~~ the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness constitutes ~~shall constitute~~ an absolute power not limited to specific or ascertainable purposes.

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

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

(d) "Current beneficiary" means a beneficiary who, on the date his or her qualification is determined, is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person who is a beneficiary only because he or she holds another power of appointment.

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

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

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

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

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

2. Does not include a power of appointment that is exercisable only upon the death of the power holder.

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

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

2. The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or

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

(j) "Supplemental needs trust" means 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 government benefits.

(k) "Vested interest" means 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.

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

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

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

(a) Unless a trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of the trust to invade its principal, referred to in this section as the "first trust," to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the "second trust," for the current benefit of one or more of such beneficiaries only if:

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

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

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

1. Retain a power of appointment granted in the first

trust;

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

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

4. Create or modify a power of appointment if the power holder 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 power holder becomes, or would have become if then living, a current beneficiary of the first trust; and

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

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

(3) DISTRIBUTION FROM FIRST TRUST TO SECOND TRUST WHEN AUTHORIZED TRUSTEE DOES NOT HAVE ABSOLUTE POWER TO INVADE.— Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power, other than an absolute power, under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

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

interests of the beneficiary in the first trust.

(b) 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.

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

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

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

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

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

(a) Notwithstanding subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current

distributions to or for the benefit of a beneficiary with a disability may instead exercise such power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust that is a supplemental needs trust if:

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

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

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

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

(5) PROHIBITED DISTRIBUTIONS.—

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for, or that would reduce a federal tax benefit, including a federal tax exclusion or deduction, which was originally claimed or could have been claimed for that contribution, including:

1. An exclusion under s. 2503(b) or s. 2503(c) of the Internal Revenue Code;

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

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

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

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

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

(c) Except as provided in paragraphs (a), (b), and (d), an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either trust under ss. 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, he or she may not be treated as the owner of the second trust unless he or she at all times has the power to cause the second trust to cease being treated as if it were owned by the settlor.

(d) If an interest in property which is subject to the minimum distribution rules of s. 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute such an interest to a second trust under subsection (2), subsection (3), or subsection (4) if the distribution would

shorten the otherwise applicable maximum distribution period.

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

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

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

(b) Is~~, and Shall be~~ subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

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

(d) May not:

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

2. Relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument; however, the exercise of the power may

divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as otherwise allowed under law or common law.

(8) NOTICE.—

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

1. All qualified beneficiaries of the first trust.

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

3. All trustees of the first trust.

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

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

(c) If all of those required to be notified ~~qualified beneficiaries~~ waive the notice period by signed written instrument delivered to the authorized trustee, the authorized

trustee's power to invade principal shall be exercisable immediately.

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

(9) ~~(5)~~ INAPPLICABILITY OF SPENDTHRIFT CLAUSE OR OTHER PROHIBITION.—The exercise of the power to invade principal under subsection (2), subsection (3), or subsection (4) ~~(1)~~ is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(10) ~~(6)~~ NO DUTY TO EXERCISE.—Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety may ~~shall~~ be made as a result of an authorized trustee's failure to exercise ~~a trustee not exercising~~ the power to invade principal conferred under subsections (2), (3), and (4) ~~subsection (1)~~.

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

Section 6. Subsection (3) of section 736.08135, Florida Statutes, is amended to read:

736.08135 Trust accountings.—

(3) Subsections (1) and (2) govern the form and content of

~~This section applies to~~ all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings rendered on or after July 1, 2018. This subsection does not affect the beginning period from which a trustee is required to render a trust accounting.

Section 7. Subsection (3) of section 736.1008, Florida Statutes, is amended to read:

736.1008 Limitations on proceedings against trustees.—

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:

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

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

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

such claim.

Section 8. The changes to ss. 736.08135 and 736.1008, Florida Statutes, made by this act are intended to clarify existing law, are remedial in nature, and apply retroactively to all cases pending or commenced on or after July 1, 2018.

Section 9. Except as otherwise provided in this act and except for this section, which shall take effect upon becoming a law, this act shall take effect July 1, 2018.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR DOROTHY L. HUKILL
14th District

COMMITTEES:
Education, *Chair*
Appropriations Subcommittee on the Environment and Natural Resources, *Vice Chair*
Regulated Industries, *Vice Chair*
Agriculture
Environmental Preservation and Conservation
Health Policy
Transportation

JOINT COMMITTEE:
Joint Committee on Public Counsel Oversight

October 26, 2017

The Honorable Greg Steube
326 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Re: Senate Bill 478 – Trusts

Dear Chairman Steube:

Senate Bill 478, relating to Trusts, has been referred to the Senate Committee on Judiciary. I respectfully request that SB 478 be placed on the committee agenda at your earliest possible convenience.

Should you need any additional information, please do not hesitate to contact my office.

Thank you for your consideration.

Sincerely,

Dorothy L. Hukill
State Senator, District 14

Cc: Tom Cibula, Staff Director, Senate Committee on Judiciary
Joyce Butler, Administrative Assistant, Senate Committee on Judiciary

REPLY TO:
☐ 209 Dunlawton Avenue, Unit 17, Port Orange, Florida 32127 (386) 304-7630 FAX: (888) 263-3818
☐ 434 Delannoy Avenue, Suite 204, Cocoa, Florida 32922 (321) 634-3549
☐ 406 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5014

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

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

1-10-18
Meeting Date

478
Bill Number (if applicable)

Topic Trust Bill

Amendment Barcode (if applicable)

Name Martha Edenfield

Job Title

Address 215 So. Monroe Street
Street

Phone 850-999-4100

Tallahassee FL 32301
City *State* *Zip*

Email medenfield@deanmead.com

Speaking: ☐ For ☐ Against ☐ Information

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

Representing The Real Property, Probate + 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)

1/10/18
Meeting Date

478
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Fruit Bill

Name Anthony DiMarco

Job Title EVP of Government Affairs

Address 100 Thomasville Rd
Street

Tallahassee FL 32301
City State Zip

Phone 224-3267

Email adimarco@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.

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 Judiciary

BILL:	CS/SB 566
INTRODUCER:	Judiciary Committee and Senator Young
SUBJECT:	Unlawful Detention by a Transient Occupant
DATE:	January 11, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Little	McKay	CM	**Favorable**
2.	Davis	Cibula	JU	**Fav/CS**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 566 revises the laws governing a transient occupant who "unlawfully detains" a residential property. Under current law, a transient occupant is someone who initially possesses real property lawfully, such as a longer-term houseguest. A transient occupant, however, unlawfully detains the property after being directed to leave by the party entitled to possession. If the transient occupant refuses to leave the property after being directed to do so by a law enforcement officer, the transient occupant becomes a trespasser. Absent action by a law enforcement officer, the person entitled to possession of the dwelling must bring an unlawful detainer action against the transient occupant to have him or her removed.

The changes by the bill:

- Narrow the criteria defining whether an individual is a transient occupant whom the rightful possessor may remove through an unlawful detainer action.
- Identify events that terminate a transient occupancy and restore the right to possess a dwelling to the person having a right to possess the property. These events include surrendering a key to a dwelling, beginning to reside elsewhere, or agreeing to leave the dwelling.
- Generally require a former transient occupant to collect his or her personal belongings within 10 days after the termination of a transient occupancy. Otherwise, the personal property will be deemed abandoned.
- Authorize a former transient occupant to bring a civil action for damages or the recovery of his or her personal belongings that are unreasonably withheld by the person entitled to

possession of the dwelling. In that action, the court must award the prevailing party reasonable attorney fees and costs.

II. Present Situation:

Transient Occupant

Florida law provides for the removal of unwanted occupants from residential real property in several chapters. Section 82.045, however, outlines the remedies for an unlawful detention by a transient occupant. The term "transient" means temporary or impermanent and passing away after a short time.[1] A transient occupant is an individual whose residency in a residential dwelling has occurred for a brief length of time, is not pursuant to a lease, and whose occupancy was intended as transient in nature.[2]

Unlawful Detention by a Transient Occupant of a Residential Property

An unlawful detention of residential property occurs when someone initially possesses real property lawfully but then unjustifiably retains possession of the property after the party entitled to possession has directed him or her to leave.[3] Legal actions to recover the property are based on the premise that no individual who has lawfully entered the property of another may continue to occupy the property without the consent of the party entitled to possession.[4]

A law enforcement officer may direct a transient occupant to surrender the residential property when the rightful possessor provides a sworn affidavit asserting that a transient occupant is unlawfully detaining the property. The affidavit must set forth any relevant facts that establish the unwanted occupant is a transient occupant, including any applicable factors listed in s. 82.045(1)(a), F.S. An individual may be a transient occupant if the person:[5]

- Does not have ownership, financial, or leasehold interest in the property that entitles occupancy of the property;
- Does not have property utility subscriptions;
- Does not use the property address as an address of record with any governmental agency;[6]
- Does not receive mail at the property;
- Pays minimal or no rent for his or her stay at the property;
- Does not have a designated space of his or her own, such as a room, at the property;
- Has minimal, if any, personal belongings at the property; or
- Has an apparent permanent residence elsewhere.[7]

[1] BLACK'S LAW DICTIONARY (10th ed. 2014).
[2] Section 82.045(1), F.S.
[3] BLACK'S LAW DICTIONARY (10th ed. 2014) and s. 82.045(1)(a), F.S.
[4] *See generally* chapter 82, F.S.
[5] Section 82.045(3), F.S.
[6] The Department of Highway Safety and Motor Vehicles and the supervisor of elections are listed as agencies included in the consideration of this factor. *See* s. 82.045(1)(a)3., F.S.
[7] Section 82.045(1)(a), F.S.

Unlawful Detainer Action

A rightful possessor may bring an action against a transient occupant within 3 years after an unlawful detention.[8] The action does not involve a question of title. Instead, the action is an expeditious remedy in which the main issue is the right to immediate possession[9] and related damages.[10] According to the office of the Clerk of the Circuit Court and Comptroller for Leon County, the filing fee for an unlawful detainer action is $300, plus an additional $10 for issuance of a summons.[11]

Unlawful detainer actions are resolved through summary procedure under s. 51.011, F.S.[12] In order to establish an unlawful detention, the plaintiff must demonstrate that:

- He or she was in possession of the property at one time;
- The plaintiff was ousted or deprived of rightful possession of the property by the defendant;
- The defendant withheld possession from the plaintiff without consent; and
- The action has been filed within the 3-year statute of limitation for unlawful detainer actions.[13]

Within 5 days after service of process, the defendant must file an answer to the unlawful detainer complaint. If the defendant's answer incorporates a counterclaim, the plaintiff is required to serve any answer to the counterclaim within 5 days. No other pleadings are allowed.[14]

If the plaintiff prevails, the court must enter judgment that the plaintiff is entitled to recover possession of the property described in the complaint, along with damages and costs, and a writ of possession without delay and execution.[15] If the defendant prevails, the court must enter judgment against the plaintiff by dismissing the complaint and awarding the defendant costs.[16]

Additional Causes of Action

Criminal Trespass

A transient occupant is subject to the criminal charge of trespass if he or she fails to surrender possession of the property when directed to do so by a law enforcement officer who has a sworn affidavit pursuant to s. 82.045(3), F.S.[17] Section 810.08, F.S., establishes the offense of trespass for anyone who:

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[8] Section 82.04, F.S.
[9] *Tollius v. Dutch Inns of America, Inc.*, 218 So. 2d 504 (Fla. 3rd DCA 1969).
[10] Section 82.05, F.S.
[11] Telephone conversation with Pam Kristoph, Office of the Clerk of the Circuit Court and Comptroller for Leon County, Tallahassee, Fla. (Jan. 3, 2018).
[12] A summary proceeding under s. 51.011, F.S., is applicable to actions that specifically provide for this procedure by statute or rule, including actions for forcible entry, unlawful detainer, and certain tenant evictions. Sections 51.011, 82.03, 82.04, 83.21, and 83.59, F.S.
[13] *Florida Athletic & Health Club v. Royce*, 33 So. 2d 222 (Fla. 1948); *Floro v. Parker*, 205 So. 2d 363, 367-368 (Fla. 2d DCA 1967).
[14] Section 51.011(1), F.S.
[15] Section 82.091, F.S.
[16] *Id.*
[17] Section 82.045(3)(a), F.S.

> without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.[18]

Criminal trespass penalties range from a second degree misdemeanor for simple trespass to a first degree misdemeanor if a person was in the structure or conveyance at the time the offender trespassed or attempted to trespass.[19]

Wrongful Removal of an Individual

A person who is wrongfully removed from a property under s. 82.045, F.S., has a cause of action for wrongful removal against the person who requested the removal, excluding the law enforcement officer and his or her employing agency.[20] If the court finds that a wrongful removal occurred, the court may award the plaintiff injunctive relief and compensatory damages.[21]

Eviction

If the court, in examining an action for unlawful detainer, finds the defendant is a tenant rather than a transient occupant, the court must allow the plaintiff to provide adequate notice to the defendant as required under the act and to amend the complaint to pursue an eviction under the Landlord and Tenant Act.[22]

Generally, in eviction proceedings, a landlord is required to provide the tenant written notice of any violation of the rental agreement and must allow the tenant an opportunity to correct the problem.[23] If the tenant fails to correct the problem, the landlord may bring an action in the county court where the property is located.[24] The filing fee for the removal of a tenant is $180, plus an additional $10 for the issuance of a summons.[25] If the court enters a judgment for the landlord, the clerk will issue a writ of possession to the sheriff.[26] After the sheriff provides 24 hours' notice to the tenant, through a posting on the premises, the landlord may remove the tenant's property and change the locks.[27]

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[18] Section 810.08(1), F.S.
[19] Section 810.08(2)(a) and (b), F.S. A second degree misdemeanor is punishable by a jail term of up to 60 days. A first degree misdemeanor is punishable by a jail term of up to 1 year. Section 775.082(4)(a) and (b), F.S. Section 775.083(1)(d) and (e), F.S., authorize fines of up to $500 for a second degree misdemeanor and up to $1,000 for a first degree misdemeanor.
[20] However, the wrongfully removed individual may bring an action against a law enforcement officer or his or her employing agency upon a showing of bad faith. *See* s. 82.045(3)(b), F.S.
[21] *Id.*
[22] Section 82.045(4), F.S.
[23] Section 83.56(2), F.S.; *3618 Lantana Road Partners, LLC v. Palm Beach Pain Management, Inc.*, 57 So. 3d 966, 968 (Fla. 4th DCA 2011).
[24] Section 83.59(2), F.S.
[25] Section 34.041(1)(a)7., F.S. and verified in a phone conversation with the Office of the Clerk of the Circuit Court and Comptroller for Leon County, Tallahassee, Fla. (Jan. 3, 2018).
[26] Section 83.62(1), F.S.
[27] Section 83.62(2), F.S.

Ejectment and Trespass

A judgment rendered in an unlawful detainer case does not bar any action of trespass for injury to the property or ejectment. Additionally, the verdict in an action for unlawful detainer is not conclusive of the facts found in any subsequent proceeding of trespass or ejectment.[28]

Recovery and Abandonment of Personal Belongings

The statutes do not provide a process for recovering abandoned personal belongings that remain on a property after an unlawful detention has ended.

Under landlord-tenant regulations, a landlord is required to provide written notice to a former tenant of the right to reclaim abandoned property when it remains on the premises after the tenancy has terminated or expired and the premises have been vacated by the tenant.[29] The written notice must describe the property at issue, state where the property may be claimed, and specify the date by which the claim must be made.[30] The notice must also advise the former tenant that reasonable costs of storage may be charged before the property is returned.[31]

III. Effect of Proposed Changes:

Transient Occupancy

The bill revises the factors used in determining whether an occupant of a residential dwelling is a transient occupant who is entitled to some procedural protections from removal or a tenant who is entitled to the protections of the Landlord and Tenant Act or a trespasser.

The bill modifies two of the existing factors detailed in the Present Situation that may be used to determine whether someone is a transient occupant. The factors are narrowed in a way that makes occupants who are not tenants less likely to have the status of transient occupants. Under the existing factors, one might argue that the use of an address as an address of record with a government agency in the distant past, indicates that he or she presently has the status of a transient occupant at that address. The intent of the bill, by changing the factor, appears to require that a person claiming the status of a transient occupant have used the address as an address of record within the past 12 months. The current factor of whether the person received mail at the property is deleted and therefore the receipt of mail at a particular address may not be used to establish a person's status as a transient occupant. As a result, property owners and leaseholders and others entitled to possession of a residential property will have more control over their properties.

The bill provides that a transient occupancy terminates when a transient occupant:

- Begins to reside elsewhere;
- Surrenders the key to the dwelling; or

[28] Section 82.101, F.S.
[29] Section 715.104, F.S.
[30] The date specified in the notice cannot be less than 10 days after the notice is personally delivered or less than 15 days after the notice is mailed. Section 715.104(2), F.S.
[31] *Id.*

- Agrees to leave the dwelling when directed by a law enforcement officer, the party entitled to possession, or a court.

The bill also specifies that a transient occupancy is not extended by the presence of the former transient occupants' personal belongings. By identifying events terminating a transient occupancy, those entitled to possession of a residential property may have certainty as to when their rights to control property and exclude unwanted guests is restored.

Recovery of Former Transient Occupant's Personal Belongings

A transient occupant must collect his or her belongings or they may be presumed abandoned. A reasonable time for the recovery of the personal belongings includes a convenient time when the party entitled to possession of the dwelling or a trusted third party can be present at the dwelling to supervise the recovery of the belongings.

The bill establishes that it is reasonable for the party entitled to possession of the dwelling to impose additional conditions on access to the dwelling or personal belongings if he or she reasonably believes that the former transient occupant has engaged in misconduct or has a history of violence or drug or alcohol abuse.

The additional conditions that may be imposed on access to the dwelling or personal belongings include, but are not limited to, the presence of a law enforcement officer, the use of a mover registered with the Department of Agriculture and Consumer Services (DACS),[32] or the use of a trusted third party to recover the personal belongings.

Misconduct includes, but is not limited to:
- Intentional damage to the dwelling, to the property owned by the party entitled to possession of the dwelling, or to property owned by another occupant of the dwelling;
- Physical or verbal abuse directed at the party entitled to possession of the dwelling or another occupant of the dwelling; or
- Theft of property belonging to the party entitled to possession of the dwelling or property of another occupant of the dwelling.

Abandonment of Former Transient Occupant's Personal Belongings

The bill provides that the person who is entitled to possession of a dwelling can presume that the former transient occupant has abandoned any personal belongings left at the dwelling if he or she does not seek to recover the belongings within a "reasonable time" after surrendering occupancy of the dwelling. A reasonable time for a former transient occupant to recover personal belongings is 10 days after the termination of the transient occupancy, unless specific circumstances require a reasonable time to be shorter or longer than 10 days. If the party entitled to possession of the property is unavailable to supervise the recovery of the personal belongings, the time may be extended.

Circumstances that may shorten the length of reasonable time include, but are not limited to:

[32] Ch. 507, F.S. requires any person who is engaged in intrastate moving for compensation to register with the DACS.

- The poor condition of or the perishable or hazardous nature of the personal belongings;
- The intent of the former transient occupant to abandon or discard the belongings; or
- The significant impairment of the use of the dwelling by the storage of the former transient occupant's personal belongings.

Unreasonably Withheld Access to Personal Belongings

The bill provides that a former transient occupant may bring a civil action for damages or the recovery of the property against a person entitled to possession of the dwelling if that person unreasonably withholds access to the former transient occupant's personal belongings. In such action, the bill directs the court to award reasonable attorney fees and costs to the prevailing party.

Construction Language

Subsection (6) states that the entire section relating to the remedy for unlawful detention by a transient occupant should be "construed in recognition of the right to exclude others as one of the most essential components of property rights." This statement paraphrases language found in a U.S. Supreme Court decision which discusses property rights.[33] According to the Court, it has "repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[34]

Effective Date

The bill provides an effective date of July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The State Constitution addresses the property rights of citizens in two pertinent provisions. Article 1, section 2 provides that all natural persons have the right to acquire,

[33] *Nollan v. California Coastal Com'n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).
[34] *Id.*

possess, and protect property. Article 1, section 9 provides that "No person shall be deprived of life, liberty or property without due process of law . . ."

The bill requires the party entitled to possession of the dwelling to allow a former transient occupant to recover his or her personal belongings and provides that the belongings are presumed abandoned if the former transient occupant does not seek to recover the personal belongings within 10 days of surrendering occupancy of the dwelling. However, the bill does not address whether the former transient occupant will receive notice of his or her opportunity to recover the personal belongings.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By narrowing the criteria used to determine whether a person is a transient occupant and clarifying when a transient occupancy ends, the bill may reduce the time and legal expenses that a property owner, leaseholder, or other person entitled to possession would incur to remove an occupant or former transient occupant.

C. Government Sector Impact:

This bill may reduce the expenses associated with the county courts because it may result in fewer unlawful detainer actions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 82.045 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 Judiciary on January 10, 2018:
The committee substitute makes several small changes that are consistent with the bill's underlying purposes. Those changes include:

- Limiting documents or identification cards used to support a claim of transient occupancy to have been issued or sent within the previous 12 months and not the distant past.
- Increasing the time to recover personal belongings after the transient occupancy ends to 10 days from 5 days.
- Making stylistic changes for clarity or consistency throughout the bill.

B. Amendments:

None.

260152

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/10/2018	.	
	.	
	.	
	.	

The Committee on Judiciary (Young) recommended the following:

Senate Amendment (with title amendment)

Delete lines 32 - 159

and insert:

occupant of residential property; recovery of transient occupant's personal belongings.—

(1) As used in this section, the term "transient occupant" means a person whose residency in a dwelling intended for residential use has occurred for a brief length of time, is not pursuant to a lease, and whose occupancy was intended as transient in nature.

260152

(a) Factors that establish that a person is a transient occupant include, but are not limited to:

1. The person does not have an ownership interest, financial interest, or leasehold interest in the property entitling him or her to occupancy of the property.

2. The person does not have any property utility subscriptions.

3. The person cannot produce documentation, correspondence, or identification cards sent or issued by a government agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections, which show that the person used the property address as an address of record with the agency within the previous 12 months ~~does not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections~~.

~~4. The person does not receive mail at the property.~~

4.~~5.~~ The person pays minimal or no rent for his or her stay at the property.

5.~~6.~~ The person does not have a designated space of his or her own, such as a room, at the property.

6.~~7.~~ The person has minimal, if any, personal belongings at the property.

7.~~8.~~ The person has an apparent permanent residence elsewhere.

(b) Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses, do not establish residency.

(2) A transient occupant unlawfully detains a residential property if the transient occupant remains in occupancy of the residential property after the party entitled to possession of the property has directed the transient occupant to leave. A transient occupancy terminates when a transient occupant begins to reside elsewhere, surrenders the key to the dwelling, or agrees to leave the dwelling when directed by a law enforcement officer in receipt of an affidavit under subsection (3), the party entitled to possession, or a court. A transient occupancy is not extended by the presence of personal belongings of a former transient occupant.

(3) Any law enforcement officer may, upon receipt of a sworn affidavit of the party entitled to possession that a person who is a transient occupant is unlawfully detaining residential property, direct a transient occupant to surrender possession of residential property. The sworn affidavit must set forth the facts, including the applicable factors listed in paragraph (1)(a), which establish that a transient occupant is unlawfully detaining residential property.

(a) A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense.

(b) A person wrongfully removed pursuant to this subsection has a cause of action for wrongful removal against the person

who requested the removal, and may recover injunctive relief and compensatory damages. However, a wrongfully removed person does not have a cause of action against the law enforcement officer or the agency employing the law enforcement officer absent a showing of bad faith by the law enforcement officer.

(4) A party entitled to possession of a dwelling has a cause of action for unlawful detainer against a transient occupant pursuant to s. 82.04. The party entitled to possession is not required to notify the transient occupant before filing the action. If the court finds that the defendant is not a transient occupant but is instead a tenant of residential property governed by part II of chapter 83, the court may not dismiss the action without first allowing the plaintiff to give the transient occupant the notice required by that part and to thereafter amend the complaint to pursue eviction under that part.

(5) The party entitled to possession of a dwelling shall allow a former transient occupant to recover his or her personal belongings at reasonable times and under reasonable conditions.

(a) Unless otherwise agreed to, a reasonable time for the recovery of the former transient occupant's personal belongings generally means a time period within 10 days after termination of the transient occupancy, when the party entitled to possession of the dwelling or a trusted third party can be present at the dwelling to supervise the recovery of the belongings.

(b) If the party entitled to possession of the dwelling reasonably believes that the former transient occupant has engaged in misconduct or has a history of violence or drug or

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alcohol abuse, it is reasonable for the party entitled to possession of the dwelling to impose additional conditions on access to the dwelling or the personal belongings. These conditions may include, but are not limited to, the presence of a law enforcement officer, the use of a mover registered with the Department of Agriculture and Consumer Services, or the use of a trusted third party to recover the personal belongings. For purposes of this paragraph, misconduct includes, but is not limited to:

1. Intentional damage to the dwelling, to property owned by the party entitled to possession of the dwelling, or to property owned by another occupant of the dwelling;

2. Physical or verbal abuse directed at the party entitled to possession of the dwelling or another occupant of the dwelling; or

3. Theft of property belonging to the party entitled to possession of the dwelling or property of another occupant of the dwelling.

(c) The person entitled to possession of a dwelling may presume that the former transient occupant has abandoned personal belongings left at the dwelling if the former transient occupant does not seek to recover them within a reasonable time after the transient occupant surrenders occupancy of the dwelling. The time period to recover personal belongings may be extended due to the unavailability of the party entitled to possession of the dwelling to supervise the recovery of the personal belongings. Circumstances that may shorten the time include, but are not limited to, the poor condition of or the perishable or hazardous nature of the personal belongings, the

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intent of the former transient occupant to abandon or discard the belongings, or the significant impairment of the use of the dwelling by the storage of the former transient occupant's personal belongings.

(d) If the person entitled to possession of the dwelling unreasonably withholds access to a former transient occupant's personal belongings, the former transient occupant may bring a civil action for damages or the recovery of the property. The court shall award the prevailing party reasonable attorney fees and costs.

(6) This section shall be construed in recognition of the right

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

And the title is amended as follows:

Delete lines 11 - 20

and insert:

recover personal belongings at reasonable times and under reasonable conditions; specifying a reasonable time to recover personal belongings; authorizing a party entitled to possession of the dwelling, under certain circumstances, to impose additional conditions on access to the dwelling or personal belongings; providing a presumption of when a former transient occupant has abandoned his or her personal belongings; providing circumstances in which the period for recovering personal belongings may be extended or shortened; authorizing a former transient

By Senator Young

18-00472B-18 2018566__

A bill to be entitled

An act relating to unlawful detention by a transient occupant; amending s. 82.045, F.S.; revising factors that establish a person as a transient occupant of residential property; specifying circumstances when a transient occupancy terminates; providing that a transient occupancy is not extended by the presence of personal belongings of a former transient occupant; requiring the party entitled to possession of a dwelling to allow a former transient occupant to recover personal belongings at certain reasonable times and under reasonable conditions; authorizing a party entitled to possession of the dwelling, under certain circumstances, to impose additional conditions on access to the dwelling or personal belongings; providing a presumption of when a former transient occupant has abandoned his or her personal belongings; specifying a reasonable time to recover personal belongings and circumstances that may extend or shorten the time; authorizing a former transient occupant, under certain circumstances, to bring a civil action for damages or recovery of personal belongings; requiring a court to award the prevailing party reasonable attorney fees and costs; providing construction; providing an effective date.

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

Section 1. Section 82.045, Florida Statutes, is amended to

Florida Senate - 2018 **SB 566**

18-00472B-18 2018566__

read:

82.045 Remedy for unlawful detention by a transient occupant of residential property.—

(1) As used in this section, the term "transient occupant" means a person whose residency in a dwelling intended for residential use has occurred for a brief length of time, is not pursuant to a lease, and whose occupancy was intended as transient in nature.

(a) Factors that establish that a person is a transient occupant include, but are not limited to:

1. The person does not have an ownership interest, financial interest, or leasehold interest in the property entitling him or her to occupancy of the property.

2. The person does not have any property utility subscriptions.

3. Within the previous 12 months, the person did ~~does~~ not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections.

~~4. The person does not receive mail at the property.~~

4.~~5.~~ The person pays minimal or no rent for his or her stay at the property.

5.~~6.~~ The person does not have a designated space of his or her own, such as a room, at the property.

6.~~7.~~ The person has minimal, if any, personal belongings at the property.

7.~~8.~~ The person has an apparent permanent residence elsewhere.

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

(b) Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses, do not establish residency.

(2) A transient occupant unlawfully detains a residential property if the transient occupant remains in occupancy of the residential property after the party entitled to possession of the property has directed the transient occupant to leave. A transient occupancy terminates when a transient occupant begins to reside elsewhere, surrenders the key to the dwelling, or agrees to leave the dwelling when directed by a law enforcement officer, the party entitled to possession, or a court. A transient occupancy is not extended by the presence of personal belongings of a former transient occupant.

(3) Any law enforcement officer may, upon receipt of a sworn affidavit of the party entitled to possession that a person who is a transient occupant is unlawfully detaining residential property, direct a transient occupant to surrender possession of residential property. The sworn affidavit must set forth the facts, including the applicable factors listed in paragraph (1)(a), which establish that a transient occupant is unlawfully detaining residential property.

(a) A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense.

(b) A person wrongfully removed pursuant to this subsection has a cause of action for wrongful removal against the person who requested the removal, and may recover injunctive relief and compensatory damages. However, a wrongfully removed person does not have a cause of action against the law enforcement officer or the agency employing the law enforcement officer absent a showing of bad faith by the law enforcement officer.

(4) A party entitled to possession of a dwelling has a cause of action for unlawful detainer against a transient occupant pursuant to s. 82.04. The party entitled to possession is not required to notify the transient occupant before filing the action. If the court finds that the defendant is not a transient occupant but is instead a tenant of residential property governed by part II of chapter 83, the court may not dismiss the action without first allowing the plaintiff to give the transient occupant the notice required by that part and to thereafter amend the complaint to pursue eviction under that part.

(5) The party entitled to possession of a dwelling shall allow a former transient occupant to recover his or her personal belongings at reasonable times and under reasonable conditions.

(a) A reasonable time for the recovery of the former transient occupant's personal belongings includes a convenient time when the party entitled to possession of the dwelling or a trusted third party can be present at the dwelling to supervise the recovery of the belongings.

(b) If the party entitled to possession of the dwelling reasonably believes that the former transient occupant has engaged in misconduct or has a history of violence or drug or

alcohol abuse, it is reasonable for the party entitled to possession of the dwelling to impose additional conditions on access to the dwelling or the personal belongings. These conditions may include, but are not limited to, the presence of a law enforcement officer, the use of a mover registered with the Department of Agriculture and Consumer Services, or the use of a trusted third party to recover the personal belongings. For purposes of this paragraph, misconduct includes, but is not limited to:

1. Intentional damage to the dwelling, to property owned by the party entitled to possession of the dwelling, or to property owned by another occupant of the dwelling;

2. Physical or verbal abuse directed at the party entitled to possession of the dwelling or another occupant of the dwelling; or

3. Theft of property belonging to the party entitled to possession of the dwelling or property of another occupant of the dwelling.

(c) The person entitled to possession of a dwelling may presume that the former transient occupant has abandoned personal belongings left at the dwelling if the former transient occupant does not seek to recover them within a reasonable time after the transient occupant surrenders occupancy of the dwelling. A reasonable time to recover personal belongings is deemed to be 5 days after the termination of the transient occupancy, but may be longer or shorter depending on the specific circumstances. Circumstances that may extend the time include an agreement to hold the property for longer than 5 days or the unavailability of the party entitled to possession of the

dwelling to supervise the recovery of the personal belongings. Circumstances that may shorten the time include, but are not limited to, the poor condition of or the perishable or hazardous nature of the personal belongings, the intent of the former transient occupant to abandon or discard the belongings, or the significant impairment of the use of the dwelling by the storage of the former transient occupant's personal belongings.

(d) If the person entitled to possession of the dwelling unreasonably withholds access to a former transient occupant's personal belongings, the former transient occupant may bring a civil action for damages or the recovery of the property. The court shall award the prevailing party reasonable attorney fees and costs.

(6) This section is construed in recognition of the right to exclude others as one of the most essential components of property rights.

Section 2. This act shall take effect July 1, 2018.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Health Policy, *Chair*
Appropriations Subcommittee on Pre-K - 12 Education, *Vice Chair*
Commerce and Tourism
Communications, Energy, and Public Utilities
Regulated Industries

JOINT COMMITTEE:
Joint Committee on Public Counsel Oversight

SENATOR DANA YOUNG
18th District

December 5, 2017

Senator Greg Steube, Chair
Senate Judiciary Committee
515 Knott Building
404 S. Monroe Street
Tallahassee, Florida 32399-1100

Dear Chair Steube,

My Senate Bill 566 relating to Unlawful Detention by a Transient Occupant has been referred to your committee for a hearing. I respectfully request that this bill be placed on your next available agenda.

Should you have any questions, please do not hesitate to reach out to me.

Sincerely,

Dana Young
State Senator – 18th District

cc: Tom Cibula, Staff Director – Senate Judiciary Committee

REPLY TO:
☐ 1211 N. Westshore Blvd, Suite 409, Tampa, Florida 33607 (813) 281-5507
☐ 316 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5018

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

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

Jan 10, 2018
Meeting Date

566
Bill Number (if applicable)

Topic Unlawful Detention

Amendment Barcode (if applicable)

Name Ken "cope-CHEN-ski" Kopczynski

Job Title Lobbyist

Address 300 East Brevard St
Street

Phone 222-3329

Tally FL 32301
City *State* *Zip*

Email ken@flpba.org

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

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

Representing Fla PBA Inc

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

Lobbyist registered with Legislature: [X] 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)

1.10.17
Meeting Date

SB 526
Bill Number (if applicable)

Topic Transient

Amendment Barcode (if applicable)

Name David Bernhardt

Job Title Vice President Fraternal Order Police

Address 147 Office Plaza
Street

Phone

Tally
City *State* *Zip*

Email

Speaking: ☑ For ☐ Against ☐ Information

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

Representing F.O.P.

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 Judiciary

BILL:	CS/SB 1216
INTRODUCER:	Judiciary Committee and Senator Book
SUBJECT:	Public Records/Videotaped Statement of a Minor
DATE:	January 10, 2018 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Fav/CS**
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1216 expands an existing public records exemption that makes information from the videotaped statements of minor children who are alleged to be or are the victims of several specific sexual offenses confidential and exempt from public access requirements under the public records laws. Under the bill, the exemption also applies if the videotaped statements relate to the sexual performance by a child and child pornography as those offenses are redefined in a linked bill SB 1214, which revises laws relating to child exploitation.

The bill requires a two-thirds vote of each chamber because it expands a public records exemption.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution

Under the Florida Constitution, the public is guaranteed the right of access to government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, unless the record is exempted or specifically made confidential.[1]

[1] FLA. CONST., art. I, s. 24(a).

The public is also guaranteed the right to be notified and have access to meetings of any collegial public body of the executive branch of state government or of any local government.[2] The Legislature's meetings must also be open and noticed to the public, unless an exception is provided for in the Constitution.[3]

The Florida Statutes

Similarly, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., contains the main body of public records laws and is known as the Public Records Act.[4] The Act deals with public records access and guarantees every person's right to inspect and copy any state or local government public record.[5] Section 286.011, F.S., which is often referred to as the state's sunshine law, requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.[6] A violation of the Public Records Act may result in civil or criminal liability.[7]

Public Records Exemptions

Only the Legislature may create an exemption to public records or open meeting requirements.[8] An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law. The law must be passed by a two-thirds vote of each house of the Legislature.[9]

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[2] FLA. CONST., art. I, s. 24(b).
[3] *Id.*
[4] Additional public records laws are found throughout the Florida Statutes.
[5] Section 119.011(12), F.S., defines "public record" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The public records chapter does not apply to legislative records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.
[6] Section 286.011(1) and (2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.
[7] Section 119.10, F.S.
[8] FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature designates as both exempt *and* confidential. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991). However, if the Legislature designates a record as confidential, the information is not subject to public inspection and may be released only to the organizations or persons designated in the statute. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[9] FLA. CONST., art. I, s. 24(c).

When creating a public records exemption, the Legislature may provide that a record is "confidential and exempt" or "exempt."[10] Records designated both as "confidential and exempt" may be released by the records custodian only under the circumstances defined by the Legislature.[11] However, records designated as "exempt" may be released at the discretion of the records custodian under certain circumstances.[12]

Open Government Sunset Review Act

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meeting exemptions.[13] The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.[14]

The Sunset Review Act provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.[15] An exemption serves an identifiable purpose if it (A) meets one of the stated requirements below *and* (B) the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. Under (A), the stated requirements are that the exemption must:

(1) Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption;16
(2) Protect sensitive personal information that would be defamatory or damaging to someone's reputation or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[17] or
(3) Protect confidential information of entities including, but not limited to, trade or business secrets.[18]

The act also requires specified questions to be considered during the review process.[19] In examining an exemption, the act directs the Legislature to carefully question the purpose and

[10] If the Legislature designates a record as confidential, the record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).
[11] A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).
[12] *Id*.
[13] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.
[14] Section 119.15(3), F.S.
[15] Section 119.15(6)(b), F.S. *See also* s. 119.01(1), F.S. "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.").
[16] Section 119.15(6)(b)1., F.S.
[17] Section 119.15(6)(b)2., F.S.
[18] Section 119.15(6)(b)3., F.S.
[19] Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?

necessity of reenacting the exemption. If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[20] If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.[21]

Public Records Exemptions for Crime Victims

Under current law, a document identifying the victim of a crime is generally exempt from public access requirements under the public records laws.[22] Such documents are exempt when they both:

(1) Reveal a crime victim's identity or personal identifying information, such as home and employment phone numbers or addresses or the victim's personal assets, *and*
(2) Specify the person who is the victim of the crime.[23]

There are also two categories of "special victims" for which additional public records exemptions have been deemed necessary:

(1) *Personally targeted abuse victims*—victims of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence may request in writing that any information that is not already confidential and exempt and reveals the victim's *location* also be deemed exempt from inspection.[24]

(2) *The videotaped statements of child sex crime victims*—any information in a videotaped statement of a minor who is alleged to be or is a victim of sexual battery,[25] lewd and lascivious acts,[26] or other sexual misconduct as proscribed under various statutory provisions (generally concerning exhibition or depiction of sexual acts)[27] are confidential and exempt

- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

[20] FLA. CONST., art. I, s. 24(c).
[21] Section 119.15(7), F.S.
[22] Section 119.071(2)(j)1., F.S.; FLA. CONST., art. I, s. 24(c).
[23] *Id.*
[24] *Id.*
[25] Section 794.011(1)(h), F.S. ("'Sexual battery' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.").
[26] Sections 800.01-.09, F.S. (Chapter 800).
[27] Section 827.071, F.S. (prohibiting use of a child in a sexual performance and the promotion, possession, or intentionally viewing of a visual depiction of the child's sexual performance (with the exception of law enforcement investigations)); s. 847.012, F.S. (prohibiting intentional selling, renting, or loaning sexually graphic or pornographic materials to minors); s. 847.0125, F.S. (prohibiting retail display of sexually graphic magazine covers which are harmful to minors); s. 847.013, F.S. (prohibiting exposure of minors to sexually graphic or pornographic movies, exhibitions, shows, presentations, or representations); s. 847.0133, F.S. ("A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor" including drawings and written materials); s. 847.0145, F.S. (prohibiting sexual trafficking of minors).

from public access under the Public Records Act if the videotaped statement reveals the minor's identity or other identifying information (the minor's name, face, home, phone number, school, church, etc.) *and* specifies that the minor is the victim of one of the proscribed sexual crimes.[28] The child sex crime exemption also criminally penalizes any public employee or official who willfully and knowingly discloses such information from the video.[29]

III. Effect of Proposed Changes:

Section 1 expands the existing public records exemption concerning information in the videotaped statements of minor children who are the victims of sexual battery,[30] lewd and lascivious acts,[31] or other sexual misconduct as proscribed under various statutory provisions.[32] Under the bill, the exemption also applies if the videotaped statements relate to the sexual performance by a child[33] and child pornography[34] as those offenses are redefined in a linked bill SB 1214, which revises laws relating to child exploitation. The bill also amends and conforms the same statutory references in the enforcement provision of the exemption, providing criminal penalties for a public employee or officer who willfully and knowingly discloses videotaped information of a child victim of a sex crime.

In accordance with the Open Government Sunset Review Act,[35] the bill states that:

- The record is exempt from section 24, Article I, of the State Constitution;
- The record is exempt from section 119.07(1), F.S.; and
- The exemption will be repealed in 5 years, on October 2, 2023, unless reviewed by the Legislature and reenacted.[36]

Section 2 contains legislative findings that the expansion of the public records exemption is a public necessity. The findings note that many of the videotaped statements by child victims

[28] Section 119.071(2)(j)2.a., F.S.
[29] Section 119.071(2)(j)2.b., F.S.
[30] Section 794.011(1)(h), F.S. ("'Sexual battery' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.").
[31] Sections 800.01-.09, F.S. (Chapter 800).
[32] Section 827.071, F.S. (prohibiting use of a child in a sexual performance and the promotion, possession, or intentionally viewing of a visual depiction of the child's sexual performance (with the exception of law enforcement investigations)); s. 847.012, F.S. (prohibiting intentional selling, renting, or loaning sexually graphic or pornographic materials to minors); s. 847.0125, F.S. (prohibiting retail display of sexually graphic magazine covers which are harmful to minors); s. 847.013, F.S. (prohibiting exposure of minors to sexually graphic or pornographic movies, exhibitions, shows, presentations, or representations); s. 847.0133, F.S. ("A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor" including drawings and written materials); s. 847.0145, F.S. (prohibiting sexual trafficking of minors).
[33] *See* SB 1214 at p. 48, proposing creation of 847.003, "Sexual performance by a child; penalties" to replace section 827.071, F.S., also entitled "Sexual performance by a child; penalties," which SB 1214 proposes to repeal.
[34] *See* SB 1214 at p. 52, proposing substantial revisions to Section 847.0137, F.S., titled "Transmission of pornography by electronic device or equipment prohibited; penalties," and renaming it "Child pornography; prohibited acts; penalties."
[35] Section 119.15(4)(a), F.S.
[36] Section 119.15(4)(a), F.S. ("A law that enacts a new exemption or substantially amends an existing exemption must state that the record or meeting is: 1. Exempt from s. 24, Art. I of the State Constitution; 2. Exempt from s. 119.07(1) or s. 286.011; and 3. Repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.").

contain highly sensitive information in which the child describes the sexual crime in graphic detail. If such videotaped information were publicized, it could lead to further victimization, humiliation, trauma, sorrow, and emotional injury for both the child and his or her family. To minimize trauma, prevent further victimization and injury, and protect the child's privacy, the findings note that the videotaped statements of child victims of proscribed sexual crimes, including ss. 847.003 and 847.0137, F.S., should also be exempt.

Section 3 provides that the effective date is the same as the effective date of the linked bill, SB 1214, or similar bill. Accordingly, this bill takes effect on October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement: Article I, s. 24(c), of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption.

Public Necessity Statement: Article I, s. 24(c), of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. Here, the bill includes a public necessity statement in Section 2 and, therefore, meets this requirement.

Breadth of Exemption: Article I, s. 24(c), of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.[37] Additionally, the Open Government Sunset Review Act (Act) provides that the stated purpose or "identifiable public purpose is served if [(A)] the exemption meets one of the [enumerated] purposes *and* [(B)] the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption[.]"[38]

Here, the bill's exemption serves the second enumerated "identifiable purpose" under the Act: to protect the sensitive personal information of child sex crime victims by limiting access to information in their videotaped statements in order to protect these children and their families from further victimization and trauma. Only personal, identifying information is exempt and confidential under the bill.[39]

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[37] "The public records act 'is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.'" *Lightbourne v. McCollum*, 969 So. 2d 326, 332–33 (Fla. 2007) (quoting *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994)).

[38] Section 119.15(6)(b), F.S. (setting out three enumerated purposes: (1) allow effective and efficient administration of government program, (2) protect individual's identity and sensitive personal information, (3) protect confidential business and trade information).

[39] Section 119.15(6)(b)2., F.S. (permitting the exemption of sensitive, personal information pertaining to individuals which could jeopardize the safety of the individual if disclosed, so long as the exemption is limited to identifying information).

Based on the statement of public necessity, the purpose of the exemption is sufficiently compelling to expand the exemption given its aim to protect the identity and reputation of vulnerable child victims. While the bill does not explicitly set out a legislative finding that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption,[40] the Act itself does not specifically require that the legislative finding be made in writing.[41] Also, that open government policy is outweighed in the context of videotaped statements by child sex crime victims and the need to protect sexually exploited children seems to be an obvious and logical conclusion.

In sum, it appears the bill does not conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish the stated purpose of the law.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. None. Government Sector Impact:

The bill appears unlikely to have a significant fiscal impact on government agencies because videotaped statements of child sex crime victims are already confidential and exempt.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[40] *See, e.g.,* CS/CS/HB 397 (2017 Reg. Session) ("The Legislature finds that the potential harm that may result from the release of such information outweighs any public benefit that may be derived from the disclosure of such information."). *But see* HB 7093 (2017 Reg. Session) (no written finding that need for exemption outweighs public policy); HB 111 (2017 Reg. Session) (no written finding that need for exemption outweighs public policy).

[41] Rather, the Act requires that the legislature "find" that the purpose is sufficiently compelling to override public policy favoring open government. As a legal term, the word "find" is a verb meaning "[t]o determine a fact in dispute by verdict or decision <find guilty> <found that no duty existed>."). BLACK'S LAW DICTIONARY (10th ed. 2014).

VIII. Statutes Affected:

This bill substantially amends section 119.071 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.)

CS by Judiciary Committee on January 10, 2018:
The CS amends the effective date provision by filling in the "blank" for the linked bill information. The effective date is now pinned to the effective date of SB 1214 or similar legislation.

B. Amendments:

None.

771212

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/10/2018	.	
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	.	
	.	

The Committee on Judiciary (Book) recommended the following:

Senate Amendment

Delete line 102

and insert:

SB 1214 or similar legislation takes effect, if such legislation

By Senator Book

32-00436A-18 20181216__

A bill to be entitled

An act relating to public records; amending s. 119.071, F.S.; expanding the exemption from public records requirements for any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct; providing for future review and repeal of the exemption; providing a statement of public necessity; providing a contingent effective date.

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

Section 1. Paragraph (j) of subsection (2) of section 119.071, Florida Statutes, is amended to read:

119.071 General exemptions from inspection or copying of public records.—

(2) AGENCY INVESTIGATIONS.—

(j)1. Any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Any information not otherwise held confidential or exempt from s. 119.07(1) which reveals the home or employment telephone number, home or employment address, or personal assets of a person who has been the victim of sexual battery, aggravated child abuse, aggravated

stalking, harassment, aggravated battery, or domestic violence is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, upon written request by the victim, which must include official verification that an applicable crime has occurred. Such information shall cease to be exempt 5 years after the receipt of the written request. Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding this section.

2.a. Any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct proscribed in chapter 800 or in s. 794.011, s. 847.003, ~~s. 827.071,~~ s. 847.012, s. 847.0125, s. 847.013, s. 847.0133, s. 847.0137, or s. 847.0145, which reveals that minor's identity, including, but not limited to, the minor's face; the minor's home, school, church, or employment telephone number; the minor's home, school, church, or employment address; the name of the minor's school, church, or place of employment; or the personal assets of the minor; and which identifies that minor as the victim of a crime described in this subparagraph, held by a law enforcement agency, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Any governmental agency that is authorized to have access to such statements by any provision of law shall be granted such access in the furtherance of the agency's statutory duties, notwithstanding the provisions of this section.

b. A public employee or officer who has access to a

videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct proscribed in chapter 800 or in s. 794.011, s. 847.003, ~~s. 827.071,~~ s. 847.012, s. 847.0125, s. 847.013, s. 847.0133, s. 847.0137, or s. 847.0145 may not willfully and knowingly disclose videotaped information that reveals the minor's identity to a person who is not assisting in the investigation or prosecution of the alleged offense or to any person other than the defendant, the defendant's attorney, or a person specified in an order entered by the court having jurisdiction of the alleged offense. A person who violates this provision commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

c. This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct as proscribed by s. 847.003, Florida Statutes, or s. 847.0137, Florida Statutes, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The Legislature finds that such information is highly sensitive and shows the minor victim describing in graphic detail sexual acts for which he or she is alleged to be or is a victim. If such information regarding a minor victim of sex crimes were viewed, copied, or publicized, it could result in trauma, sorrow,

humiliation, or emotional injury to the minor victim and his or her family. The Legislature finds that it is important to strengthen the protections afforded minor victims of sex crimes in order to ensure their privacy and to prevent their revictimization. This exemption serves to minimize the trauma to those minor victims because the release of such information would compound the tragedy already visited upon their lives. For these reasons, the Legislature finds that it is a public necessity to make confidential and exempt any information in a videotaped statement of a minor who is alleged to be or who is a victim of sexual battery, lewd acts, or other sexual misconduct as proscribed by s. 847.003, Florida Statutes, or s. 847.0137, Florida Statutes.

Section 3. This act shall take effect on the same date that SB ____ or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on the Environment and Natural Resources, *Chair*
Appropriations
Appropriations Subcommittee on Health and Human Services
Education
Environmental Preservation and Conservation
Health Policy
Rules

SENATOR LAUREN BOOK
Democratic Leader Pro Tempore
32nd District

December 19, 2017

Chair Greg Stuebe
Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Chair Stuebe,

I respectfully request that you place SB 1216, relating to Public Records/Videotaped Statement of a Minor, on the agenda of the Committee on Judiciary at your earliest convenience.

Should you have any questions or concerns, please feel free to contact my office or me. Thank you in advance for your consideration.

Thank you,

Lauren Book

Senator Lauren Book
Senate District 32

cc: Tom Cibula, Staff Director
Joyce Butler, Administrative Assistant

REPLY TO:
☐ 967 Nob Hill Road, Plantation, Florida 33324 (954) 424-6674
☐ 202 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5032

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

THE FLORIDA SENATE

APPEARANCE RECORD

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

1-10-2018
Meeting Date

1216
Bill Number (if applicable)

Topic Public Records/Videotaped Statement of a Minor

Amendment Barcode (if applicable)

Name Erin Choy

Job Title Immediate Past Chair

Address 404 E. Sixth Avenue
Street

Tallahassee FL 32303
City *State* *Zip*

Phone 561-635-4168

Email erin.choy@gmail.com

Speaking: ☐ For ☐ Against ☐ Information

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

Representing Junior Leagues of Florida

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)

1/10/18
Meeting Date

1216
Bill Number (if applicable)

Topic PUBLIC RECORDS - VIDEOTAPED STATEMENT OF A MINOR *Amendment Barcode (if applicable)*

Name BILL BUNKLEY

Job Title PRESIDENT

Address PO BOX 341644 Phone 813.264.2977
Street

TAMPA FL 33694 Email
City *State* *Zip*

Speaking: ☑ For ☐ Against ☐ Information

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

Representing FLORIDA ETHICS AND RELIGIOUS LIBERTY COMMISSION

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

SPECIAL MASTER ON CLAIM BILLS

Location
515 Knott Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5198

DATE	COMM	ACTION
1/4/18	SM	Fav/1 amendment
1/11/18	JU	**FAV/CS**
	GO	
	RC	

January 2, 2018

The Honorable Joe Negron
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 52** – Judiciary Committee and Senator Mayfield
HB 6515 – Representative Altman
Relief of Cathleen Smiley

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM PREDICATED UPON A CONSENT JUDGMENT ENTERED AGAINST BREVARD COUNTY TO COMPENSATE THE CLAIMANT, CATHLEEN SMILEY, FOR INJURIES SUFFERED IN A MOTOR VEHICLE ACCIDENT AS A RESULT OF THE NEGLIGENT ACTIONS OF AN EMPLOYEE OF THE COUNTY.

FINDINGS OF FACT:

On June 18, 1998, Cathleen Smiley ("Claimant") was involved in a multi-vehicle accident caused by a bus owned and operated by Brevard County. Claimant was the driver of a 1994 Ford Ranger pickup truck that was stopped in the westbound inside lane of West Hibiscus Boulevard waiting to make a left turn. A van being driven by Howard Evarts was traveling behind Claimant at roughly 5 mph, also preparing to turn left, when a Brevard County transit bus traveling at 45 mph failed to brake and rear-ended the van leaving approximately 76 feet of skid marks. This collision caused the Evarts van to rear-end Claimant's vehicle. At the time of the accident, Claimant was wearing her seatbelt. The driver of the County bus, Dale McKale, was dismissed from county employment as a result of this accident.

Upon impact, Claimant's head hit the rear window of her pickup truck and she was knocked unconscious. She also sustained a laceration to her head which required 38 stitches. Injuries sustained by Claimant also included a post-traumatic cervical sprain, a post-traumatic thoracic sprain, post-traumatic headaches, a left shoulder injury, and a closed head injury with post-concussive syndrome. Claimant's neurologist, Dr. Christopher Prusinski, opined that she is at a point of maximum medical improvement and that she had suffered an 8 percent whole body impairment. To this day, Claimant experiences periodic neck and left shoulder pain.

After the accident, Claimant received substantial medical care with bills totaling $22,437.42. Claimant testified that the accident caused a strain on her family life with her husband and young children. She could no longer perform her job as a certified nursing assistant due to the physically demanding nature of the position due to her injuries. But she has since found other work that is less physically demanding.

Collateral Sources
Claimant received $8,650 from the County for property damage to her truck. She also received $10,000 from Allstate Insurance from personal injury protection (PIP) coverage, which went towards her medical bills and support while she could not work.

Litigation History
Claimant and her husband filed suit against the Brevard County Board of Commissioners on or around February 29, 2000. The County filed an Answer in September 25, 2000. On May 27, 2014, Claimant and the County entered into a settlement agreement. The County agreed to pay Claimant $25,000. Due to paying out other claims from the same accident, the county reached the $200,000 sovereign immunity cap that was in place at the time of the accident, so the settlement agreement stipulates that Claimant will be compensated once a claims bill is passed. A consent judgment was entered on January 25, 2016. The Brevard County Board of County Commissioners has approved the settlement. The County is prepared to pay using risk management reserves, and payment of this claim bill will not affect county operations. The Legislature has already passed

two claim bills for the driver and passenger of the van involved in this same accident.[1]

CONCLUSIONS OF LAW:

The County owned the bus driven by its employee, Mr. McKale and is covered by the provisions of s. 768.28, F.S. Section 768.28, F.S., generally allows injured parties to sue state or local governments for damages caused by their negligence or the negligence of their employees by waiving the government's sovereign immunity from tort actions. However, at the time of this accident, the statute limited the amount of damages that a plaintiff could collect from a judgment against or settlement with a government entity to $100,000 per person and $200,000 for all claims or judgments arising out of the same incident. Funds can be paid in excess of these limits only upon the approval of a claim bill by the Legislature. The district has settled all claims associated with this accident except for Claimant's claim.

In a negligence action, a plaintiff bears the burden of proof to establish the four elements of negligence. These elements are duty, breach, causation, and damages. *Charron v. Birge*, 37 So. 3d 292, 296 (Fla. 5th DCA 2010) (quoting *Jefferies v. Amery Leasing, Inc.*, 698 So. 2d 368, 370-71 (Fla. 5th DCA 1997)).

The driver of a motor vehicle has a duty to use reasonable care, in light of the attendant circumstances, to prevent injuring persons within the vehicle's path. *Gowdy v. Bell*, 993 So. 2d 585, 586 (Fla. 1st DCA 2008). Reasonable care is the degree of care a reasonably careful person would have used under like circumstances. *Foster v. State*, 603 So. 2d 1312, 1316 n. 3 (Fla. 1st DCA 1992).

The long-standing doctrine of *respondeat superior* provides that an employer is liable for an employee's acts committed within the course and scope of employment. *City of Boynton Beach v. Weiss*, 120 So. 3d 606, 611 (Fla. 4th DCA 2013). Florida's dangerous instrumentality doctrine imposes "vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). Motor vehicles have been considered dangerous instrumentalities under Florida

[1] House Bills 797 and 799 (2003).

law for over a century. See *Anderson v. S. Cotton Oil Co.*, 74 So. 975, 978 (Fla. 1917). Mr. McKale was employed by the County and was acting within the scope of his employment at the time of the accident. Accordingly, the negligence of Mr. McKale is attributable to the district.

Duty & Breach
The County employee driving the bus was acting within the scope of his employment at the time of the accident. He had a duty to exercise reasonable care while operating the bus, which he breached when he failed to brake and collided into the rear of the van driven by Mr. Evarts, causing Mr. Evarts to rear-end Claimant. Brevard County admits that its employee, Dale McKale, operated the bus in a negligent manner and the county is liable.

Causation
The County's breach of the duty of care caused the accident that resulted in Claimant's injuries and damages.

Damages
Claimant suffered various serious injuries, with medical bills totaling $22,437.42. She will have ongoing pain for the rest of her life, and will require lifelong treatment due to her injuries. After the accident she was unable to do her job as a certified nursing assistant, resulting in a lack of employment for some time. Her injuries also contributed to the strain on her marriage, which later ended in a divorce.

ATTORNEYS FEES: The attorney in this case submitted an affidavit affirming that his fees will not exceed 25 percent of any recovery as required by s. 768.28, F.S. Outstanding costs are $2,343.12.

SPECIAL ISSUES: The undersigned recommends the bill is amended to reflect that Claimant's current married name is Cathleen L. Waller.

RECOMMENDATIONS: Based on the above findings, I recommend that Senate Bill 52 be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Kellie Cochran
Senate Special Master

cc: Secretary of the Senate
Senator Mayfield, Senate Sponsor
Representative Altman, House Sponsor
Jordan Jones, House Special Master

CS by Judiciary:
The committee substitute recognizes the Claimant's name change as the result of her marriage.

279020

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
01/10/2018	.	
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	.	
	.	

The Committee on Judiciary (Mayfield) recommended the following:

Senate Amendment

Delete lines 85 - 86
and insert:
Smiley, now known as Cathleen Waller, to compensate her for personal injuries and damages sustained.

THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR DEBBIE MAYFIELD
17th District

COMMITTEES:
Education, Vice Chair
Government Oversight & Accountability, Vice Chair
Appropriations Subcommittee on the Environment and Natural Resources
Appropriations subcommittee on General Government
Agriculture
Judiciary

JOINT COMMITTEES:
Joint Legislative Auditing Committee, Alternating Chair

January 3, 2018

Chair Greg Steube
326 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Re: SB 52

Dear Chair Steube,

I am respectfully requesting SB 52, a claims bill related to Cathleen Smiley, be placed on the agenda for your Judiciary committee.

I appreciate your consideration of this request and I look forward to working with you and the Judiciary Resources in the future. If you have any questions or concerns, please do not hesitate to call me directly.

Thank you,

Debbie Mayfield

Senator Debbie Mayfield
District 17

Cc: Tom Cibula, Joyce Butler, Alex Blaire, Libby Bolles

REPLY TO:
☐ 900 E. Strawbridge Avenue, Melbourne, Florida 32901 (321) 409-2025
☐ 1801 27th Street, Vero Beach, Florida 32960 (772) 226-1970
☐ 324 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5017

Senate's Website: *www.flsenate.gov*

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

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 Judiciary

BILL:	SB 1022
INTRODUCER:	Senator Steube
SUBJECT:	Determination of Parentage
DATE:	January 9, 2018
REVISED:	1/11/18

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Tulloch	Cibula	JU	**Favorable**
2.			CF	
3.			RC	

I. Summary:

SB 1022 authorizes a court to recognize a third legal parent and add that parent to the child's birth certificate. Under the bill, when an "alleged parent" reasonably believes that he or she is the biological parent of a child already deemed the legal child of another, the alleged parent may file a petition in circuit court to establish that he or she is the "actual" legal parent of the child. The child or the child's mother may also file a petition to establish actual legal parentage.

The bill sets forth the procedures both the court and the petitioner must follow. To prevail, the petitioner must ultimately rebut one of the presumptions of legal parentage in another person during a trial and establish that the alleged parent: (a) is the biological parent, (b) has demonstrated a substantial concern and interest in the child's welfare, and (c) that it is in the best interests of the child to establish the biological parent as a legal parent.

If the petitioner is successful, the bill authorizes the court to enter an order recognizing the alleged or biological parent as a legal parent of the child in one of two ways: (1) by terminating the rights of the current legal parent (not the mother) and adding the new legal parent/biological parent to the birth certificate; *or* (2) by adding the biological legal parent as a third legal parent to the birth certificate. However, if the petitioner is unsuccessful at any stage of the proceeding or the court determines that establishing the alleged parent's legal parentage is not in the best interests of the child, the court must dismiss the petition and seal the record.

II. Present Situation:

Overview

In Florida, the biological father of a child conceived as the result of an extramarital affair with a married woman will not be deemed the child's legal parent. Rather, by operation of a common

law rule safeguarding the legitimacy of children, the mother's husband is deemed the legal parent of the child because the child was born into an intact marriage.[1]

Legal Parentage

Well before DNA and extensive keeping of birth records and birth certificates, issues of legal parentage—both maternity and paternity—arose.

In modern times, the status of being a "legal parent" is coveted for a variety of reasons. "The status of legal parent . . . has tremendous legal significance, as it comes with near complete independence in decision-making [for the child] and significant constitutional protection."[2] "Parental rights constitute a fundamental liberty interest . . . protected by the Due Process Clause of the Fourteenth Amendment[.]"[3] Additionally, "[l]egal parents enjoy considerable protection from state and third-party interference"[4] and are not subjected to the scrutiny that those seeking to become adoptive parents must undergo.[5] "While legal parents bear the obligations of parentage, such as food, shelter, clothing, medical care, and the like, legal parents also enjoy all of the benefits of parentage, such as custody and influencing the child's educational, moral, and religious development."[6]

But the paramount consideration in the parent-child relationship is not the right of the parents but the best interests of the child. Parents who are "fit parents" will be free from state interference because "fit parents" are presumed "to act in the best interests of their children."[7] As the United States Supreme Court has explained:

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[8]

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[1] *Department of Health & Rehabilitative Services v. Privette*, 617 So. 2d 305 (Fla. 1993); *C.G. v. J.R.*, 13 So. 3d 776 (Fla. 2d DCA 2014) (defining the "legal father" as "the man to whom the mother was married when the child was born and whose name appears on the birth certificate").
[2] Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 213–14 (2012).
[3] *In re K.M.*, 946 So. 2d 1214, 1219 (Fla. 2d DCA 2006) (quoting *Padgett v. Dep't of Health & Rehab. Servs.*, 577 So.2d 565, 571 (Fla.1991)(internal quotation marks omitted); citing *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion)).
[4] Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 311 (2007).
[5] *See* note 2, *supra*.
[6] *Id.*
[7] *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").
[8] *Id.* (quoting *Parham v. J. R.*, 442 U.S. 584, 602 (1979)).

Third Party Intervention in the Legal Parent-Child Relationship

Generally, the only third party permitted to interfere with the legal parent-child relationship is the state, when intervention is necessary to protect the health or safety of the child.[9] However, when the state must intervene for the health and safety of the child, the state must also presume that parents want to be "fit" and competent parents, and must make every effort to keep families stable and intact.[10] Stability is one of the key statutory factors in determining the best interests of the child and is deemed paramount in determining custody or timesharing between parents[11] as well as dependency issues.[12]

On the other hand, "a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference . . . absent a powerful countervailing interest, protection."[13] Where the child's mother is not married when the child is born, the right of both unmarried biological fathers and mothers to establish a legal parent-child relationship with the child has been recognized in Florida. [14] The constitutional right of the unwed biological parent is described as "inchoate" and may "develop into a fundamental right to be a parent" when the biological parent "demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of [the] child."[15] However, when the mother is already married, the unwed biological parent is not the legal parent. Rather, for purposes of legitimacy, the mother's spouse is the legal parent under the common law presumption applicable to children born into an intact marriage.[16]

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[9] *See* Ch. 39, F.S.

[10] Section 39.001(1), F.S. ("The purposes of this chapter are: (a) To provide for the care, safety, and protection of children . . . (b) To recognize that most families desire to be competent caregivers and providers for their children and that children achieve their greatest potential when families are able to support and nurture the growth and development of their children. Therefore, the Legislature finds that policies and procedures that provide for prevention and intervention through the department's child protection system should be based on the following principles: 1. The health and safety of the children served shall be of paramount concern. . . . 3. The prevention and intervention *should intrude as little as* possible into the life of the family, . . .[and] ensure[] the health and safety of children *and the integrity of families*. (f) *To preserve and strengthen the child's family ties whenever possible*, removing the child from parental custody only when his or her welfare cannot be adequately safeguarded without such removal.").

[11] Section 61.13(3), F.S. (requiring court to consider factors including the maintaining the stability of the child's current environment, as well as each parent's capacity to honor timesharing schedule, put the child's needs above his or her own, communicate with the other parent, create a stable home life establishing routines for the child, etc.). *See also Neville v. McKibben*, 227 So. 3d 1270, 1273 (Fla. 1st DCA 2017) ("the trial court must find, at a minimum, that its custody determination is in the best interests of the child").

[12]Section 39.001(1)(h), F.S. ("To ensure that permanent placement with the biological or adoptive family is achieved as soon as possible for every child in foster care and that no child remains in foster care longer than 1 year.").

[13] *T.M.H. v. D.M.T.*, 79 So. 3d 787, 796–97 (Fla. 5th DCA 2011), *aff'd in part, disapproved in part*, 129 So. 3d 320 (Fla. 2013) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), accord *Stanley*, 405 U.S. at 651, 92 S.Ct. 1208); *see also Lehr v. Robertson*, 463 U.S. 248, 256, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983)).

[14] *D.M.T. v. T.M.H.*, 129 So. 3d 320, 335 (Fla. 2013) ("a biological father's constitutional rights are inchoate and develop into a fundamental right to be a parent when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child" (citations, quotation marks, and alterations in original text omitted) (extending to unmarried biological mother who contributed an egg to her same-sex partner with the intention of conceiving and parent a child together) . . . [because] his interest in personal contact with his child acquires substantial protection under the due process clause."

[15] *Id.* (internal quotations and citation omitted).

[16] *Daniel v. Daniel*, 681 So. 2d 849, 851 (Fla. 2d DCA 1996), *approved*, 695 So. 2d 1253 (Fla. 1997) (quoting *In Matter of Adoption of Baby James Doe*, 572 So.2d 986, 988 (Fla. 1st DCA 1990) ("A child born or conceived during a lawful marriage is a legitimate child.").

The Common Law Presumption of Parentage for Legitimacy

Though not identical, historically, parentage and legitimacy have been closely related concepts.[17] Parentage determines who bears the duty to care for and support a child (the parent in fact), whereas legitimacy concerns the legal relationships between the parent and the child and its consequences.[18] Many of the laws establishing presumptions concerning legal parentage at common law were developed to shield a child from the severe consequences of illegitimacy. Illegitimacy carried not only a stigma of disrepute for the unwed mother and her innocent child,[19] it carried criminal penalties for the mother and father engaged in adultery[20] as well as severe legal consequences for the child:

> Under the English common law, a bastard could not be the heir of anyone, and neither could he have heirs except the heirs of his own body; being nullius filius, he was considered to be kin to nobody and to have no ancestor from whom any inheritable blood could be derived, and in this country, . . . it is generally recognized that in the absence of any statute conferring rights of inheritance upon them, illegitimate children are without capacity to inherit from or through either parent. Common law disabilities of the illegitimate are relaxed or removed only to the extent that the legislature has seen fit to remove them, and no rights of inheritance can exist in any case which is not within the statute.[21]

Under Florida's common law, "any action challenging a child's legitimacy" as a byproduct of challenging the child's parentage was viewed "with great disfavor."[22] The Florida Supreme Court in *Department of Health & Rehabilitative Services v. Privette* expressed concern over disturbing the common law presumption of legitimacy where the Department of Health & Rehabilitative Services sued the biological father for support of a child born into the mother's intact marriage, even though the mother's spouse had been listed as the legal father on the birth certificate:

> Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their own best interest. Art. I, § 9, Fla. Const. The child's legally recognized father likewise has an unmistakable interest in maintaining the relationship with his child unimpugned, . . . such that his opposition to the blood test and reasons for so objecting would be relevant evidence in determining the child's best interests.[23]

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[17] *Id.* at 851–52 ("The American Heritage College Dictionary 1001 (3d ed. 1993), defines paternity as 'the state of being a father; fatherhood. . . . a woman attempting to establish that a particular man is the father of her child. . . .' Only one person can be the biological father of a child. The American Heritage College Dictionary 775 (3d ed. 1993), defines legitimate as 'being in compliance with the law; lawful. . . . Born to legally married parents.' Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts.").

[18] *Id.*

[19] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384–85 (Fla. 5th DCA 1997) (noting that adultery was historically a crime; and "[s]ociety was so scornful of bringing children into the world as a result of adulterous conduct that 'bastardy' was also a crime.").

[20] *Id.* (noting that the biological father often did not come forward for fear of criminal prosecution).

[21] *In re Caldwell's Estate*, 247 So. 2d 1, 5 (Fla. 1971) (citing 10 Am.Jur.2d Sec. 146, Pg. 948).

[22] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384–85 (Fla. 5th DCA 1997).

[23] 617 So.2d 305 (Fla.1993).

Thus, legitimacy laws came into being to protect children. While a child would not necessarily suffer the same legal consequences if legal parentage were challenged today, the child would still suffer the consequences of potential alienation from a loved legal parent. [24]

Establishing Legal Parentage of a Child in Florida

Currently, a child's legal parentage is established in several ways in Florida. Unless abandoned following a home birth, the child's mother is usually identified by virtue of the fact that she has given birth at a hospital or elsewhere with the assistance of a midwife or other emergency or medical professionals.[25] If she is the only known parent of the child at the time of birth, she will be the only parent listed on the birth certificate.[26]

The identity of the legal father of the child may be established as follows:

- In the case of a child born to a legally married couple, legal parentage is established by operation of the common law rule that presumes the husband of the child's mother is the legal father, particularly where the husband's name is listed as the father on the birth certificate and he acknowledges the child as his own.[27]
- For a child born to a couple that is not married to one another, legal parentage may be established by:
  - A voluntary acknowledgment of paternity entered by the parties during proceedings to determine inheritance, dependency under worker's compensation or a similar compensation program, or by the Department of Revenue to determine child support;[28]
  - Voluntary acknowledgment of paternity signed by both parents within five days after the child's birth as reflected on the child's birth certificate issued by the Department of Health's Office of Vital Statistics;[29]

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[24] It appears the only legislative body in the United States to permit more than two legal parents is California. Section 7612 (c) of the California Family Code focuses more on the potential harm to the child:

> (c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

[25] Section 382.013(1), F.S.

[26] Section 382.013(2) (c), F.S. ("If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father.").

[27] *G.F.C. v. S.G.*, 686 So. 2d 1382, 1384 (Fla. 5th DCA 1997) ("There existed an almost irrebuttable presumption that the husband was the father of his wife's children, a presumption which could be overcome only upon a showing that the husband either was impotent or lacked access to his wife at the time of conception.") (citing 41 Am.Jur.2d *Presumption From Birth In Wedlock*, § 10 (1995). *See also* s. 382.013(2) (a), F.S. ("If the mother is married at the time of birth, the name of the husband shall be entered on the birth certificate as the father of the child, unless paternity has been determined otherwise by a court of competent jurisdiction.").

[28] Section 409.256, F.S. If the affidavit or stipulation is filed in conjunction with an adjudicatory hearing, it establishes parentage. When no adjudicatory hearing is held, however, the affidavit or stipulation creates a rebuttable presumption of parentage and may be rescinded within 60 days. *Id.*

[29] Section 382.013(2) (c), F.S. ("If the mother is not married at the time of the birth, the name of the father may not be entered on the birth certificate without the execution of an affidavit signed by both the mother and the person to be named as the father. . . . Upon request of the mother and the person to be named as the father, the facility shall assist in the execution of

- Marrying after the birth of the child, in which case the child is treated as if born into an intact marriage (common law rule above);[30] or
- DNA testing to establish paternity when the "putative" or unmarried biological father does not acknowledge paternity within five days after the birth of the child, provided certain procedures set out in chapter 742, F.S., are followed.[31]

- In adoption cases, the legal parentage of a child is established by judicial decree after the rights of the legal or biological parent(s) are terminated.[32]
- In donor cases, where a child is conceived within wedlock by means of donated biological contributions (sperm, eggs or preembryos), the husband and wife are deemed the legal parents and the donor relinquishes all rights and obligations, provided the written consent requirements set out in chapter 742, F.S., are followed.[33]
- For children born in another state within the U.S., a certified copy of a final order concerning legal parentage from that state is conclusive evidence of paternity.[34]
- If the legal father who was married to the mother at the child's birth voluntarily disestablishes paternity, the biological father may be able to establish paternity and become the legal parent.[35]

"If a father's name is listed on the birth certificate, the birth certificate may only be amended to remove the father's name or to add a different father's name upon court order."[36]

Legal Father versus Biological Father in *C.G. v. J.R.* [37]

As recognized in *C.G. v. J.R.*, there is no basis under Florida law to recognize dual paternity where the child was conceived as the result of an extramarital affair between the biological father and the child's mother. Rather, because a child is born into a legally intact marriage, the child's legal father is the mother's spouse.[38]

Facts of C.G. v. J.R.

The biological father and the legal father were business partners. The biological father began having an affair with the legal father's wife (the mother) in 2005 and they conceived a child. Because the child was born while the mother was married, the mother's spouse was named as the

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the affidavit, a notarized voluntary acknowledgment of paternity, or a voluntary acknowledgment of paternity that is witnessed by two individuals and signed under penalty of perjury as specified by s. 92.525(2).").

[30] Section 742.091, F.S. *See also* s. 382.013(f), F.S.

[31] Section 742.10, F.S. *See also* s. 63.032, F.S. ("'Unmarried biological father' means the child's biological father who is not married to the child's mother at the time of conception or on the date of the birth of the child and who, before the filing of a petition to terminate parental rights, has not been adjudicated by a court of competent jurisdiction to be the legal father of the child or has not filed an affidavit pursuant to s. 382.013(2)(c).").

[32] Section 63.032, F.S. ("'Adoption" means the act of creating the legal relationship between parent and child where it did not exist, thereby declaring the child to be legally the child of the adoptive parents and their heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock."); ss. 63.087-.089, F.S. (governing procedures for termination of parental rights pending adoption).

[33] Sections 742.11 & 742.14, F.S.

[34] Section 742.105, F.S.

[35] Section 742.18, F.S.

[36] Section 382.016(1)(c), F.S.

[37] 13 So. 3d 776 (Fla. 2d DCA 2014).

[38] *See* note 37, *supra*.

legal father on the birth certificate. As soon as the child was born, the mother permitted the biological father to frequently visit the child. Although the biological father was aware that the child was his, the legal father was not made aware of the affair for approximately seven months after the child's birth. Until that point, the legal father believed he was the biological father.[39]

However, in May 2007, after learning of the affair, the mother and the legal father no longer allowed the biological father to visit the child. The biological father filed a paternity action. However, he was not permitted to visit the child until January 2009 when the mother and legal father separated.

At that point, the mother and biological father entered into an agreement acknowledging him as the biological and "legal" father, granting him visitation with the child and providing that he would provide support for the child. The agreement also contained a stipulation that the legal father's rights were not affected or removed. The legal father signed the agreement, and a trial court entered a final order acknowledging the agreement in February 2009.[40]

Things began to fall apart, however, after the mother was arrested for drug possession. As a result of her arrest, the biological father refused to return the child to the legal father following a visitation with the child, citing concerns that the legal father was also using drugs. The child was eventually returned to the mother pursuant to an emergency pick-up order, and the legal father filed a motion to set aside both the January 2009 agreement and the February 2009 court order.[41]

Between February 2009 and June 2009, things had apparently been smoothed over between the mother and the biological father. The mother and her new boyfriend moved in with the biological father and his family, and they subsequently entered into another agreement acknowledging the biological father as the legal father and granting him visitation. The new agreement also purported to release the legal father of any financial obligation for the child. The legal father's parental rights were not mentioned in this agreement, nor did he sign it.[42]

In June 2009, the mother filed for divorce, although the petition was dismissed in October 2010 for lack of prosecution. In the meantime, the trial court adopted the new agreement of the biological father and the mother on a temporary basis while the legal father pursued his motion to vacate the earlier agreement and order.[43]

Finally, in October 2009, the trial court vacated the final judgment approving the first agreement between the mother and biological father on the basis that "dual paternity" is contrary to Florida law and public policy. Thus, the trial court concluded the agreement was unenforceable.[44]

Although the biological father had not seen the child since 2009, in July 2011, he filed an emergency motion for timesharing and sole or shared custody on the basis that: (1) his DNA test

[39] *Id.* at 777.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 777-78.
[43] *Id.* at 778.
[44] *Id.*

reveals he is the child's biological father, and (2) he has been involved in the child's life. He also cited concerns over the mother's instability and drug use.[45]

Although the biological father's motion was denied, the matter was set for trial and a guardian ad litem was appointed to the child in February 2012 to evaluate the best interests of the child. In March 2012, the guardian ad litem filed her report noting that the only suitable parents were either the legal father or the biological father because the mother had not had any contact with the child for longer than two years. The report noted that the mother was a drug user and unstable.[46]

As between the fathers, the guardian ad litem reported that it was in the best interests of the child to be placed with the legal father. The report noted the faults of the biological father:

- He permitted the mother to reside with her boyfriend in his home while she abused drugs and used "the media and street signs to publicize the custody issue."[47]
- He tried "to gain an advantage in the custody battle" by entering the agreements with the mother.[48]
- His moral fitness was in question because,
  - He used public forums to convey information about how he interfered with the attempts of the legal father and mother to reconcile their marriage;
  - He may have made false allegations of medical neglect of the child; and
  - He may have made false allegations concerning drug use by the legal father.[49]

The guardian ad litem reported that the legal father was "better equipped to facilitate timesharing based on [the biological father's] unilateral decision to modify the timesharing agreement (i.e., when he refused to return [the child] after visitation)."[50] The legal father, however, had been more cooperative with timesharing. The guardian ad litem also reported that the child was doing well in her placement with her legal father and considered him to be her father, and that the child was so closely bonded to her half-siblings that it would be detrimental to the child to separate them. Additionally, the guardian ad litem noted that the child's home, school, and community records favored placement with the legal father. The guardian ad litem "ultimately concluded that it was in [the child's] best interest to preserve the 'presumption of legitimacy' that arose when she was born during an intact marriage."[51]

The trial court agreed and entered an order against the biological father in his paternity action. In its order, the trial court considered the statutory child custody factors[52] and found that the biological father had no "significant relationship with the child" and that none of the factors favored him. Rather, the factors favored the legal father. Thus, the trial court ruled that it was in

[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 779.
[52] Section 61.13(3), F.S.

the child's best interest that the legal father "remain as her legitimate and legal father."[53] The trial court ordered that the birth certificate reflect that the legal father is the father.[54]

The trial court's order was affirmed by the Second District Court of Appeal. Initially, the Second District rejected the biological father's argument that the trial court erroneously ruled against his emergency motion for timesharing. The Second District held that, contrary to the biological father's argument, the child custody factors were supported by competent, substantial evidence.[55]

The Second District also issued a written opinion to explain why it was affirming the trial court's order vacating the February 2009 agreement between the mother and the biological father which purported to recognize both the biological and the legal fathers' rights to parent the child. The Second District noted that the issue is "whether a child can have two legally recognized fathers in addition to a mother."[56] After examining current Florida law,[57] the Second District held that there was no support under the law to legally recognize two fathers when the child was born into an intact marriage:

> This is not a case where either the biological father or the legal father has abandoned the child. Nor is this a case where either father failed to demonstrate a strong desire to be a part of the child's life or even the ability to care for the child. Rather, this is one of those cases presenting the unfortunate circumstance of a child who was born into a legally intact marriage but who was conceived as the result of an extramarital affair. The consequence of that circumstance is that the third party, here C.G., has an interest in that child which is adverse to the legal father, here J.R. We are cognizant of the gravity of our decision and the legal ramification that it has on C.G.'s and H.G.-R.'s relationship. However, under the facts of this case, there is simply no support in Florida law for the proposition that H.G.-R. is entitled to have two legally recognized fathers. *Because similar circumstances could arise in other cases, the legislature may choose to readdress the issue of a biological father's right to establish paternity where the child is conceived and born during an intact marriage to another man.* But under the current state of the law, we are constrained to affirm the trial court's order vacating the February 2009 order approving the original paternity and support agreement.[58]

[53] *C.G. v. J.R.* at 779.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] The court examined but ultimately distinguished the cases of *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. 5th DCA 2011), *approved in part, disapproved in part*, 129 So. 3d 320 (Fla. 2013) (holding that unmarried biological mother who gave egg to same sex partner with the intent and demonstrated commitment to parent the resulting child was not a donor but more akin to a unmarried biological father who has an inchoate constitutional right that develops into a fundamental right upon coming forward to participate in rearing of child), and *Greenfield v. Daniels*, 51 So. 3d 421, 427 (Fla. 2010) (holding that child born into a legally intact marriage could claim survivor damages in a wrongful death action involving the biological father "so long as it is established that the decedent is the biological parent and that he acknowledged responsibility for support."). The court noted that these cases were distinguishable because *C.G. v. J.R* did not involve an unmarried parent, nor did it involve a wrongful death claim.
[58] *Id.* (emphasis added).

The Florida Bar Family Law Section's Concern with *C.G. v. J.R.*

In response to the Second District's opinion and calls to "to fill the gap" in chapter 742 and address the interests of a biological father who desires a parental relationship with a biological child born out of an extramarital affair into an intact marriage, the Family Law Section of The Florida Bar established the following standing positions that were adopted by The Florida Bar:

> 96. Supports the right of a biological parent to pursue and, when appropriate, establish his or her parental rights when the biological parent has demonstrated or evinced a settled purpose to assume parental responsibilities and when doing so would be in the best interest of the child.
>
> 97. Supports the concept that a child may legally have more than two mothers, two fathers or, when appropriate, more than two parents. The best interests of the child must be the foremost concern in determining such matters.[59]

Thus, the Family Law Section drafted the proposed bill, designated as section 742.19, F.S., to address the issues of "quasi-marital children and parental rights in a manner that will further the best interests of the children" while also helping the law "catch up with science."[60]

III. Effect of Proposed Changes:

The bill provides that an "alleged parent" is one who reasonably believes that he or she is the biological parent of a child. The bill permits the alleged parent, the child, or the child's mother to rebut the presumption of legal parentage in one person and establish "actual legal parentage" in another person either to the exclusion of *or* in addition to the legal parent(s). In other words, the bill permits the court to decree that a child has more than two legal parents.

Specifically, the alleged parent, the child, or the child's mother may file a petition in circuit court to rebut the presumption that:

- A child born to an intact marriage is the child of the mother's spouse;
- A child born to an unmarried couple who later marries is the child of the mother's spouse;[61]
- A voluntary acknowledgment of paternity entered by the parties during proceedings to determine inheritance, dependency under worker's compensation or a similar compensation program, or by the Department of Revenue to determine child support, establishes the child's parentage;[62] or

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[59] The Family Law Section of The Florida Bar, *White Paper: BASIS FOR PROPOSED SECTION 742.19, FLORIDA STATUTES* (2017) (on file with the Senate Committee on Judiciary).

[60] *Id. See also* Roberts, P. *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*. Center for Law and Social Policy (2003), available at https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/0111.pdf (last visited January 8, 2018) (noting the ease of conducting DNA testing and the dilemma created for states, courts, parents and children: "At what point should the truth about genetic parentage outweigh the consequences of leaving a child fatherless? Is a child better off knowing his/her genetic heritage or maintaining a relationship with his/her father and his family that provides both emotional and financial support? Should it matter who brings the action or should the rules be the same for men trying to disestablish paternity, women seeking to oust a father from the child's life, and third parties trying to assert their paternity of a child who already has a legal father?")

[61] Section 742.091, F.S.

[62] Section 742.10(1), F.S.

- A foreign judgment of another state resulting from a voluntary acknowledgment or affidavit of paternity establishes the child's parentage.[63]

The bill provides the procedures the courts and a petitioner must follow to establish parentage in an alleged parent.

Step 1—The Petition: A petitioner initiates an action to establish "actual legal parentage" and rebut the enumerated legal presumptions by filing a petition in circuit court. The petition must meet the following requirements:

- Be signed by the petitioner under oath.
- Identify all parties, including the mother, the mother's spouse, the alleged parent, and any other person who may be a parent.
- Provide specific facts to support a claim that the alleged parent: (1) is the biological parent; (2) has demonstrated a substantial interest in or concern for the welfare of the child; *and* (3) should be deemed a legal parent based on the best interests of the child.

Step 2—Protect the Child's Best Interests: Unless deemed unnecessary, the court must appoint a guardian ad litem or attorney ad litem for the child depending on the child's age and level of understanding.

Step 3—Evidentiary Hearing on Petition: The court now acts as a gatekeeper and must conduct an evidentiary hearing to essentially test whether the petition is filed in good faith or whether it must be dismissed. In deciding whether to dismiss the petition and seal the record, or permit the petition to move forward, the court must determine two things, giving particular weight to the mother's circumstances (if she is deceased, incapacitated, or seeking a divorce from her spouse):

(1) Whether the alleged parent has demonstrated a substantial concern or interest for the welfare of the child. If this is not demonstrated, the court must dismiss the petition and seal the record.
(2) Whether it would be in the best interests of the child to permit the petition to proceed. If the court determines that the best interests of the child will not be served by permitting the petition to go forward, the court must dismiss the petition and seal the record.

Step 4—Order Genetic Testing: If the court determines that the petition may proceed, the court must next order the alleged parent and the child to submit to genetic testing to determine the probability of parentage. The court must also advise all parties of the testing requirements, how to object to the results, and of the consequences for failing to object. However, it is the responsibility of the alleged parent to file the test results by the date specified in the court's order.

Once the test results are filed, the next steps vary depending on whether an objection is filed:

- If no written objection to the test results is filed within 10 days, the results must be admitted into evidence by the court without the need for an evidentiary foundation or predicate, and weighed by the court along with all other evidence of parentage.

[63] Section 742.105, F.S.

- If a party timely files a written objection to the test results, the court must hold an evidentiary hearing and permit the party to refute the test results (usually by calling expert witnesses). If a party places the test results in dispute, the court may order retesting at the requesting party's expense.
- If the test results show the alleged parent is not the biological parent, the court must dismiss the petition and seal the court file.
- However, if the test results show there is a statistical probability of parentage of 95 percent or more, a rebuttable presumption that the alleged parent is the biological parent is created.
- When there is no objection to the test results or a party fails to rebut the 95 percent parentage presumption, the court may enter summary judgment on the parentage issue but must conduct a trial.
- If the court otherwise rules that genetic testing establishes the alleged parent is the biological parent, the court must conduct a trial.

Step 5—Trial: During the trial, the court must decide between three options:

- (1) Whether the mother's spouse remains the legal parent based on the best interests of the child.
  - In determining the best interests of the child, the court is required to evaluate a long list of factors affecting the welfare and interests of the child and the circumstances of the family.
  - If the court determines that the mother's spouse should remain the legal parent to the exclusion of the biological parent, the court must dismiss the petition and seal the court file.
- (2) Whether the parental rights of the mother's spouse should be terminated and granted to the biological parent if doing so is in the best interests of the child.
  - If the court decides to terminate the parental rights of the mother's spouses and recognize the biological parent as the legal parent, the court must enter an order reflecting the same and order that the birth certificate be amended.
- (3) Whether the all three – the mother, the mother's spouse, and the biological parent – should have shared parental rights and responsibilities.
  - The court may decide the child should have three legal parents when both the mother's spouse (legal parent) and the biological parent have established a substantial relationship with the child and the petitioner shows that adding the biological parent as a legal parent is in the best interests of the child.
  - The court will enter an order that:
    - Preserves the rights of the mother's spouse;
    - Establishes the biological parent's rights and responsibilities as a third legal parent;
    - Requires that the birth certificate be amended to add a third legal parent; and
    - Declares that each legal parent is recognized as an equal parent with equal standing to secure shared parenting rights, including time-sharing, responsibility, and child support.

Step 6—Continuing Jurisdiction After Trial: When the court rules that the biological parent must replace the mother's spouse as the legal parent or declares there are three legal parents, the court has continuing jurisdiction to:

- Approve, grant, or modify parenting plans as defined in s. 64.046, F.S. (which is amended by the bill to include a cross-reference to the newly created provision).
- Order the payment of child support calculated under the child support guidelines[64] when the biological parent replaces the mother's spouse as the legal parent.
- Order the payment of child support when there are three legal parents to ensure the child receives the same full benefit of the total child support amount that would be received under the child support guidelines.[65]

The bill states the legitimacy of a child is not affected by the proceedings to establish a biological parent as a legal parent.

The effective date of the bill is July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Equal Protection: The bill's use of the word "parent" rather than "father" may avoid some equal protection issues. However, the bill may also apply to situations beyond the scenario presented in *C.G. v. J.R.* (involving a contest between the legal father and biological father), that could give rise to other equal protection issues.

Under the bill, a "legal parent" includes the legal spouse of the *child's mother* at the time of the child's birth. Although not contemplated at common law, the presumption would appear to now apply to the same-sex spouse of the birth mother when they are legally married for purposes of establishing legal parentage. Additionally, an unmarried biological mother who has contributed biological material to a legally married same-sex male couple appears to fall within the bill's definition of an "alleged parent."

However, in the case of a legally married, same-sex male couple, the spouse of the biological father does not meet the definition of a "legal parent" under the common law presumption (legal parent is the *mother's* spouse at the time of birth).

[64] Section 61.30, F.S.
[65] *Id.*

Due Process: The bill provides that, if it is in the "best interests of the child," the court can enter an order terminating the legal parent's parental rights and establishing the biological parent's legal rights. However, a legal parent's parental rights are constitutionally protected and generally cannot be terminated without their consent (as in the case of adoption[66]) or without following "the strict procedures set forth in chapter 39, Florida Statutes," for involuntary termination of parental rights.[67] Under chapter 39 proceedings,

> Termination of parental rights by the state requires clear and convincing evidence of: (1) a statutory ground for termination set forth in section 39.806, Florida Statutes [such as abandonment, abuse, neglect, incarceration]; (2) that termination is in the manifest best interest of the child pursuant to section 39.810; and (3) that termination is the least restrictive means of protecting the child from harm. *See Padgett v. Dep't of Health & Rehab. Servs.*, 577 So.2d 565, 570–71 (Fla. 1991). A finding of least restrictive means is required because "parental rights constitute a fundamental liberty interest." *Id.* at 571.[68]

Accordingly, it appears likely that a legal parent's parental rights cannot be terminated in the manner described by the bill without running afoul of the legal parent's due process rights.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

With the exception of the child, any party to a petition to establish an alleged parent's legal parentage of a child will likely incur financial costs.

Attorney's Fees and Court Costs: The bill makes no provision for attorney's fees or court costs (including the guardian ad litem's fees) to any party. While there is a discretionary attorney's fee and costs provision applicable to all proceedings under chapter 742,[69] any award is within the court's discretion and based in part on the financial resources of the parties to pay. Thus, the mother's spouse/legal parent who is forced to defend his or her legal status against termination (which may violate his or her due process rights) may still be liable to pay his or her own attorney's fees or court costs. The difficulty, however, in requiring that the "petitioner" pay attorney's fees and court costs under the bill is that the "petitioner" may be the child.

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[66] *See* Chapter 63, F.S. (the Florida Adoption Act).
[67] *Fahey v. Fahey*, 213 So. 3d 999, 1001 (Fla. 1st DCA 2016) ("Under Florida law, parental rights may only be terminated through adoption or the strict procedures set forth in chapter 39, Florida Statutes").
[68] *D.S. v. Dep't of Children & Families*, 164 So. 3d 29, 33 (Fla. 4th DCA 2015).
[69] Section 742.045, F.S.

Genetic Testing Costs: The bill does not specify whether the alleged parent or another party is responsible to pay for genetic testing, although it does specify that the party seeking retesting will bear the cost. Because the alleged parent is responsible to file the results of a genetic test, it seems reasonable that they may be required to pay the costs of testing.

Child Support: The bill does not state whether the alleged parent, once declared as a legal parent, will owe back child support payments. However, it would appear that the new legal parent's obligations for child support relate back to the date of the child's birth because the new legal parent will be added to the birth certificate. Thus, it appears the newly established legal parent may owe an arrearage of child support.

Additionally, when the new legal parent replaces the mother's spouse on the birth certificate and the parental rights of the mother's spouse are terminated (which, again, implicates due process concerns), it is unclear from the bill whether the mother's spouse will be entitled to recoup the financial support provided to the child since the child's birth from the mother and the new legal parent.

It appears the "alleged parent" cannot be forced into the proceedings in order to force the payment of child support, because the alleged parent is responsible to file the genetic test results with the court. If the alleged parent fails to file the results, the petition will likely be dismissed.

C. Government Sector Impact:

The state court system and the guardian ad litem program have not provided information on the fiscal impact of the bill to committee staff. It appears the bill could add to the workload of the courts as well as to the guardian ad litem program. However, whether the increase will be significant or minimal is not known.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not appear to apply to a "donor" of biological material (an egg or sperm).[70]

VIII. Statutes Affected:

This bill substantially amends sections 742.13 and 61.046 of the Florida Statutes.
This bill creates section 742.19 of the Florida Statutes.

[70] Section 742.14, F.S. ("The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.213, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.").

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.

By Senator Steube

23-00909A-18 20181022__

A bill to be entitled

An act relating to the determination of parentage; amending s. 742.13, F.S.; defining the term "alleged parent"; creating s. 742.19, F.S.; providing presumptions of legal parentage; authorizing a child, the child's mother, or the child's alleged parent to file a petition in circuit court to rebut the presumption of legal parentage and establish actual legal parentage; requiring such petition to include certain information; requiring the court to appoint a guardian ad litem or an attorney ad litem under certain conditions; providing qualifications and requirements for a guardian ad litem; requiring the court to hold an evidentiary hearing on the petition to make a certain determination; requiring the court to dismiss the petition under certain circumstances; requiring the court to order genetic testing of the child and the alleged parent if the court allows the petition to proceed; requiring certain information to be included in the order; requiring the alleged parent to file the test results with the court on or before a specified date; specifying that a statistical probability of parentage of 95 percent or more creates a rebuttable presumption that the alleged parent is a biological parent; providing a procedure for a party to object to the test results; authorizing the court to enter a summary judgment of parentage and requiring the court to hold a trial if a presumption of parentage is established; requiring the court to

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dismiss the petition and seal the court file if the test results indicate that the alleged parent is not a biological parent; requiring the court to determine parental rights in the best interest of the child; requiring the court to evaluate specified factors to determine the best interest of the child; providing information to be included in final orders or judgments; authorizing the court to approve, grant, or modify a parenting plan in the best interest of the child and under certain conditions; requiring that a parenting plan include certain information; authorizing the court to order the payment of child support; requiring the court to consider certain criteria in its calculation of child support; authorizing the court to modify a parenting plan or child support order entered pursuant to this section upon a showing by the parent petitioning for modification that a substantial change in circumstances has occurred; clarifying that an order entered under this section does not impugn or affect a child's legitimacy; amending s. 61.046, F.S.; clarifying that a parenting plan entered under a specified section determines the rights of custody and access for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, the International Child Abduction Remedies Act, and the Convention on the Civil Aspects of International Child Abduction; providing an effective date.

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

Section 1. Section 742.13, Florida Statutes, is amended to read:

742.13 Definitions.—As used in ss. 742.11-742.19 ~~ss. 742.11-742.17~~, the term:

(1) "Alleged parent" means a person with a reasonable and well-founded belief that he or she is a child's biological parent.

(2)~~(1)~~ "Assisted reproductive technology" means those procreative procedures which involve the laboratory handling of human eggs or preembryos, including, but not limited to, in vitro fertilization embryo transfer, gamete intrafallopian transfer, pronuclear stage transfer, tubal embryo transfer, and zygote intrafallopian transfer.

(3)~~(2)~~ "Commissioning couple" means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.

(4)~~(3)~~ "Egg" means the unfertilized female reproductive cell.

(5)~~(4)~~ "Fertilization" means the initial union of an egg and sperm.

(6)~~(5)~~ "Gestational surrogate" means a woman who contracts to become pregnant by means of assisted reproductive technology without the use of an egg from her body.

(7)~~(6)~~ "Gestational surrogacy" means a state that results from a process in which a commissioning couple's eggs or sperm, or both, are mixed in vitro and the resulting preembryo is

implanted within another woman's body.

(8)~~(7)~~ "Gestational surrogacy contract" means a written agreement between the gestational surrogate and the commissioning couple.

(9)~~(8)~~ "Gamete intrafallopian transfer" means the direct transfer of eggs and sperm into the fallopian tube prior to fertilization.

(10)~~(9)~~ "Implantation" means the event that occurs when a fertilized egg adheres to the uterine wall for nourishment.

(11)~~(10)~~ "In vitro" refers to a laboratory procedure performed in an artificial environment outside a woman's body.

(12)~~(11)~~ "In vitro fertilization embryo transfer" means the transfer of an in vitro fertilized preembryo into a woman's uterus.

(13)~~(12)~~ "Preembryo" means the product of fertilization of an egg by a sperm until the appearance of the embryonic axis.

(14)~~(13)~~ "Pronuclear stage transfer" or "zygote intrafallopian transfer" means the transfer of an in vitro fertilized preembryo into the fallopian tube before cell division takes place.

(15)~~(14)~~ "Sperm" means the male reproductive cell.

(16)~~(15)~~ "Tubal embryo transfer" means the transfer of a dividing, in vitro fertilized preembryo into the fallopian tube.

Section 2. Section 742.19, Florida Statutes, is created to read:

742.19 Establishment of parentage for children born in wedlock or when parentage is otherwise established by law.—

(1) A person is presumed to be the legal parent of a child when:

(a) At the time of the child's conception or birth, the person was married to the child's mother; or

(b) Parentage has been established under s. 742.091, s. 742.10, or s. 742.105.

(2) The child, the child's mother, or the child's alleged parent may rebut the presumption of legal parentage in subsection (1) and establish actual legal parentage by filing a petition in circuit court. The petition must:

(a) Be signed by the petitioner under oath.

(b) Identify as parties the mother, the mother's spouse, the alleged parent, and any other person who may be the parent.

(c) Provide specific facts to support a claim that the alleged parent is the biological parent of the child, that the alleged parent has demonstrated a substantial interest in or concern for the welfare of the child, and that it is in the best interest of the child to establish the alleged parent as the legal parent of the child.

(3)(a) The court must appoint a guardian ad litem for the child unless good cause is shown that a guardian ad litem is not needed. The person appointed as a guardian ad litem must meet the qualifications in s. 61.402, shall have the powers and authorities described in s. 61.403, and must maintain confidentiality in accordance with s. 61.404, unless otherwise specified by a court order.

(b) If the court determines that the child is of sufficient age and understanding to participate in the proceedings, the court must appoint an attorney ad litem for the child in lieu of a guardian ad litem unless good cause is shown that an attorney ad litem is not needed.

(4)(a) The court shall hold an evidentiary hearing on the petition to determine whether:

1. The alleged parent has demonstrated a substantial interest in or concern for the welfare of the child.

2. The best interest of the child would be served by allowing the petition to proceed.

(b) In making its determination, the court shall give particular weight to the fact that the mother is deceased or incapacitated, or that the mother seeks or obtains a dissolution of her marriage to her spouse.

(c) If the court determines that the alleged parent has not demonstrated a substantial interest in or concern for the welfare of the child or that the best interest of the child would not be served by allowing the petition to proceed, the court must dismiss the petition and seal the court file.

(5)(a) If the petition is allowed to proceed under subsection (4), the court must order the child and the alleged parent to submit to genetic testing conducted by a qualified technical laboratory, as defined in s. 409.256, to determine the probability of parentage. Upon the entry of the order for scientific testing, the court must inform each person to be tested of the procedures and requirements for objecting to the test results and of the consequences of the failure to object.

(b) The alleged parent shall file the test results, together with the opinions and conclusions of the test laboratory, with the court on or before a date specified in the order. Test results are admissible in evidence and should be weighed along with other evidence of the parentage of the alleged parent unless the statistical probability of parentage

equals or exceeds 95 percent. A statistical probability of parentage of 95 percent or more creates a rebuttable presumption, as defined in s. 90.304, that the alleged parent is a biological parent of the child.

(c) Any objection to the test results must be made in writing and must be filed with the court no more than 10 days after the test results are filed.

1. If no objection is filed, the test results shall be admitted into evidence without the need for predicate to be laid or third-party foundation testimony to be presented.

2. If an objection is filed, the court must hold an evidentiary hearing. Nothing in this paragraph prohibits a party from calling an outside expert witness to refute or support the testing procedure or results, or the mathematical theory on which they are based. If the test results or the expert analysis of the inherited characteristics is disputed, the court, upon reasonable request of a party, must order that an additional test be made by the same laboratory or an independent laboratory at the expense of the party requesting additional testing.

(d) If no objection is filed or if a party fails to rebut the presumption of parentage which arose from the statistical probability of parentage of 95 percent or more, the court may enter a summary judgment of parentage and must hold a trial pursuant to subsection (6). If the test results indicate that the alleged parent is not a biological parent, the court must dismiss the petition and seal the court file.

(6) If the genetic testing establishes that the alleged parent is the biological parent of the child, the court must hold a trial to determine whether:

(a) The mother's spouse remains the legal parent of the child based on the best interest of the child;

(b) The parentage and legal rights and obligations of the mother's spouse are terminated and granted to the biological parent; or

(c) The mother, mother's spouse, and biological parent must share parental rights and responsibilities.

(7) To determine the best interest of the child, the court shall evaluate all of the following:

(a) The established bond between the child and the mother's spouse, including love, affection, and emotional ties.

(b) The established bond between the child and the biological parent, including love, affection, and emotional ties.

(c) The permanence and stability of the child's current family unit or units, including the length of time the child has lived in a satisfactory environment and the desirability of maintaining continuity or creating stability.

(d) The capacity and disposition of the mother's spouse and the biological parent to provide for the child's financial needs.

(e) The moral fitness of the mother's spouse and the biological parent.

(f) The mental and physical health of the mother's spouse and the biological parent.

(g) The home, school, and community record of the child.

(h) The preference of the child, taking into consideration the child's age and understanding.

(i) Whether the mother's spouse or the biological parent

has abandoned, abused, or neglected the child, or has otherwise been remiss in his or her responsibilities toward the child.

(j) Whether the mother's spouse or the biological parent has ever acted contrary to the best interest of the child.

(k) Whether the mother's spouse or the biological parent wishes to exercise or continue to exercise parental rights.

(l) Whether the mother is deceased or incapacitated.

(m) Whether the mother seeks or obtains a dissolution of her marriage to the spouse.

(n) Any other factor affecting the welfare and interests of the child and the circumstances of that family.

(8)(a) If the court determines that it is in the best interest of the child for the mother's spouse to remain the legal parent of the child to the exclusion of the biological parent, the court must dismiss the petition and seal the court file.

(b) If the court determines that it is in the best interest of the child for the parental rights of the mother's spouse to be terminated and the biological parent to be the legal parent of the child, the court must enter a final order or judgment:

1. Terminating the parental rights and responsibilities of the mother's spouse, declaring that the biological parent is the legal parent of the child, and specifying the biological parent's parental rights and responsibilities, including, but not limited to, time-sharing and child support.

2. Requiring that the biological parent's name be substituted on the child's birth certificate and the mother's spouse's name be removed.

(c) If the court determines that the mother's spouse and

the biological parent have each established a substantial relationship with the child and that it is in the best interest of the child for both the mother's spouse and the biological parent to be the child's legal parents, the court shall enter a final order or judgment:

1. Preserving the parental rights of the mother's spouse.

2. Establishing the biological parent's parental rights and responsibilities as the child's third legal parent.

3. Requiring the Office of Vital Statistics of the Department of Health to amend the child's birth certificate to add the third legal parent.

4. Declaring that each legal parent is recognized as an equal parent to the child and has equal standing to secure shared parenting rights to time-sharing, parental responsibility, and child support.

(9) The court may approve, grant, or modify a parenting plan, as defined in s. 61.046, in a final order or judgment entered pursuant to paragraph (8)(b) or paragraph (8)(c). A parenting plan may be developed and agreed to by all legal parents and approved by a court or may be established by the court.

(a) The court may approve or establish a parenting plan, regardless of whether the child is physically present in this state, if the court finds that the child was removed from this state for the primary purpose of removing the child from the court's jurisdiction in an attempt to avoid the court's approval, creation, or modification of the parenting plan.

(b) A parenting plan approved or established by the court must describe the shared responsibilities for the daily tasks of

parenting; the time-sharing schedule specifying the time the child will spend with each parent; a designation of which parent will be responsible for health care, school-related matters, and extracurricular activities; the address to be used for school-boundary determination and registration; and the means of communication or technology which the parents will use to communicate with the child.

(c) The court shall determine matters relating to the parenting and time-sharing of each child of the parties in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act, part II of chapter 61. The best interest of the child should govern and be of foremost concern in the court's determination.

(10) The court may order the payment of child support by any legal parent or parents owing a duty of support in a final order or judgment entered pursuant to paragraph (8)(b) or paragraph (8)(c). When calculating child support, the court shall:

(a)1. For an order entered pursuant to paragraph (8)(b), calculate support obligations pursuant to s. 61.30.

2. For an order entered pursuant to paragraph (8)(c), ensure that the child receives the same full benefit of the total child support as a child would receive under the guidelines schedule in s. 61.30.

(b) Consider each deviation factor listed in s. 61.30(11)(a) to ensure that the distribution of the child support is fair and equitable.

(11) The court may modify a parenting plan or child support order entered pursuant to this section upon a showing by the

parent petitioning for modification that a substantial change in circumstances has occurred.

(12) An order entered pursuant to this section does not impugn or affect a child's legitimacy.

Section 3. Paragraphs (c) and (d) of subsection (14) of section 61.046, Florida Statutes, are amended to read:

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

(14) "Parenting plan" means a document created to govern the relationship between the parents relating to decisions that must be made regarding the minor child and must contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child's education, health care, and physical, social, and emotional well-being. In creating the plan, all circumstances between the parents, including their historic relationship, domestic violence, and other factors must be taken into consideration.

(c) For purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, part II of this chapter, a judgment or order incorporating a parenting plan under this part or under s. 742.19 is a child custody determination under part II of this chapter.

(d) For purposes of the International Child Abduction Remedies Act, 42 U.S.C. ss. 11601 et seq., and the Convention on the Civil Aspects of International Child Abduction, enacted at the Hague on October 25, 1980, rights of custody and rights of access are determined pursuant to the parenting plan under this part or under s. 742.19.

Section 4. This act shall take effect July 1, 2018.

THE FLORIDA SENATE

APPEARANCE RECORD

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

01-10-18
Meeting Date

SB 1022
Bill Number (if applicable)

Topic Parentage Bill

Amendment Barcode (if applicable)

Name John W. Foster

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Address 618 East South Street Suit 110
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Speaking: ☑ For ☐ Against ☐ Information

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

Representing Family Law Section of Florida Bar Assn.

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 Judiciary

BILL:	SB 1034
INTRODUCER:	Senator Steube
SUBJECT:	Mediation
DATE:	January 9, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			BI	

I. Summary:

SB 1034 reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. Additionally, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement.

The current Florida Statutes authorize courts to order parties to mediation conducted according to the Florida Rules of Civil Procedure. The rules currently address the attendance and settlement authority of parties and their representatives, but not the attendance of interested nonparties, such as lienholders.

Under the rules, an insurance carrier representative attending mediation must have authority to settle up to the lesser of the policy limit or the plaintiff's last demand. Under the bill, however, the insurance carrier representative attending mediation must have authority to settle only up to the insurer's reserve on the claim, which would be less than the policy limits and may be less than the plaintiff's last demand. Nonetheless, the attending representative must have immediate access to a person who has authority to settle up to the lesser of the policy limits or the plaintiff's last demand.

The bill also authorizes a circuit court, upon a party's motion, to compel lienholders or other interested nonparties to attend a mediation conference.

Finally, the bill sets forth what may be in a mediator's report to a court regarding the result of a mediation process. If no agreement is reached in mediation, the report may say only that no agreement was reached. This is more restrictive than the current rule, which permits additional information to be included if the parties consent. In the case of a partial or complete agreement, the current rules require the mediator to report the existence of the agreement, "without comment," to the court. Regarding a complete agreement, the bill is consistent with current rule,

stating that the mediator's report may state only that a complete agreement was reached. Regarding a partial agreement, the bill permits the report to state only that such an agreement was reached, unless any claims or parties were eliminated from the litigation by virtue of the partial agreement. And if a claim or party was eliminated by virtue of a partial agreement, the report may list these claims or parties.

II. Present Situation:

Mediation is a process in which a neutral third person acts to facilitate the resolution of a lawsuit or other dispute between two or more parties.[1] The statutes currently authorize courts to use mediation to aid in resolving cases, but the statutes also provide that many of the procedural aspects of mediation are to be governed by the Florida Rules of Civil Procedure.[2] Depending on the type of case, there are different circumstances under which a court would refer the matter to mediation. In a lawsuit for money damages, the court must refer the matter to mediation upon the request of a party if the party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.[3] However, a court need not refer such a case to mediation if it is one of medical malpractice or debt collection, is a landlord-tenant dispute not involving personal injury, is governed by the Small Claims Act, or involves one of the few other circumstances set forth in statute.[4]

Beyond these cases that a court *must* refer to mediation, the court *may*, in general, refer all or part of any other filed civil action to mediation.[5]

Rule 1.720, Florida Rules of Civil Procedure, governs the mediation process, including who exactly must attend the mediation conference and what settlement authority these persons must have.[6]

Each party must attend the mediation conference and is subject to sanctions for failure to attend without good cause.[7] And Rule 1.720, Fla. R. Civ. P., specifies that unless a special circumstance applies as described in the rule, "a party is deemed to appear at a mediation conference if the following persons are physically present:"

- The party or party representative having full authority to settle without further consultation;
- The party's counsel of record, if any; and
- A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.[8]

[1] Fla. Jur. 2d, Arbitration and Award §113.
[2] Section 44.102(1), F.S.
[3] Section 44.102(2)(a), F.S.
[4] *Id.*
[5] Additionally, a court is required or authorized to refer certain family law and dependency matters to litigation, as specified in s. 44.102(2)(c)-(d), F.S.
[6] There is no Florida Statute that has similar provisions.
[7] Rule 1.720(f), Fla. R. Civ. P.
[8] Rule 1.720(b), Fla. R. Civ. P.

"Party representative having full authority to settle" is defined in the rule as "the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party."[9]

Moreover, each party must provide to the court and all parties a written notice, 10 days prior to the conference, which identifies who will attend the conference as a party representative or insurance carrier representative. This notice must also confirm that these persons have the required settlement authority.[10]

At the conclusion of the mediation process, the mediator must report the result of the mediation to the court.[11] If the parties do not reach an agreement, the mediator must report the lack of agreement to the court "without comment or recommendation."[12] However, if the parties consent, the mediator's report may also identify pending motions, outstanding legal issues, or other "actions" which, "if resolved or completed, would facilitate the possibility of a settlement."[13]

If the parties come to a partial or final agreement, a report of the agreement or a stipulation of dismissal shall be filed with the court.[14]

III. Effect of Proposed Changes:

Overview

The bill reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. With respect to the report that a mediator must provide the court at the conclusion of mediation, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement. To the extent that these issues are addressed differently in the Florida Rules of Civil Procedure, the Supreme Court may choose to conform the rules to the provisions of the bill.

Insurance Carrier Representative's Required Settlement Authority

Under the Florida Rules of Civil Procedure, one of the persons that must be physically present at a mediation conference in order for a party to be deemed to be in appearance is an insurance representative for any insured party. Moreover, the insurance representative must have full authority to settle, without consultation, in an amount up to the lesser of the policy limits or the plaintiff's last demand. However, this requirement may be modified by court order or stipulation of the parties.[15]

[9] Rule 1.720(c), Fla. R. Civ. P.
[10] Rule 1.720(e), Fla. R. Civ. P.
[11] However, if the agreement is not transcribed or signed, a stipulation of dismissal may be filed with the court instead of a report of the agreement. Rule 1.730(b), Fla. R. Civ. P.
[12] Rule 1.730(a), Fla. R. Civ. P.
[13] *Id.*
[14] Rule 1.730(b), Fla. R. Civ. P.
[15] Rule 1.720(b)(3), Fla. R. Civ. P.

Under the bill, an insurance carrier representative attending a mediation conference must have authority to settlement up to the amount of the insurance carrier's "reserve on the claims." The reserve on a claim, though not defined in the bill or the Florida Statutes, appears to be the amount of money set aside by an insurance carrier to pay a claim that has not yet been settled.[16] However, the representative must have the ability to immediately consult during the mediation conference with the person having authority to settle above the reserve, up to the lesser of the policy limit or the plaintiff's last demand. As such, the bill requires less settlement authority than does the current rule for the insurance representative who attends the mediation conference.

Failure to comply with these requirements subjects an insurance carrier representative to sanctions in the same manner as a party who fails to appear while having the required settlement authority. These sanctions, which may be imposed upon motion by the court, include mediation fees, attorneys' fees, and costs. The current rules, on the other hand, do not include the threat of sanctions for the insurance carrier itself, but instead for a party whose insurance representative does not show at all or shows up without proper settlement authority.

Compelling Interested Third Parties to Attend a Mediation Conference

Currently, there appears to be no law or rule authorizing circuit courts to compel interested third parties, such as lienholders, to attend a mediation conference.[17]

Under the bill, the court may, upon motion of any party, order a third to attend and participate in a mediation conference if:

- The third party claims a lien or other asserted interest on proceeds that a party may receive as part of a mediated settlement agreement;
- "The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process according to law [;]" and
- The third party's presence will facilitate the mediation process.

The designated representative of the third party that was compelled to attend must have the ability to settle its entire claim or have the ability to immediately consult with a person who has this authority.[18]

Finally, a third party ordered to attend a mediation conference who fails to do so is subject to sanctions in the same manner as a party who fails to appear.

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[16] *See* INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., *claims reserve*, *Glossary of Insurance & Risk management Terms*, https://www.irmi.com/online/insurance-glossary/terms/c/claims-reserve.aspx (last visited Jan. 9, 2018); INVESTOPEDIA, *Claims Reserve*, https://www.investopedia.com/terms/c/claims-reserve.asp (last visited Jan. 9, 2018).

[17] An example of an interested nonparty would be the Agency for Health Care Administration, which administers the Medicaid program in Florida. Assuming the plaintiff was a Medicaid recipient and that the agency paid to treat the plaintiff for the injuries that were allegedly caused by the defendant, the agency would likely have a reimbursement claim (often referred to as a "lien") on any recovery resulting from a mediated settlement.

[18] The person consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

Mediator's Report

The bill modifies what may be in a mediator's report to the court regarding the result of a mediation process. If no agreement is reached at mediation, the report may say only that no agreement was reached. Current rule permits the parties to consent to the report's containing additional information, such as pending motions or issues in discovery.[19]

If a complete agreement is reached in mediation, the mediator's report may state only this. And this appears consistent with current rule, which requires the mediator to report "the existence" of the agreement to the court "without comment" within 10 days of the agreement being signed or transcribed.[20]

If a partial agreement is reached, the report may in general state only this. However, the report may also list any claims or parties that were eliminated from the litigation by virtue of the partial agreement. Beyond this, "no additional information may be disclosed." Current rule, on the other hand, appears more restrictive, as it permits the reporting only of the existence of the agreement, "without comment."[21]

Effective Date

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 2 of the bill authorizes a court, upon a party's motion, to compel a lienholder or other interested nonparty to attend a circuit court mediation conference. This raises the issue of whether a circuit court could constitutionally exercise this power over a nonparty to a lawsuit, even with a purported statutory grant of such power. There appears to be no case law on point. However, circuit courts have long exercised power over persons who are not parties to cases, such as over persons compelled to attend jury duty and nonparties subpoenaed to appear as witnesses in criminal or civil cases. Moreover, courts have

[19] Rule 1.730(a), Fla. R. Civ. P.
[20] Further, Rule 1.730(b), Fla. R. Civ. P., prohibits the reporting of any agreement to the court except as provided in the rule.
[21] *Id*.

authority "to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions."[22] Accordingly, assuming a circuit court has jurisdiction over a given case, the court would appear to have the authority to compel interested nonparties to attend mediation based on the court's inherent powers and those granted to the court under the bill.

Another constitutional issue is whether any of the statutes created by the bill constitute impermissible rules of "practice and procedure," which generally are regarded as the province of only the judiciary.[23] The Legislature's authority, on the other hand, includes the enactment "substantive" law.[24] The Florida Supreme Court has stated that where it "has promulgated rules that relate to practice procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."[25] As such, where the statutes created by the bill modify current Florida Rules of Civil Procedure these statutes may be unconstitutional. However, were a court to invalidate procedural provisions of the statutes created by the bill, the court may nonetheless permit any substantive provisions of these statutes to remain in effect if these provisions are "severable" from the invalid portions.[26] Moreover, the Florida Supreme Court has previously acknowledged that procedural statutes, though invalid, are helpful expressions of the will of the Legislature and the Supreme Court has adopted the statutory provisions as rules.[27]

If the constitutionality of the bill is challenged, the Court will likely recognize that the Legislature enacted statues authorizing and in some cases requiring the courts to use mediation before the courts enacted rules of procedure regulating mediation in more detail. Additionally, the differences between the bill and the procedural rules are subtle

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[22] *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla.1978).

[23] Article V, section 2(a) of the Florida Constitution provides the Supreme Court of Florida with exclusive authority to "adopt rules for the practice and procedure in all courts."

[24] The Florida Supreme Court explained the basic distinction between substantive and procedural laws in *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991):

> *Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.* On the other hand, *practice and procedure* "encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.

(emphasis in the original) (quoting *In re Fla. Rules of Crim. Pro.*, 272 So. 2d 65, 66 (1972))

[25] *Massey v. David*, 979 So.2d 931, 937 (Fla. 1998)

[26] *See Allen v. Butterworth*, 756 So. 2d 52, 57 (Fla. 2000) ("An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions, i.e., if the expressed legislative purpose can be accomplished independently of those provisions which are void, if the valid and invalid provisions are not inseparable, if the Legislature would have passed one without the other, and if an act complete in itself remains after the invalid provisions are stricken.")

[27] *See, e.g., In re Rules of Civil Procedure*, 281 So. 2d 204 (Fla. 1973) (stating that the "Supreme Court has considered [laws enacted by the Legislature relating to practice and procedure] as expressing the intent of the Legislature and has formulated rules of practice and procedure that attempts [sic] to conform with the intent of the Legislature and at the same time further the orderly procedure in the judicial branch.").

and consistent with the purposes of mediation. As such, one might argue that the bill's requirements for the settlement authority of those at a mediation conference and the final reports of mediators are substantive in that they further define what mediation is. Finally, the Court often adopts rules in response to legislation.[28]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may make it more difficult to schedule a mediation conference and thus to settle a given case. This could arise where, whether or not in good faith, a party moves the court to require each of a large number of lienholders to attend mediation, thus causing a scheduling problem. On the other hand, the bill could reduce the overall costs of fully resolving a case by bringing all interested persons to the mediation table, perhaps to fully resolve not only the claims raised in the complaint but also ancillary matters such as reimbursement claims, subrogation claims, and liens.

C. Government Sector Impact:

The bill may reduce court costs by fostering settlements of not only the claims contained in a lawsuit but of liens or other claims to the proceeds of a mediated settlement. However, the Office of the State Courts Administrator has not provided an analysis of the impact on the bill on judicial workloads.

VI. Technical Deficiencies:

The bill repeatedly refers to "mediation" where it seems to be referring to just one aspect of mediation—a mediation conference. The Legislature may wish to amend the bill accordingly.

Also, "reserve on the claims" is an important term in the bill, but is not defined in the bill and does not appear to be defined in the Florida Statutes. Accordingly, the Legislature may wish to amend the bill to define this term.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 44.407, 44.408, and 44.409.

[28] *See generally, id.*; *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 498 n. 12 ("We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural.") (citing *In re Amendments to the Florida Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002)); *In re Amendments to the Florida Family Law Rules of Procedure*, 987 So. 2d 65 (Fla. 2008).

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.

738538

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Steube) recommended the following:

Senate Amendment

Delete lines 77 - 82

and insert:

(4) A third party or the designated representative of a third party ordered to attend a mediation may participate via telephone or videoconference unless the order expressly requires personal attendance. If participating via telephone or videoconference, a third party or the designated representative may complete and submit necessary documentation via electronic means during the mediation.

738538

(5) Any person or persons consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

(6) A third party ordered to attend a mediation conference who fails to appear is subject to sanctions in the same manner as a party who fails to appear.

By Senator Steube

23-01254-18 20181034__

A bill to be entitled

An act relating to mediation; creating s. 44.407, F.S.; requiring that insurance carrier representatives who attend circuit court mediation have specified settlement authority and the ability to immediately consult by specified means with persons having certain additional settlement authority; requiring certain persons to be available to teleconference with the mediator under certain circumstances; providing sanctions for insurance carriers that fail to comply in good faith; creating s. 44.408, F.S.; providing that certain third parties may be compelled to attend mediation in circuit court under certain circumstances; providing that such third parties may not be compelled to pay any portion of the mediator's fees or costs; requiring that the designated representatives of such third parties have full authority to settle certain amounts or interests or be able to immediately consult by specified means with the person having such authority; requiring that certain persons be available to teleconference with the mediator upon the request of the mediator; providing sanctions for certain third parties who fail to appear; creating s. 44.409, F.S.; limiting the information that may be included in the mediator's report to the court; providing an effective date.

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

23-01254-18 20181034__

Section 1. Section 44.407, Florida Statutes, is created to read:

44.407 Insurance carrier representative's settlement authority at circuit court mediation.—

(1) An insurance carrier representative attending a circuit court mediation must have:

(a) Full authority to settle up to the amount of the insurance carrier's reserve on the claims subject to mediation; and

(b) The ability to immediately consult during the mediation by electronic or telephonic means with the person having authority to settle above the amount of the insurance carrier's reserve on the claims subject to mediation, up to the applicable insurance policy limit or the amount of the plaintiff's last demand, whichever is less.

(2) The person or persons consulted by the insurance carrier representative in attendance must be available to teleconference with the mediator at the mediator's request.

(3) An insurance carrier appearing for mediation which does not comply in good faith with this section is subject to sanctions in the same manner as a party that fails to appear with the required settlement authority.

Section 2. Section 44.408, Florida Statutes, is created to read:

44.408 Compelling interested third parties to attend circuit court mediation.—

(1) Upon motion of any party, a court may order a third party to attend a circuit court mediation and participate in good faith in the mediation process if all of the following

apply:

(a) The third party claims a lien or other asserted interest in the proceeds of any funds that a party may receive as part of a mediated settlement agreement.

(b) The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process according to law.

(c) The presence of the third party at the mediation will facilitate the mediation process.

(2) A third party ordered to attend a mediation who appears and participates in good faith may not be compelled to pay any portion of the mediator's fees or costs.

(3) The designated representative of a third party ordered to attend a mediation who appears on behalf of the third party must have full authority to settle the amount of the third-party's lien or other asserted interest or have the ability to immediately consult with the person having such authority by electronic or telephonic means during the mediation conference.

(4) The person or persons consulted by the third-party representative in attendance must be available to teleconference with the mediator at the mediator's request.

(5) A third party ordered to attend a mediation conference who fails to appear is subject to sanctions in the same manner as a party who fails to appear.

Section 3. Section 44.409, Florida Statutes, is created to read:

44.409 Mediator's report.—

(1) Except as provided in subsection (2), the mediator's report to the court may only state one of the following:

(a) A complete agreement was reached.

(b) A partial agreement was reached.

(c) No agreement was reached.

(2) If a partial agreement was reached which eliminates claims or parties from the litigation, a list of such claims and parties may be provided, but no additional information may be disclosed.

Section 4. This act shall take effect July 1, 2018.

Duplicate

THE FLORIDA SENATE

APPEARANCE RECORD

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

01.10.18
Meeting Date

1034
Bill Number (if applicable)

Amendment Barcode (if applicable)

Topic Mediation

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Job Title

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Speaking: ☐ For ☑ Against ☐ Information

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

Representing Florida Justice Reform Institute

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)