

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Diaz de la Portilla, Chair
Senator Ring, Vice Chair

MEETING DATE: Tuesday, March 10, 2015
TIME: 4:00 —6:00 p.m.
PLACE: *Toni Jennings Committee Room*, 110 Senate Office Building

MEMBERS: Senator Diaz de la Portilla, Chair; Senator Ring, Vice Chair; Senators Bean, Benacquisto, Brandes, Joyner, Simmons, Simpson, Soto, and Stargel

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 368 Abruzzo (Compare CS/H 149)	Rights of Grandparents and Great-grandparents; Redefining the term "next of kin" to include great-grandparents; providing great-grandparents the same visitation rights as grandparents; authorizing the grandparent of a minor child to petition a court for visitation under certain circumstances; providing for application of the Uniform Child Custody Jurisdiction and Enforcement Act; authorizing, after petition, a court to terminate a grandparent visitation order upon adoption of a minor child by a stepparent or close relative, etc. JU 03/10/2015 Favorable CF ACJ FP	Favorable Yeas 10 Nays 0
2	CS/SB 496 Children, Families, and Elder Affairs / Detert (Similar CS/CS/H 437)	Guardians; Requiring the court at the permanency review hearing to review the necessity of the guardianship and whether restoration of guardianship proceedings are needed when the child reaches a certain age under certain circumstances; providing that parents are the joint natural guardians of their children unless their parental rights have been terminated, etc. CF 02/19/2015 Fav/CS JU 03/10/2015 Fav/CS AP	Fav/CS Yeas 10 Nays 0
3	CS/SB 604 Commerce and Tourism / Flores (Similar CS/H 271)	Consumer Protection; Citing this act as the "True Origin of Digital Goods Act"; requiring owners and operators of specified websites and online services to disclose certain information; providing for injunctive relief, etc. CM 03/02/2015 Fav/CS JU 03/10/2015 Favorable AP	Favorable Yeas 10 Nays 0

COMMITTEE MEETING EXPANDED AGENDA

Judiciary

Tuesday, March 10, 2015, 4:00 —6:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	SB 656 Latvala (Similar H 305)	Landlords and Tenants; Excluding transient occupancy in a dwelling unit or premises from the regulation of residential tenancies; revising the definition of the term "transient occupancy", etc. JU 03/10/2015 Fav/CS RI RC	Fav/CS Yeas 10 Nays 0
5	CS/SB 224 Governmental Oversight and Accountability / Simpson (Similar CS/H 163)	Public Records/Public Agency Contracts; Requiring that a public agency contract for services include a statement providing the name and contact information of the public agency's custodian of records; revising required provisions in a public agency contract for services regarding a contractor's compliance with public records laws; specifying applicable penalties for a contractor who fails to produce requested records; specifying circumstances under which a court may assess and award reasonable costs of enforcement against a public agency or contractor, etc. GO 02/03/2015 Fav/CS JU 03/10/2015 Fav/CS FP	Fav/CS Yeas 10 Nays 0
6	SB 794 Ring (Similar H 941)	Prejudgment Interest; Requiring a court to include prejudgment interest on the amount of money damages awarded to a plaintiff in a final judgment; providing for retroactive application, etc. JU 03/10/2015 Temporarily Postponed ACJ AP	Temporarily Postponed
7	SB 872 Hukill (Compare CS/H 343)	Estates; Authorizing the court, if costs and attorney fees are to be paid from the estate under specified sections of law, to direct payment from a certain part of the estate or, under specified circumstances, to direct payment from a trust; prohibiting an attorney or person related to the attorney from receiving compensation for serving as a personal representative if the attorney prepared or supervised execution of the will unless the attorney or person is related to the testator or the testator acknowledges in writing the receipt of certain disclosures, etc. JU 03/10/2015 Fav/CS BI RC	Fav/CS Yeas 10 Nays 0

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Judiciary

Tuesday, March 10, 2015, 4:00 —6:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
8	SB 1170 Bradley (Similar H 1069, H 1187, Compare S 1452)	Problem-solving Courts; Defining the term "problem-solving court"; authorizing a person eligible for participation in a problem-solving court to transfer his or her case to another county's problem-solving court under certain circumstances, etc. JU 03/10/2015 Favorable ACJ FP	Favorable Yeas 10 Nays 0
9	SB 1312 Simmons (Similar H 1041)	Strategic Lawsuits Against Public Participation; Providing that legislative intent includes the protection of specified forms of free speech; defining the phrase "free speech in connection with public issues", etc. JU 03/10/2015 Fav/CS RC	Fav/CS Yeas 10 Nays 0
10	SB 1362 Simmons (Similar CS/H 439)	Department of Legal Affairs; Revising the list of offenses that may be investigated and prosecuted by the Office of Statewide Prosecution; specifying the distribution of certain funds recovered in Medicaid fraud actions; revising the maximum victim compensation amounts that the department may award to elderly persons or disabled adults who suffer a property loss that causes a substantial diminution in their quality of life in certain circumstances; providing for relocation assistance for human trafficking victims, etc. JU 03/10/2015 Favorable ACJ AP	Favorable Yeas 10 Nays 0
11	SB 318 Diaz de la Portilla (Compare CS/CS/H 5, S 366)	Guardianship Proceedings; Requiring that a duly noticed hearing be held before the appointment of an emergency temporary guardian; providing that an emergency temporary guardian of an incapacitated person is a fiduciary and may exercise only delegated rights; requiring the court to specify authority for health care decisions with respect to a ward's advance directive, etc. JU 03/10/2015 Fav/CS ACJ FP	Fav/CS Yeas 10 Nays 0

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Judiciary

Tuesday, March 10, 2015, 4:00 —6:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
12	SB 36 Diaz de la Portilla (Identical H 3513)	Relief of the Estate of Victor Guerrero by Pasco County; Providing for an appropriation to compensate the Estate of Victor Guerrero for Officer Guerrero's death, which was the result of negligence by an employee of Pasco County; providing that the appropriation settles all present and future claims relating to the death of Officer Guerrero; providing a limitation on fees and costs, etc. SM 03/05/2015 Recommendation: Fav/1 Amendment JU 03/10/2015 Fav/CS CA FP	Fav/CS Yeas 9 Nays 1

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 368

INTRODUCER: Senator Abruzzo

SUBJECT: Rights of Grandparents and Great-grandparents

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Favorable
2.			CF	
3.			ACJ	
4.			FP	

I. Summary:

SB 368 provides in limited circumstances visitation rights for grandparents and great-grandparents with their grandchildren and great-grandchildren in situations in which the child is in the custody of a parent. The bill also provides great-grandparents with the same rights to visitation with a child who has been adjudicated dependent as that afforded to grandparents.

Under existing law, grandparents have the right to unsupervised, reasonable visitation with a grandchild who has been adjudicated dependent unless the court finds that visitation would not be in the best interest of the child or would interfere with the goals of a case plan developed by the Department of Children and Families (DCF).¹ However, a grandparent may be denied visitation if he or she has entered a plea or been found guilty of certain enumerated crimes.

A grandparent's visitation rights under existing law extend to:

- Visitation in the home of the grandparent unless a caseworker documents a compelling reason to deny or restrict visitation; and
- Unrestricted appropriate displays of affection with the child and provision of gifts and cards to the child.²

Existing ch. 752, F.S., authorizes grandparents to file a petition for visitation with a child who has not been adjudicated dependent. Several provisions of the chapter, however, have been ruled unconstitutional by the Florida Supreme Court. This bill repeals those provisions and creates new authority for grandparents and great-grandparents to file a petition for visitation with a child if:

- The parents are deceased, missing, or in a permanent vegetative state; or

¹ Section 39.509, F.S.

² Section 39.509(1) and (2), F.S.

- At least one of the parents is deceased, missing, or in a permanent vegetative state and the other parent has been convicted of a felony or a violent offense.

If a petition for grandparent visitation is filed, the court will hold a preliminary hearing to determine whether a prima facie showing of parental unfitness or danger of significant harm to the minor child exists. If the petitioner establishes a prima facie case, the court will order the case to family mediation. At the final hearing, the court will determine by clear and convincing evidence whether the parent is unfit or a danger of significant harm to the child exists, visitation is in the best interest of the minor child, and visitation will not materially harm the parent-child relationship.

In determining the best interest of the child, the court will consider factors such as the emotional ties, length, and quality of the relationship between the child and the grandparent, the reason that the parent ended visitation with the grandparent, whether there has been demonstrable significant mental or emotional harm to the child and whether the support and stability of the grandparent has benefitted the child, the mental, physical, and emotional health of both the minor child and the grandparent; the recommendation of a guardian ad litem; and the child's preference.

II. Present Situation:

Grandparent Visitation Law

Grandparent and Great-grandparent Visitation when a Parental Relationship is Intact

Chapter 752, F.S., establishes grandparent visitation rights. These rights extend to great-grandparents.³ Under this law, grandparents may petition the court over a parent's objection for visitation with a minor child.

In 1984, the Florida Legislature created ch. 752, F.S., to give grandparents the right to petition for visitation with their grandchildren. Since that time, almost all of the substantive provisions of ch. 752, F.S., has been struck down as unconstitutional. Specifically, the court found that parents have a fundamental right to be free from governmental interference in their parenting. Imposing grandparent visitation on a parent would violate those fundamental rights.

Section 752.01, F.S., provides grandparents and great-grandparents reasonable rights to visitation of a child if the court determines visitation is in the child's best interest and:

- The child's parents divorce;
- A parent of the child has deserted the child; or
- The minor child is considered to have been born out of wedlock.

In determining a child's best interest, a court must consider:

- The willingness of the grandparent or great-grandparent to encourage a close relationship between the child and the parent or parents;
- The length and quality of the relationship between the grandparent or great-grandparent;
- The preference of the child if the child is sufficiently mature to express a preference;
- The mental and physical health of the child; and

³ Section 752.001, F.S.

- The mental and physical health of the grandparent or great-grandparent.⁴

The right to grandparent visitation does not apply to situations in which a child is placed for adoption unless the child is adopted by a stepparent subsequent to the remarriage of one of the natural parents.

Section 752.015, F.S., provides for disputes over grandparent visitation to be resolved through mediation.

Grandparent Visitation with a Child who has been Adjudicated Dependent

The court has struck down much of ch. 752, F.S., which provided grandparents visitation with children in intact families. Chapter 39, F.S., provides grandparent visitation with children who have been adjudicated dependent. Grandparents have the right to unsupervised, reasonable visitation unless the court finds that visitation would not be in the best interest of the child or would interfere with the goals of the case plan designed by a caseworker with the Department of Children and Families (DCF).⁵

Visitation rights extend to:

- Visitation in the home of the grandparent unless a caseworker documents a compelling reason to deny or restrict visitation; and
- Unrestricted appropriate displays of affection with the child and provision of gifts and cards to the child.⁶

Termination of Visitation Rights

The right of grandparents to visitation with a grandchild who is adjudicated dependent automatically terminates if the grandparents facilitate a meeting between the child and a parent or another person in violation of a court order. If the court returns the child to the physical custody of the parent, visitation rights terminate.⁷

Prior Criminal History as a Basis for Denying Visitation

The court may deny grandparent visitation if it is not in the child's best interest, based on the grandparent's prior criminal history. Specifically, the court may deny visitation if the person has entered a plea of guilt or nolo contendere or been found guilty, of the following:

- Removing a minor child from the state or concealing a minor child;
- Sexual battery;
- Lewd and lascivious behavior, including indecent exposure;
- Incest; or
- Child abuse.

⁴ Sections 752.01(1) and (2), F.S.

⁵ Section 39.509, F.S.

⁶ Section 39.509(1) and (2), F.S.

⁷ Section 39.509(3) and (4), F.S.

Designation as a sexual predator may also be a basis for denial of visitation as is a report and investigation for abuse, abandonment, or neglect of a disabled adult.⁸

Termination of Parental Rights

Before the court may terminate parental rights, notice must be provided to certain persons, including:

- The parents of the child;
- The legal custodians of the child;
- A living relative of the child if the parents are dead or unknown;
- Any person who has physical custody of the child; and
- Any grandparent entitled to priority for purposes of adoption.⁹

Existing grandparent visitation with a child who has been adjudicated dependent does not automatically terminate if the court enters an order for a termination of parental rights. Grandparent visitation rights will only terminate if the court finds that continued grandparent visitation is not in the best interest of the child or visitation would interfere with DCF goals of permanency planning for the child.¹⁰

Permanent Placement and Permanent Guardianship

A court may determine that reunification with a parent and adoption are not in the best interest of the child. The court may instead determine that a permanent guardianship is in the child's best interest. The court must address a number of factors in the order for permanent guardianship, including the frequency and nature of visitation or contact between the child and his or her grandparents.¹¹

Alternatively, the court may enter an order for permanent placement if the court finds that it is in the best interest of the child. If so, the court must address a number of factors in the order for permanent placement, including the frequency and nature of visitation or contact between the child and his or her grandparents.¹²

Uniform Child Custody and Enforcement Act

The Uniform Child Custody and Enforcement Act (UCCJEA) applies to situations in which parents live in different states. The UCCJEA is used to determine which court has jurisdiction in child custody matters. The UCCJEA generally favors the resolution of disputes in the child's home state.¹³

⁸ Section 39.509(6), F.S.

⁹ Section 39.801(3)(a), F.S. A grandparent has the right to notice by the court if a child has lived with the grandparent for at least 6 out of 24 months immediately preceding the filing of a petition for termination of parental rights pending adoption. Section 63.0425(1), F.S.

¹⁰ Section 39.509(5), F.S.

¹¹ Section 39.6221(2)(d), F.S.

¹² Section 39.6231(3)(d), F.S.

¹³ See *Arjona v. Torres*, 941 So. 2d 451 (Fla. 3d DCA 2006); *In re D.N.H.W.*, 955 So. 2d 1236 (Fla. 2d DCA 2007).

III. Effect of Proposed Changes:

This bill gives great-grandparents the same visitation right grandparents have with a child who has been adjudicated dependent. Additionally, under certain limited circumstances, the bill provides grandparents and great-grandparents with visitation rights to a child who is in the custody of a parent.

Visitation Rights with Children who Remain in Parental Custody (Parental Rights have not been Terminated)

In 1984, the Florida Legislature created ch. 752, F.S., to give grandparents the right to petition for visitation with their grandchildren over the objection of a parent. Since that time, almost all of the substantive provisions of ch. 752, F.S., have been struck down as unconstitutional. (See discussion in “D. Other Constitutional Issues” section below.)

In response to these court rulings which have invalidated several provision in ch. 752, F.S., this bill repeals s. 752.01 and s. 752.07, F.S., and specifies special, limited circumstances under which a grandparent or great-grandparent may petition for visitation with a minor child through the creation of s. 752.011, F.S.

Section 752.011, F.S., authorizes grandparents and great-grandparents to file a petition for visitation with a child if:

- The parents are deceased, missing, or in a permanent vegetative state; or
- At least one of the parents is deceased, missing, or in a permanent vegetative state and the other parent has been convicted of a felony or a violent offense.

If a petition for grandparent visitation is filed, the court will hold a preliminary hearing to determine whether a prima facie showing of parental unfitness or danger of significant harm to the minor child exists. If the petitioner establishes a prima facie case, the court will order the case to family mediation.

At the final hearing, the court will determine by clear and convincing evidence whether the parent is unfit or a danger of significant harm to the child exists, visitation is in the best interest of the minor child, and visitation will not materially harm the parent-child relationship.

In determining the best interest of the child, the court will consider factors such as:

- The love, affection, and other emotional ties between the child and the grandparent;
- The length and quality of the previous relationship between the child and the grandparent;
- Whether the grandparent established ongoing personal contact with the child before the death of the parent;
- The reasons that the parent ended contact or visitation with the grandparent;
- Whether there has been demonstrable significant mental or emotional harm to the child and whether the support and stability of the grandparent has benefitted the child;
- Mental, physical, and emotional health of both the minor child and the grandparent;
- The recommendation of a guardian ad litem; and
- The preference of the minor child if he or she is sufficiently mature.

In assessing material harm to the parent and child relationship, the court must look at the totality of the circumstances.

The Uniform Child Custody Jurisdiction and Enforcement Act, which governs the resolution of child custody between states, applies to determination of grandparent visitation. This bill encourages consolidation of court determination of grandparent visitation and child custody, parenting, and time-sharing actions to minimize the burden of litigation on the parties.

The grandparent may file a petition once every 2 years, except on good cause that the minor child is suffering or may suffer harm caused by a parent's denial of grandparent visitation.

This bill repeals existing s. 752.07, F.S., which provided for the continuation of grandparent visitation upon adoption by a stepparent. Instead, the bill authorizes the stepparent to petition the court to terminate grandparent visitation, unless the grandparent can show that the criteria authorizing visitation with a child who remains in parental custody still applies.

Section 63.172(2), F.S., preserves existing grandparent visitation if one or both parents of a child die without parental rights being terminated and a spouse of the living parent or a close relative of the child adopts the child. This bill preserves great-grandparent rights to visitation in s. 63.172, F.S.

Visitation Rights with Children who Have Been Adjudicated Dependent

This bill grants great-grandparents the same visitation rights as that afforded to grandparents with a child who has been adjudicated dependent and taken from the physical custody of the parent. Visitation rights extend to:

- Visitation in the home of the great-grandparent unless a caseworker documents a compelling reason to deny or restrict visitation; and
- Unrestricted appropriate displays of affection with the child and provision of gifts and cards to the child.

Termination of Visitation Rights

The right of great-grandparents to visitation with a great-grandchild who is adjudicated dependent automatically terminates if they violate a court order by facilitating a meeting between the child and a parent or another person in violation of a court order. If the court returns the child to the physical custody of the parent, visitation rights terminate.

Prior Criminal History as a Basis for Denying Visitation

The court may deny great-grandparent visitation if it is not in the child's best interest, based on the great-grandparent's prior criminal history. Just as for grandparents, the court may deny visitation if the person has entered a plea of guilt or nolo contendere or been found guilty, of the following:

- Removing a minor child from the state or concealing a minor child;
- Sexual battery;
- Lewd and lascivious behavior, including indecent exposure;
- Incest; or

- Child abuse.

Designation as a sexual predator may also be a basis for denial of visitation as is a report and investigation for abuse, abandonment, or neglect of a disabled adult.

Great-grandparent Adoption of a Great-grandchild

This bill adds great-grandparents to the list of relatives entitled to receive the notice of hearing at which the court is considering a termination of parental rights. The court may consider a great-grandparent for adoption of a dependent child if the child has lived with him or her for the same length of time (6 months within the last 24-month period preceding the filing of a petition for the termination of parental rights) as that afforded to grandparents who wish to adopt.

Granting a Child a Permanent Guardianship as an Alternative to Adoption

This bill includes the level of contact between the child and the great-grandparent as a factor to be used by the court in determining a suitable permanent guardianship.

Granting a Child a Permanent Placement with a Fit and Willing Relative as an Alternative to Adoption

This bill includes the level of contact between the child and a great-grandparent as a factor to be used by the court in determining a permanent placement of a child with a suitable relative.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not affect cities and counties.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Various provisions of ch. 752, F.S., have been challenged as unconstitutional a number of times since becoming law in 1984. In 1996, the Florida Supreme Court reviewed the issue of whether it is proper for the government to impose grandparent visitation on an intact family, absent evidence of demonstrated harm to the child.¹⁴ In applying Article I, s. 23 of the Florida Constitution, the court found that parents have a fundamental right to be free from governmental interference. Further, the court found that the state failed to

¹⁴ *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996).

show a compelling interest.¹⁵ For these reasons, the court ruled that part of the law unconstitutional.

In 1998, the Florida Supreme Court again struck down part of the grandparent visitation law.¹⁶ The court noted that the United States Supreme Court had recognized an implicit right of person privacy in the liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Along with the implicit right of privacy, the State Constitution provides the explicit right of privacy to citizens under Article I, s. 23.¹⁷ Here the Court found that the law suffered the same infirmity, namely the part of the law that mandated grandparent visitation under a best interest of the child standard, without a showing of proof of demonstrable harm to the child.¹⁸

Again, in 2004, the Florida Supreme Court reviewed a statute which authorized a court to award grandparent visitation rights to a child if it is in the child's best interest. The statutory provision challenged was not in ch. 752, F.S., but in ch. 61, F.S., dealing with custody time-sharing, and paternity (s. 61.13(2)(b)2.c., F.S.)¹⁹ Here, the child's mother filed a motion for rehearing in a paternity action and subsequently died in a car accident. The case was before the court on a motion to intervene filed by the grandmother.²⁰ Although the court resolved the case on the issue of the motion to intervene, the court reiterated the unconstitutionality of any provision of law which would impose grandparent visitation absent a showing of harm to the child.²¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Children and Families (DCF) identifies a potential fiscal impact from this bill. The impact relates to:

- Possible increased costs for Community-based Care lead agencies, subcontracted agencies, dependency case managers, and foster parents, associated with transporting or supervising great-grandparent visitation; and

¹⁵ *Id.* at 1276.

¹⁶ *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998).

¹⁷ *Id.* at 513-514.

¹⁸ *Id.* at 514.

¹⁹ *Sullivan v. Sapp*, 866 So.2d 28, 38 (Fla. 2004). Section 61.13(2)(b)2.c., F.S. (2003), provided, "The court may award the grandparents visitation rights with a minor child if it is in the child's best interest. Grandparents have legal standing to seek judicial enforcement of such an award."

²⁰ *Id.* at 30-31.

²¹ *Id.* at 38-39.

- Possible increased costs for private adoption attorneys and Children’s Legal Services due to adding great-grandparents to the list of relatives entitled to service of process on a notice of a petition to terminate parental rights.

Personal service of process costs about \$35 (in state); up to \$180 (out-of-state), and \$28 or higher (internationally).

The Office of the State Courts Administrator (OSCA) indicates that the impact on judicial workload is difficult to determine as the number of petitions to be filed as a result of the bill is unknown.²²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 39.01, 39.509, 39.801, 63.0425, 39.6221, 39.6231, 63.087, 63.172, and 752.015.

This bill creates the following sections of the Florida Statutes: 752.011 and 752.071.

This bill repeals the following sections of the Florida Statutes: 752.01 and 752.07.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

²² Office of the State Courts Administrator, *2015 Judicial Impact Statement* (March 10, 2015); on file with the Senate Judiciary Committee.

By Senator Abruzzo

25-00324-15

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1 A bill to be entitled
 2 An act relating to the rights of grandparents and
 3 great-grandparents; amending s. 39.01, F.S.;
 4 redefining the term "next of kin" to include great-
 5 grandparents; amending s. 39.509, F.S.; providing
 6 great-grandparents the same visitation rights as
 7 grandparents; amending ss. 39.801 and 63.0425, F.S.;
 8 requiring notice to a great-grandparent under certain
 9 circumstances; repealing s. 752.01, F.S., relating to
 10 actions by a grandparent for visitation rights;
 11 creating s. 752.011, F.S.; authorizing the grandparent
 12 of a minor child to petition a court for visitation
 13 under certain circumstances; requiring a preliminary
 14 hearing; providing for the payment of attorney fees
 15 and costs by a petitioner who fails to make a prima
 16 facie showing of harm; authorizing grandparent
 17 visitation after a final hearing if the court makes
 18 specified findings; providing factors for court
 19 consideration; providing for application of the
 20 Uniform Child Custody Jurisdiction and Enforcement
 21 Act; encouraging the consolidation of certain
 22 concurrent actions; providing for modification of an
 23 order awarding grandparent visitation; limiting the
 24 frequency of actions seeking visitation; limiting
 25 application to a minor child placed for adoption;
 26 providing for venue; repealing s. 752.07, F.S.,
 27 relating to the effect of adoption of a child by a
 28 stepparent on grandparent visitation rights; creating
 29 s. 752.071, F.S.; authorizing, after petition, a court

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30 to terminate a grandparent visitation order upon
 31 adoption of a minor child by a stepparent or close
 32 relative; amending ss. 39.6221, 39.6231, 63.087,
 33 63.172, and 752.015, F.S.; conforming provisions and
 34 cross-references to changes made by the act; providing
 35 an effective date.
 36

37 Be It Enacted by the Legislature of the State of Florida:
 38

39 Section 1. Subsection (45) of section 39.01, Florida
 40 Statutes, is amended to read:

41 39.01 Definitions.—When used in this chapter, unless the
 42 context otherwise requires:

43 (45) "Next of kin" means an adult relative of a child who
 44 is the child's brother, sister, grandparent, great-grandparent,
 45 aunt, uncle, or first cousin.

46 Section 2. Section 39.509, Florida Statutes, is amended to
 47 read:

48 39.509 Visitation rights of grandparents and great-
 49 grandparents ~~Grandparents rights.~~—Notwithstanding any other
 50 ~~provision of~~ law, a maternal or paternal grandparent or great-
 51 grandparent, as well as a step-grandparent or step-great-
 52 grandparent, ~~stepgrandparent~~ is entitled to reasonable
 53 visitation with his or her grandchild or great-grandchild who
 54 has been adjudicated a dependent child and taken from the
 55 physical custody of the parent unless the court finds that such
 56 visitation is not in the best interest of the child or that such
 57 visitation would interfere with the goals of the case plan.
 58 Reasonable visitation may be unsupervised and, where appropriate

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59 and feasible, may be frequent and continuing. ~~An Any~~ order for
60 visitation or other contact must conform to ~~the provisions of~~ s.
61 39.0139.

62 (1) Grandparent or great-grandparent visitation may take
63 place in the home of the grandparent or great-grandparent unless
64 there is a compelling reason for denying such a visitation. The
65 department's caseworker shall arrange the visitation to which a
66 grandparent or great-grandparent is entitled pursuant to this
67 section. The state ~~may shall~~ not charge a fee for any costs
68 associated with arranging the visitation. However, the
69 grandparent or great-grandparent shall pay for the child's cost
70 of transportation ~~if when~~ the visitation is to take place in the
71 grandparent's or great-grandparent's home. The caseworker shall
72 document the reasons for any decision to restrict a
73 grandparent's or great-grandparent's visitation.

74 (2) A grandparent or great-grandparent entitled to
75 visitation pursuant to this section ~~may shall~~ not be restricted
76 from appropriate displays of affection to the child, such as
77 appropriately hugging or kissing his or her grandchild or great-
78 grandchild. Gifts, cards, and letters from the grandparent or
79 great-grandparent and other family members ~~may shall~~ not be
80 denied to a child who has been adjudicated a dependent child.

81 (3) ~~An Any~~ attempt by a grandparent or great-grandparent to
82 facilitate a meeting between the child who has been adjudicated
83 a dependent child and the child's parent or legal custodian, or
84 any other person in violation of a court order shall
85 automatically terminate future visitation rights of the
86 grandparent or great-grandparent.

87 (4) When the child has been returned to the physical

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88 custody of his or her parent, the visitation rights granted
89 pursuant to this section ~~shall~~ terminate.

90 (5) The termination of parental rights does not affect the
91 rights of grandparents or great-grandparents unless the court
92 finds that such visitation is not in the best interest of the
93 child or that such visitation would interfere with the goals of
94 permanency planning for the child.

95 (6) In determining whether grandparental or great-
96 grandparental visitation is not in the child's best interest,
97 ~~the court consideration~~ may consider ~~be given to~~ the following:

98 (a) The finding of guilt, regardless of adjudication, or
99 entry or plea of guilty or nolo contendere to charges under the
100 following statutes, or similar statutes of other jurisdictions:

101 1. Section ~~s-~~ 787.04, relating to removing a minor child
102 minors from the state or concealing a minor child ~~minors~~
103 contrary to court order;

104 2. Section ~~s-~~ 794.011, relating to sexual battery;

105 3. Section ~~s-~~ 798.02, relating to lewd and lascivious
106 behavior;

107 4. Chapter 800, relating to lewdness and indecent exposure;

108 5. Section ~~s-~~ 826.04, relating to incest; or

109 6. Chapter 827, relating to the abuse of children.

110 (b) The designation by a court as a sexual predator as
111 defined in s. 775.21 or a substantially similar designation
112 under laws of another jurisdiction.

113 (c) A report of abuse, abandonment, or neglect under ss.
114 415.101-415.113 or this chapter and the outcome of the
115 investigation concerning such report.

116 Section 3. Paragraph (a) of subsection (3) of section

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117 39.801, Florida Statutes, is amended to read:

118 39.801 Procedures and jurisdiction; notice; service of
119 process.—

120 (3) Before the court may terminate parental rights, in
121 addition to the other requirements set forth in this part, the
122 following requirements must be met:

123 (a) Notice of the date, time, and place of the advisory
124 hearing for the petition to terminate parental rights and a copy
125 of the petition must be personally served upon the following
126 persons, specifically notifying them that a petition has been
127 filed:

128 1. The parents of the child.

129 2. The legal custodians of the child.

130 3. If the parents who would be entitled to notice are dead
131 or unknown, a living relative of the child, unless upon diligent
132 search and inquiry no such relative can be found.

133 4. Any person who has physical custody of the child.

134 5. Any grandparent or great-grandparent entitled to
135 priority for adoption under s. 63.0425.

136 6. Any prospective parent who has been identified under s.
137 39.503 or s. 39.803.

138 7. The guardian ad litem for the child or the
139 representative of the guardian ad litem program, if the program
140 has been appointed.

141

142 The document containing the notice to respond or appear must
143 contain, in type at least as large as the type in the balance of
144 the document, the following or substantially similar language:

145

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146 ~~FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING~~

147 CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF
148 THIS CHILD (OR CHILDREN). IF YOU FAIL TO APPEAR ON THE DATE AND
149 TIME SPECIFIED, YOU MAY LOSE ALL LEGAL RIGHTS AS A PARENT TO THE
150 CHILD OR CHILDREN NAMED IN THE PETITION ATTACHED TO THIS
151 NOTICE.”

152 Section 4. Section 63.0425, Florida Statutes, is amended to
153 read:

154 63.0425 Grandparent’s or great-grandparent’s right to
155 notice.—

156 (1) If a child has lived with a grandparent or great-
157 grandparent for at least 6 months within the 24-month period
158 immediately preceding the filing of a petition for termination
159 of parental rights pending adoption, the adoption entity shall
160 provide notice to that grandparent or great-grandparent of the
161 hearing on the petition.

162 (2) This section does not apply if the placement for
163 adoption is the result of the death of the child’s parent and a
164 different preference is stated in the parent’s will.

165 (3) This section does not apply in stepparent adoptions.

166 (4) This section does not contravene the provisions of s.
167 63.142(4).

168 Section 5. Section 752.01, Florida Statutes, is repealed.

169 Section 6. Section 752.011, Florida Statutes, is created to
170 read:

171 752.011 Petition for grandparent visitation of a minor
172 child.—A grandparent of a minor child whose parents are
173 deceased, missing, or in a permanent vegetative state, or whose
174 one parent is deceased, missing, or in a permanent vegetative

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175 state and whose other parent has been convicted of a felony or
 176 an offense of violence, may petition the court for court-ordered
 177 visitation with the grandchild under this section.

178 (1) Upon the filing of a petition by a grandparent for
 179 visitation, the court shall hold a preliminary hearing to
 180 determine whether the petitioner has made a prima facie showing
 181 of parental unfitness or danger of significant harm to the minor
 182 child. Absent such a showing, the court shall dismiss the
 183 petition and shall award reasonable attorney fees and costs to
 184 be paid by the petitioner to the respondent.

185 (2) If the court finds that there is prima facie evidence
 186 that a parent is unfit or that there is a danger of significant
 187 harm to the minor child, the court shall proceed toward a final
 188 hearing, may appoint a guardian ad litem, and shall order the
 189 matter to family mediation as provided in s. 752.015.

190 (3) After conducting a final hearing on the issue of
 191 visitation, the court may award reasonable visitation to the
 192 grandparent with respect to the minor child if the court finds
 193 by clear and convincing evidence that a parent is unfit or that
 194 there is a danger of significant harm to the minor child, that
 195 visitation is in the best interest of the minor child, and that
 196 the visitation will not materially harm the parent-child
 197 relationship.

198 (4) In assessing the best interest of the minor child under
 199 subsection (3), the court shall consider the totality of the
 200 circumstances affecting the mental and emotional well-being of
 201 the minor child, including:

202 (a) The love, affection, and other emotional ties existing
 203 between the minor child and the grandparent, including those

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204 resulting from the relationship that had been previously allowed
 205 by the child's parent.

206 (b) The length and quality of the previous relationship
 207 between the minor child and the grandparent, including the
 208 extent to which the grandparent was involved in providing
 209 regular care and support for the child.

210 (c) Whether the grandparent established ongoing personal
 211 contact with the minor child before the death of the parent.

212 (d) The reasons that the surviving parent cited in ending
 213 contact or visitation between the minor child and the
 214 grandparent.

215 (e) Whether there has been demonstrable significant mental
 216 or emotional harm to the minor child as a result of the
 217 disruption in the family unit from which the child derived
 218 support and stability from the grandparent, and whether the
 219 continuation of that support and stability is likely to prevent
 220 further harm.

221 (f) The existence or threat to the minor child of mental
 222 injury as defined in s. 39.01.

223 (g) The present mental, physical, and emotional health of
 224 the minor child.

225 (h) The present mental, physical, and emotional health of
 226 the grandparent.

227 (i) The recommendations of the minor child's guardian ad
 228 litem, if one is appointed.

229 (j) The results of any psychological evaluation of the
 230 minor child.

231 (k) The preference of the minor child if he or she is
 232 determined to be of sufficient maturity to express a preference.

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233 (l) A written testamentary statement by the deceased parent
 234 regarding visitation with the grandparent. The absence of a
 235 testamentary statement is not deemed to provide evidence that
 236 the deceased parent would have objected to the requested
 237 visitation.

238 (m) Other factors that the court considers necessary in
 239 making its determination.

240 (5) In assessing material harm to the parent-child
 241 relationship under subsection (3), the court shall consider the
 242 totality of the circumstances affecting the parent-child
 243 relationship, including:

244 (a) Whether there have been previous disputes between the
 245 grandparent and the parent over childrearing or other matters
 246 related to the care and upbringing of the minor child.

247 (b) Whether visitation would materially interfere with or
 248 compromise parental authority.

249 (c) Whether visitation can be arranged in a manner that
 250 does not materially detract from the parent-child relationship,
 251 including the quantity of time available for enjoyment of the
 252 parent-child relationship and any other consideration related to
 253 disruption of the schedule and routines of the parent and the
 254 minor child.

255 (d) Whether visitation is being sought for the primary
 256 purpose of continuing or establishing a relationship with the
 257 minor child with the intent that the child benefit from the
 258 relationship.

259 (e) Whether the requested visitation would expose the minor
 260 child to conduct, moral standards, experiences, or other factors
 261 that are inconsistent with influences provided by the parent.

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262 (f) The nature of the relationship between the child's
 263 parent and the grandparent.

264 (g) The reasons that the parent cited in ending contact or
 265 visitation between the minor child and the grandparent which was
 266 previously allowed by the parent.

267 (h) The psychological toll of visitation disputes on the
 268 minor child.

269 (i) Other factors that the court considers necessary in
 270 making its determination.

271 (6) Part II of chapter 61, the Uniform Child Custody
 272 Jurisdiction and Enforcement Act, applies to actions brought
 273 under this section.

274 (7) If separate actions under this section and s. 61.13 are
 275 pending concurrently, the courts are strongly encouraged to
 276 consolidate the actions in order to minimize the burden of
 277 litigation on the minor child and the other parties.

278 (8) An order for grandparent visitation may be modified
 279 upon a showing by the person petitioning for modification that a
 280 substantial change in circumstances has occurred and that
 281 modification of visitation is in the best interest of the minor
 282 child.

283 (9) An original action requesting visitation under this
 284 section may be filed by a grandparent only once during any 2-
 285 year period, except on good cause shown that the minor child is
 286 suffering, or may suffer, demonstrable significant mental or
 287 emotional harm caused by a parental decision to deny visitation
 288 between a minor child and the grandparent, which was not known
 289 to the grandparent at the time of filing an earlier action.

290 (10) This section does not provide for grandparent

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291 visitation with a minor child placed for adoption under chapter
 292 63 except as provided in s. 752.071 with respect to adoption by
 293 a stepparent or close relative.

294 (11) Venue shall be in the county where the minor child
 295 primarily resides, unless venue is otherwise governed by chapter
 296 39, chapter 61, or chapter 63.

297 Section 7. Section 752.07, Florida Statutes, is repealed.

298 Section 8. Section 752.071, Florida Statutes, is created to
 299 read:

300 752.071 Effect of adoption by stepparent or close
 301 relative.-After the adoption of a minor child by a stepparent or
 302 close relative, the stepparent or close relative may petition
 303 the court to terminate a court order granting grandparent
 304 visitation under this chapter which was entered before the
 305 adoption. The court may terminate the order unless the
 306 grandparent is able to show that the criteria of s. 752.011
 307 authorizing the visitation continue to be satisfied.

308 Section 9. Subsection (2) of section 39.6221, Florida
 309 Statutes, is amended to read:

310 39.6221 Permanent guardianship of a dependent child.-

311 (2) In its written order establishing a permanent
 312 guardianship, the court shall do all of the following:

313 (a) List the circumstances that make or reasons why the
 314 child's parents unfit are not fit to care for the child and make
 315 why reunification impossible, referencing is not possible by
 316 referring to specific findings of fact made in its order
 317 adjudicating the child dependent or by making separate findings
 318 of fact.†

319 (b) State the reasons why establishment of a permanent

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320 guardianship is being ordered ~~established~~ instead of adoption.†

321 (c) Specify the frequency and nature of visitation or
 322 contact between the child and his or her parents.†

323 (d) Specify the frequency and nature of visitation or
 324 contact between the child and his or her grandparents or great-
 325 grandparents, under s. 39.509.†

326 (e) Specify the frequency and nature of visitation or
 327 contact between the child and his or her siblings.† ~~and~~

328 (f) Require that the permanent guardian not return the
 329 child to the physical care and custody of the person from whom
 330 the child was removed without the approval of the court.

331 Section 10. Subsection (3) of section 39.6231, Florida
 332 Statutes, is amended to read:

333 39.6231 Permanent placement with a fit and willing
 334 relative.-

335 (3) In its written order placing the child with a fit and
 336 willing relative, the court shall do all of the following:

337 (a) List the circumstances that make or reasons why
 338 reunification impossible, referencing is not possible by
 339 ~~referring to~~ specific findings of fact made in its order
 340 adjudicating the child dependent or ~~by~~ making separate findings
 341 of fact.†

342 (b) State the reasons why permanent placement with a fit
 343 and willing relative is being ordered ~~established~~ instead of
 344 adoption.†

345 (c) Specify the frequency and nature of visitation or
 346 contact between the child and his or her parents.†

347 (d) Specify the frequency and nature of visitation or
 348 contact between the child and his or her grandparents or great-

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349 ~~grandparents~~ under s. 39.509.

350 (e) Specify the frequency and nature of visitation or
351 contact between the child and his or her siblings.

352 (f) Require that the relative not return the child to the
353 physical care and custody of the person from whom the child was
354 removed without the approval of the court.

355 Section 11. Paragraph (e) of subsection (4) of section
356 63.087, Florida Statutes, is amended to read:

357 63.087 Proceeding to terminate parental rights pending
358 adoption; general provisions.—

359 (4) PETITION.—

360 (e) The petition must include:

361 1. The minor's name, gender, date of birth, and place of
362 birth. The petition must contain all names by which the minor is
363 or has been known, excluding the minor's prospective adoptive
364 name but including the minor's legal name at the time of the
365 filing of the petition. In the case of an infant child whose
366 adoptive name appears on the original birth certificate, the
367 adoptive name ~~may shall~~ not be included in the petition ~~or, nor~~
368 ~~shall it be included~~ elsewhere in the termination of parental
369 rights proceeding.

370 2. All information required by the Uniform Child Custody
371 Jurisdiction and Enforcement Act and the Indian Child Welfare
372 Act.

373 3. A statement of the grounds under s. 63.089 upon which
374 the petition is based.

375 4. The name, address, and telephone number of any adoption
376 entity seeking to place the minor for adoption.

377 5. The name, address, and telephone number of the division

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378 of the circuit court in which the petition is to be filed.

379 6. A certification of compliance with the requirements of
380 s. 63.0425 regarding notice to grandparents or great-
381 grandparents of an impending adoption.

382 Section 12. Subsection (2) of section 63.172, Florida
383 Statutes, is amended to read:

384 63.172 Effect of judgment of adoption.—

385 (2) If one or both parents of a child die without the
386 relationship of parent and child having been previously
387 terminated and a spouse of the living parent or a close relative
388 of the child thereafter adopts the child, the child's right of
389 inheritance from or through the deceased parent is unaffected by
390 the adoption and, unless the court orders otherwise, the
391 adoption does will not terminate any grandparental or great-
392 grandparental rights delineated under chapter 752. For purposes
393 of this subsection, a close relative of a child is the child's
394 brother, sister, grandparent, great-grandparent, aunt, or uncle.

395 Section 13. Section 752.015, Florida Statutes, is amended
396 to read:

397 752.015 Mediation of visitation disputes.—It is shall be
398 the public policy of this state that families resolve
399 differences over grandparent visitation within the family. It is
400 ~~shall be~~ the further public policy of this state that, when
401 families are unable to resolve differences relating to
402 grandparent visitation, ~~that~~ the family participate in any
403 formal or informal mediation services that may be available. If
404 ~~When~~ families are unable to resolve differences relating to
405 grandparent visitation and a petition is filed pursuant to s.
406 752.011 s. 752.04, the court shall, if such services are

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407 available in the circuit, refer the case to family mediation in
408 accordance with the Florida Family Law Rules of Procedure ~~rules~~
409 ~~promulgated by the Supreme Court.~~

410 Section 14. This act shall take effect July 1, 2015.

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/CS/SB 496

INTRODUCER: Judiciary Committee; Children, Families and Elder Affairs Committee; and Senator Detert

SUBJECT: Guardians

DATE: March 11, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Crosier	Hendon	CF	Fav/CS
2.	Brown	Cibula	JU	Fav/CS
3.			AP	
4.				

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 496 addresses a gap that can exist between the time that children with developmental disabilities or who lack capacity age out of the foster care system at 18 years old and are appointed a guardian. This bill provides for guardianship proceedings to begin in advance of a child's 18th birthday when the child is pre-determined by the Department of Children and Families (DCF) to need a guardian when the child becomes an adult.

II. Present Situation:

Dependency courts operate primarily under ch. 39, F.S., handling cases dealing with the abandonment, abuse, and neglect of children. Chapters 731 through 735, 744, and 747, F.S., govern wills, trusts, estates, guardianships, conservatorships, and other property and succession matters.

Types of Guardians

A guardian is defined as a person appointed by the court to act on behalf of a ward's person, property, or both.¹ The law recognizes various types of guardians.

¹ Section 744.102(9), F.S.

Natural Guardians

Parents are considered natural guardians of their biological and adopted children, up until the time that their children cease to be minors.²

Limited Guardians

Limited guardians are guardians who have been appointed by the court to exercise legal rights and powers specifically designated in the court order. These guardians have limited authority in that the ward is able to either provide some self-care or the ward has voluntarily petitioned the court for a guardian.³

Plenary Guardians

A plenary guardian is appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to provide any self-care.⁴

Guardian Advocates

Guardian advocates are appointed by the court for persons with developmental disabilities.⁵

Court and DCF Oversight for Children in Foster Care

Updated Case Plans

The dependency court is required to hold periodic hearings to review the cases of children in care. In addition to hearings held earlier, the court must hold a judicial review hearing within 90 days after a child's 17th birthday.⁶ At this hearing, the DCF must provide the court with an updated case plan. The updated case plan must address the independent living skills that the child has acquired since the age of 13 or the date the child came into foster care, whichever is later.⁷ At the last review hearing before the child turns 18 years of age, the court must consider whether the child plans to remain in foster care. At this hearing, the court must ensure that the child has been informed of the right to continued support and services from the DCF.⁸

Court Review of Young Adults who Remain in Care

The term "young adult" is defined as a person who has reached 18, but not 21 years of age.⁹ Young adults may stay in foster care until the age of 21 years old. In 2013, the Florida Legislature passed a law to enable the dependency court to retain jurisdiction over young adults with disabilities and allow them to remain in foster care until the age of 22.¹⁰ An average of 60 young adults with developmental disabilities reach 18 years of age annually while in licensed

² Section 744.301(1), F.S.

³ Section 744.102(9)(a), F.S.

⁴ Section 744.102(9)(b), F.S.

⁵ Section 744.102(11), F.S.

⁶ Section 39.701(3)(a), F.S.

⁷ Section 39.701(3)(b), F.S.

⁸ Section 39.701(3)(d), F.S.

⁹ Section 39.6251(1), F.S.

¹⁰ The Independent Living Act took effect January 2014 (ch. 2013-178, Laws of Fla.)

foster care.¹¹ Some of these young adults reside in supportive housing provided by the Agency for Persons with Disabilities (APD). Unless a court adjudicates the young adult incapacitated and appoints a guardian, the young adult is able to leave APD-licensed housing.¹²

Guardianship

A wide range of options are available to provide decision-making assistance to those with developmental disabilities or who lack capacity which are not as restrictive as guardianships.¹³

Guardianships that place decision-making authority for a ward's property and person with a guardian require an examining committee to determine that the alleged incapacitated adult lacks capacity. Only then may a judge enter a finding of an adjudication of incapacity.¹⁴ This form of guardianship is considered the most restrictive, and should be a last resort, as it removes fundamental and civil rights of an individual.

Before a guardian can be appointed for an adult, Florida law requires appointed counsel, the presence of the adult at the hearing, and an adjudication of incapacity based on the recommendation of an examining committee.¹⁵ For guardianship of a minor, none of the following are required: counsel, the minor's presence at the hearing, or an adjudication of incapacity.¹⁶ These due process protections for minors are waived under current law because the minor is not an adult and the guardianship of a minor terminates by law upon reaching 18 years of age.

The probate court does not assume jurisdiction in guardianship determinations until a child turns 18. Often probate court proceedings take 6 months or longer before a final order is entered.¹⁷ This results in a gap between the time the child turns 18 and when a guardian is appointed.

III. Effect of Proposed Changes:

CS/CS/SB 496 addresses the gap that exists between the time that children with developmental disabilities or who lack capacity age out of the foster care system at 18 years old and are appointed a guardian.

Under current law, when a minor¹⁸ with developmental disabilities or some level of incapacity ages out of the dependency system, a gap exists between the time he or she turns 18 years of age and the time a guardian advocate, plenary guardian, or limited guardian is appointed. This creates a period in which a person in need of a guardian is considered an adult but is unable to

¹¹ Department of Children and Families, *2015 Agency Legislative Bill Analysis of SB 496* (on file with the Senate Committee on Judiciary).

¹² *Id.*

¹³ The Florida Developmental Disabilities Council, *Lighting the Way to Guardianships and Other Decision-Making Alternatives: A Manual for Individuals and Families. 2010: Florida Developmental Disabilities Council, Inc.* (2010), pg. 19-20.

¹⁴ Section 744.331(5) and (6), F.S.

¹⁵ Section 744.331, F.S.

¹⁶ Sections 744.3021 and 744.342, F.S.

¹⁷ *Id.*

¹⁸ A minor is defined in law as any person who has not reached the age of 18 years (s. 1.01(13), F.S.)

adequately make decisions on his or her own. Two separate issues create this gap. The first is the lack of a procedure within the dependency system to identify adults willing to serve as guardians or guardian advocates for these minors as they reach the age of 18 years of age. The second issue is jurisdictional in that probate courts only exercise jurisdiction and begin guardianship proceedings after the child reaches 18 years of age.

This bill addresses the gap in several ways by:

- Creating a process for the Department of Children and Families (DCF) to identify through updated case plans and multidisciplinary reports the need for guardians and guardian advocates for children with developmental disabilities or who lack capacity in advance of the child's 18th birthday.
- Authorizing the court to initiate proceedings for the minor;
- Providing the same due process rights guaranteed to adults; and
- Allowing the child's parents to be considered natural guardians unless the dependency or probate court determines it is not in the child's best interest or the parents' rights have been terminated.

Court Review of Young Adults who Remain in Care

Under existing law, while a young adult remains in foster care, the dependency court maintains jurisdiction and oversight over the young adult's case plan, individual education plan, and transition plan. The court reviews the status of the young adult at least every 6 months and the permanency review hearing at least annually. This bill provides that if a guardian or guardian advocate has been appointed to the young adult, the court must review at the permanency review hearing the necessity of continuing the guardianship and whether the court needs to hold guardianship proceedings when the young adult reaches 22 years of age.

For young adults who have guardians, authorizing the court to review guardianship at a hearing that is separate from a chapter 39, F.S., review hearing provides additional oversight of the young adult.

Updated Case Plans

Under existing law, at the initial judicial review hearing for children who have reached 17 years of age, the DCF must provide the court with an updated case plan that includes specific information related to the independent living skills that the child has acquired since the age of 13 or the date the child came into foster care, whichever was later.

This bill requires the DCF, for children who are being considered for guardians as adults, to develop updated case plans in a face-to-face conference with the child, the child's attorney, guardian ad litem, temporary custodian, and the parent if the parent's rights have not been terminated.

If the dependency court determines at the first judicial review hearing after the child's 17th birthday that the child qualifies for an appointment of a guardian or guardian advocate and there is no less restrictive decision making assistance to meet the needs of the child, DCF must:

1. Complete a multidisciplinary report, including a psychosocial evaluation if one has not been completed within the previous 2 years;
2. Identify one or more individuals willing to serve as the guardian advocate, plenary guardian or limited guardian. The child's parents may not be considered unless the court issues a written order finding such an appointment is in the child's best interest; and
3. Initiate proceedings within 180 days after the child's 17th birthday for the appointment of a guardian advocate, plenary guardian, or limited guardian for the child in the court of proper jurisdiction.

If another interested party initiates proceedings for the appointment of a guardian advocate, plenary guardian, or limited guardian, the bill requires DCF to provide all necessary documentation and information to the petitioner within 45 days after the first judicial review hearing after the child's 17th birthday.

The bill also specifies that any proceeding seeking appointment of a guardian advocate, plenary guardian, or limited guardian be conducted in a court hearing separate from dependency court.

Jurisdiction of Probate Court

This bill authorizes the probate court to assume jurisdiction of a minor in need of a guardian determination, and initiate guardianship proceedings once the minor reaches the age of 17 years and 6 months or anytime thereafter.

This provision will ensure that a child in need of a guardian who is approaching the age of 18 will be eligible for guardianship when the child turns 18 years old.

Natural Guardians

This bill clarifies that parents can be a guardian or a natural guardian of a minor child who is the subject of a ch. 39, F.S., proceeding, unless the court has terminated parental rights or finds that having the parents be the guardian or natural guardian is not in the child's best interest.

Parity in Due Process Rights for Minors in Adult Guardianship Proceedings

This bill provides that the same due process rights given to adults in guardianship proceedings apply to minors aged 17 years and 6 months or older who are the subject of proceedings under ch. 39, F.S. The court may issue an order of adjudication of incapacity and letters of limited or plenary guardianship upon the minor's 18th birthday or as soon thereafter as possible.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not contain a mandate because the bill does not affect cities or counties.

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: 39.6251, 39.701, 393.12, 744.301, and 744.3021.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS/CS by Judiciary Committee on March 10, 2015:

The CS/CS:

- Requires a guardianship determination to be made in a separate proceeding for guardianship, and not during a judicial review of a young adult in continuing care in a dependency court under ch. 39, F.S. This change enables parties other than the DCF, such as a guardian ad litem or an attorney for the young adult, to initiate a petition.
- Removes references to court rules.

CS by Children, Families, and Elder Affairs Committee on February 19, 2015:
The Committee Substitute:

Amends s. 39.6251, F.S., to provide that for a youth in continuing care that has been appointed a guardian or guardian advocate, the court, at the annual permanency review hearing determine whether it is necessary to continue the guardianship and whether restoration of guardianship proceedings are needed when the child reaches age 22 years of age.

Amends s. 39.701, F.S., to provide that for a child that may meet the requirements for an appointment of a guardian or guardian advocate, the department is to develop an updated case plan in a face-to-face conference with a child, if appropriate, and include certain individuals at the conference. At the judicial review, if the court determines, pursuant to ch. 744, F.S., and the Florida Probate Rules that there is a good faith basis to believe the child qualifies for the appointment of a guardian or guardian advocate, the department shall complete certain reports and identify one or more individuals who are willing to serve as the guardian advocate or as the plenary guardian or limited guardian.

B. Amendments:

None.



902686

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete line 58

and insert:

young adult reaches 22 years of age. The court may appoint a guardian

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

And the title is amended as follows:

Delete line 6

and insert:



902686

12
13

are needed when the young adult reaches a certain age
under



461482

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete lines 80 - 192
and insert:
pursuant to the requirements of chapter 744 that there is a good
faith basis to believe that the child qualifies for appointment
of a guardian advocate, limited guardian, or plenary guardian
and that no less restrictive decisionmaking assistance will meet
the child's needs:

a. The department shall complete a multidisciplinary report
which must include, but is not limited to, a psychosocial



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12 evaluation and educational report if such a report has not been
13 completed within the previous 2 years.

14 b. The department shall identify one or more individuals
15 who are willing to serve as the guardian advocate pursuant to s.
16 393.12 or as the plenary or limited guardian pursuant to chapter
17 744. Any other interested parties or participants may make
18 efforts to identify such a guardian advocate, limited guardian,
19 or plenary guardian. A child's biological or adoptive family
20 member, including the child's parent if the parent's rights have
21 not been terminated, may not be considered for service as the
22 plenary or limited guardian unless the court enters a written
23 order finding that such an appointment is in the child's best
24 interests.

25 c. Proceedings may be initiated within 6 months after the
26 child's 17th birthday for the appointment of a guardian
27 advocate, plenary guardian, or limited guardian for the child in
28 a separate proceeding in the division of the court with proper
29 jurisdiction over guardianship matters and pursuant to chapter
30 744. The Legislature encourages the use of pro bono
31 representation to initiate proceedings under this section.

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

39 4. Any proceedings seeking appointment of a guardian
40 advocate or a determination of incapacity and the appointment of



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41 a guardian must be conducted in a separate proceeding in the
42 division of the court with jurisdiction over guardianship
43 matters and pursuant to chapter 744.

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

53 Section 1. Paragraph (c) is added to subsection (2) of
54 section 393.12, Florida Statutes, to read:

55 393.12 Capacity; appointment of guardian advocate.—

56 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

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



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70 Section 2. Subsection (1) of section 744.301, Florida
71 Statutes, is amended to read:

72 744.301 Natural guardians.—

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

92 Section 3. Subsection (1) of section 744.3021, Florida
93 Statutes, is amended, and subsection (4) is added to that
94 section, to read:

95 744.3021 Guardians of minors.—

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



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99 be appointed by the court without the necessity of adjudication
100 pursuant to s. 744.331. A guardian appointed for a minor,
101 whether of the person or property, has the authority of a
102 plenary guardian.

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

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

118 And the title is amended as follows:

119 Delete lines 20 - 38

120 and insert:

121 proceeding in guardianship court; amending s. 393.12,
122 F.S.; providing that the guardianship court has
123 jurisdiction over proceedings for appointment of a
124 guardian advocate if petitions are filed for certain
125 minors who are subject to ch. 39, F.S., proceedings if
126 such minors have attained a specified age; providing
127 that such minor has the same due process rights as



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128 certain adults; providing requirements for when an
129 order appointing a guardian advocate must be issued;
130 providing that proceedings seeking appointment of a
131 guardian advocate for certain minors be conducted in
132 separate proceedings; amending s. 744.301, F.S.;
133 providing that if a child is subject to proceedings
134 under ch. 39, F.S., the parents may act as natural
135 guardians unless the dependency or probate court finds
136 that it is not in the child's best interests or their
137 parental rights have been terminated; amending s.
138 744.3021, F.S.; requiring the guardianship court to
139 initiate proceedings for appointment of guardians for
140 certain minors who are subject to ch. 39, F.S.,
141 proceedings if petitions are filed and if such minors
142 have reached a specified age; providing that such
143 minor has the same due process rights as certain
144 adults; providing requirements for when an order of
145 adjudication and letters of limited or plenary
146 guardianship must be issued; providing that
147 proceedings seeking appointment of a guardian advocate
148 for certain minors be conducted in separate
149 proceedings; providing an

By the Committee on Children, Families, and Elder Affairs; and
Senator Detert

586-01712-15

2015496c1

1 A bill to be entitled
2 An act relating to guardians; amending s. 39.6251,
3 F.S.; requiring the court at the permanency review
4 hearing to review the necessity of the guardianship
5 and whether restoration of guardianship proceedings
6 are needed when the child reaches a certain age under
7 certain circumstances; amending s. 39.701, F.S.;
8 requiring that, for a child meeting certain
9 requirements, the updated case plan be developed in a
10 face-to-face conference with specified persons
11 present; requiring the Department of Children and
12 Families to take specified actions at the judicial
13 review hearing if the court makes certain
14 determinations; requiring the department to provide
15 documentation and information to a petitioner under
16 certain circumstances; requiring certain proceedings
17 to be conducted separately; expanding the
18 circumstances under which a court, after making
19 certain findings, may issue an order directing the
20 department to show cause; amending s. 393.12, F.S.;
21 providing that the court with proper jurisdiction over
22 probate matters has jurisdiction if a specified
23 petition is filed; requiring the provision of due
24 process rights for a minor; requiring the issuance of
25 the order of appointment of guardian advocate upon the
26 minor turning 18 years of age or as soon thereafter as
27 possible; amending s. 744.301, F.S.; providing that
28 parents are the joint natural guardians of their
29 children unless their parental rights have been

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

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30 terminated; authorizing the parents to act as natural
31 guardians of their child under certain circumstances;
32 providing an exception; amending s. 744.3021, F.S.;
33 providing an exception to the appointment of guardians
34 for a minor; specifying that the court with proper
35 jurisdiction over probate matters has jurisdiction
36 over certain proceedings if a specified petition is
37 filed; requiring the provision of due process rights
38 for an alleged incapacitated minor; providing an
39 effective date.

40
41 Be It Enacted by the Legislature of the State of Florida:

42
43 Section 1. Subsection (8) of section 39.6251, Florida
44 Statutes, is amended to read:

45 39.6251 Continuing care for young adults.—

46 (8) During the time that a young adult is in care, the
47 court shall maintain jurisdiction to ensure that the department
48 and the lead agencies are providing services and coordinate
49 with, and maintain oversight of, other agencies involved in
50 implementing the young adult's case plan, individual education
51 plan, and transition plan. The court shall review the status of
52 the young adult at least every 6 months and hold a permanency
53 review hearing at least annually. If the young adult has been
54 appointed a guardian under chapter 744 or a guardian advocate
55 under s. 393.12, the court shall review at the permanency review
56 hearing the necessity of continuing the guardianship and whether
57 restoration of guardianship proceedings are needed when the
58 child reaches 22 years of age. The court may appoint a guardian

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59 ad litem or continue the appointment of a guardian ad litem with
60 the young adult's consent. The young adult or any other party to
61 the dependency case may request an additional hearing or review.

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

64 39.701 Judicial review.—

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

66 (b) At the first judicial review hearing held subsequent to
67 the child's 17th birthday, the department shall provide the
68 court with an updated case plan that includes specific
69 information related to the independent living skills that the
70 child has acquired since the child's 13th birthday, or since the
71 date the child came into foster care, whichever came later.

72 1. For any child that may meet the requirements for
73 appointment of a guardian pursuant to chapter 744 or a guardian
74 advocate pursuant to s. 393.12, the updated case plan must be
75 developed in a face-to-face conference with the child, if
76 appropriate; the child's attorney; any court-appointed guardian
77 ad litem; the temporary custodian of the child; and the parent,
78 if the parent's rights have not been terminated.

79 2. At the judicial review hearing, if the court determines
80 pursuant to the procedures and requirements of chapter 744 and
81 the Florida Probate Rules that there is a good faith basis to
82 believe the child qualifies for appointment of a guardian or a
83 guardian advocate and that no less restrictive decisionmaking
84 assistance will meet the child's needs:

85 a. The department shall complete a multidisciplinary report
86 that must include, but is not limited to, a psychosocial
87 evaluation and educational report if such a report has not been

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88 completed within the previous 2 years.

89 b. The department shall identify one or more individuals
90 who are willing to serve as the guardian advocate pursuant to s.
91 393.12 or as the plenary guardian or limited guardian pursuant
92 to chapter 744 and the Florida Probate Rules. Any other
93 interested parties or participants may make efforts to identify
94 such a guardian advocate or plenary guardian or limited
95 guardian. A child's biological or adoptive family members,
96 including a child's parents if the parents' rights have not been
97 terminated, may not be considered for service as the plenary
98 guardian or limited guardian unless the court enters a written
99 order finding that such an appointment is in the child's best
100 interests.

101 c. Proceedings shall be initiated within 180 days after the
102 child's 17th birthday for the appointment of a guardian advocate
103 or plenary guardian or limited guardian for the child in the
104 court with proper jurisdiction over probate matters according to
105 the local rules of judicial administration and the procedures
106 and requirements of chapter 744 and the Florida Probate Rules.

107 3. In the event another interested party or participant
108 initiates proceedings for the appointment of a guardian advocate
109 or plenary guardian or limited guardian for the child, the
110 department shall provide all necessary documentation and
111 information to the petitioner to complete a petition under
112 chapter 393 or chapter 744 within 45 days after the first
113 judicial review hearing after the child's 17th birthday.

114 4. Any proceedings for appointment of a guardian advocate
115 or a determination of incapacity and the appointment of a
116 guardian must be conducted in a separate proceeding in the court

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117 with proper jurisdiction over probate matters according to local
 118 rules of judicial administration and the procedures and
 119 requirements of chapter 744 and the Florida Probate Rules.

120 (c) If the court finds at the judicial review hearing that
 121 the department has not met its obligations to the child as
 122 stated in this part, in the written case plan, or in the
 123 provision of independent living services, the court may issue an
 124 order directing the department to show cause as to why it has
 125 not done so. If the department cannot justify its noncompliance,
 126 the court may give the department 30 days within which to
 127 comply. If the department fails to comply within 30 days, the
 128 court may hold the department in contempt.

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

131 393.12 Capacity; appointment of guardian advocate.—

132 (2) APPOINTMENT OF A GUARDIAN ADVOCATE.—

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

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

148 744.301 Natural guardians.—

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

168 Section 5. Subsection (1) of section 744.3021, Florida
 169 Statutes, is amended, and subsection (4) is added to that
 170 section, to read:

171 744.3021 Guardians of minors.—

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

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175 be appointed by the court without the necessity of adjudication
176 pursuant to s. 744.331. A guardian appointed for a minor,
177 whether of the person or property, has the authority of a
178 plenary guardian.

179 (4) If a petition is filed pursuant to this section
180 requesting appointment of a guardian for a minor that is the
181 subject of any proceeding under chapter 39 and who is 17 years
182 and 6 months of age or older, the court with proper jurisdiction
183 over probate matters according to local rules of judicial
184 administration and the procedures and requirements of this
185 chapter and the Florida Probate Rules shall have jurisdiction
186 over the proceedings under s. 744.331. The alleged incapacitated
187 minor under this subsection shall be provided all the due
188 process rights conferred upon an alleged incapacitated adult
189 pursuant to this chapter and the Florida Probate Rules. The
190 order of adjudication under s. 744.331 and the letters of
191 limited guardianship or plenary guardianship may be issued upon
192 the minor's 18th birthday or as soon thereafter as possible.

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



The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: February 27, 2015

I respectfully request that **Senate Bill #496**, relating to Guardians, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in cursive script, reading "Nancy C. Detert".

Senator Nancy C. Detert
Florida Senate, District 28

The Florida Senate COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 496
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 10, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE		SENATORS	3/10/2015 1 Amendment 902686		3/10/2015 2 Amendment 461482		3/10/2015 3 Motion to vote "YEA" after Roll Call	
			Simmons		Simmons		Brandes	
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay
X		Bean						
X		Benacquisto						
VA		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
X		Ring, VICE CHAIR						
X		Diaz de la Portilla, CHAIR						
10	0	TOTALS	RCS	-	RCS	-	FAV	-
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay

CODES: FAV=Favorable RCS=Replaced by Committee Substitute TP=Temporarily Postponed WD=Withdrawn
 UNF=Unfavorable RE=Replaced by Engrossed Amendment VA=Vote After Roll Call OO=Out of Order
 -R=Reconsidered RS=Replaced by Substitute Amendment VC=Vote Change After Roll Call AV=Abstain from Voting

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 604

INTRODUCER: Commerce and Tourism Committee and Senator Flores

SUBJECT: Consumer Protection

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
2.	<u>Caldwell</u>	<u>Cibula</u>	<u>JU</u>	Favorable
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 604 creates the True Origin of Digital Goods Act, which requires owners or operators of websites that disseminate commercial recordings or audiovisual works to Florida consumers to clearly post on the website and make readily accessible to a consumer using or visiting the website the true name of the operator or owner, the physical address, and the telephone number or e-mail address. The bill creates an injunctive remedy for parties aggrieved by a website's failure to clearly post its owner's or operator's identifying information. In order to be subject to this disclosure requirement, the owner or operator of the website must electronically disseminate commercial recordings or audiovisual works to Florida consumers. The owner, assignee, authorized agent, or licensee of a commercial recording or audio visual work that is electronically disseminated by a website that does not publish required identifying information may enjoin the violating website to require compliance with the bill and recover necessary expenses and reasonable attorney fees.

II. Present Situation:

Florida law does not regulate or protect commercial recordings or audio visual works. In 2004, California passed the "True Name and Address" Act, which makes the knowing electronic dissemination of a commercial recording or audiovisual work to more than 10 people without the disclosure of the disseminator's e-mail address a misdemeanor.¹

¹ Cal. Penal Code §653aa.

Tennessee followed suit in July, 2014, with the passage of the True Origin of Goods Act.² This law requires the owner or operator of a website dealing in electronic dissemination of commercial recordings or audiovisual works to clearly post his or her true and correct name, physical address, and telephone number. If the website's owner fails to disclose his or her address, he or she may be enjoined to enforce compliance, and fined for failure to do so.³ Tennessee requires these actions to be initiated and sustained by the Tennessee Attorney General's Office.⁴

III. Effect of Proposed Changes:

Section 1 creates the "True Origin of Digital Goods Act" within the General Provisions of the chapter 501 (Consumer Protection) which requires owners or operators of websites that disseminate commercial recordings or audiovisual works to Florida consumers to clearly post on the website and make readily accessible to a consumer using or visiting the website the following information:

- The true and correct name of the operator or owner;
- The operator or owner's physical address; and
- The operator or owner's telephone number or e-mail address.

This bill does not protect copyrighted material, but rather governs "commercial recordings or audiovisual works," which are defined broadly in the bill to include a recording or audiovisual work whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate such work for sale, rental, or performance or exhibition to the public, regardless of whether the person seeks commercial advantage or private financial gain from the dissemination. This bill therefore appears to apply to websites that disseminate copyrighted material as well as any disseminated recording or audiovisual work, regardless of the disseminator's intent to seek commercial advantage or financial gain from the work.

Section 1 also establishes a right to injunctive relief for owners, assignees, authorized agents, or licensees of a commercial recording or audio visual work whose work appears on a website that has not posted identifying information in violation of the bill. Before initiating the civil action provided for in the bill, the aggrieved party must "make reasonable efforts" to place an individual alleged to be in violation of the section on notice that the owner or operator may be in violation of the act, and that failure to cure the violation within 14 days may result in civil action. The prevailing party under may also obtain necessary expenses⁵ and reasonable attorney fees. These remedies are available as a supplement to other state and federal criminal and civil law provisions.

Section 1 also authorizes the court to make appropriate orders to compel compliance with the section upon motion of the party instituting the action.

² Tenn. Code Ann. §47-18-5601 – 47-18-5606 (2014).

³ *Id.*

⁴ *Id.*

⁵ The term "necessary expenses" is not defined by this bill.

The bill specifically exempts providers of interactive computer services, communication services, commercial mobile services, information services that provide transmission, storage, or caching of electronic communications or other related telecommunications service, and commercial mobile radio services.

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

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:

For a court to exercise jurisdiction over a respondent, it must have subject matter jurisdiction and personal jurisdiction. State courts have general jurisdiction, and therefore a claim made under a state statute meets the subject matter jurisdiction requirement.⁶ Personal jurisdiction is a constitutional requirement that a respondent have minimum contacts with the state in which the court sits so that the court may exercise power over the respondent.⁷ A non-resident respondent may have sufficient contacts with Florida if he or she commits acts expressly enumerated in Florida's long-arm statute.⁸ Alternately, the non-resident respondent may be subject to a Florida court's personal jurisdiction because he or she has minimum contacts with the state that are otherwise unrelated to matter that brings him or her into court.⁹ Examples of sufficient minimum contacts include frequent business travel to the state, owning a company with a Florida office branch, or subjecting oneself to the court's jurisdiction by presenting oneself in the Florida court.¹⁰ These jurisdictional requirements ensure that a respondent has sufficient notice and due process afforded to him or her under the U.S. Constitution before his or her rights are subjected to the court.¹¹

Whether a non-resident internet company that electronically disseminates commercial recordings or audiovisual works into Florida has sufficient minimum contacts with the

⁶ *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

⁷ *Id.*

⁸ *Id.*; § 48.193, F.S.

⁹ *Caiazzo v. American Royal Arts Corp.*, 73 So. 3d 245, 250 (Fla. 4th DCA 2011).

¹⁰ *Id.*

¹¹ *Id.* at 250-251.

state is a fact-specific question that would likely need to be addressed on a case-by-case basis by a court.¹²

Content-neutral regulations are legitimate if they advance important governmental interests that are not related to suppression of free speech, and do not substantially burden more speech than necessary to further those interests.¹³ However, a law may be determined to be overbroad if a “substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁴

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Parties involved in the litigation provided for in the bill will incur costs related to bringing or defending the action.

C. Government Sector Impact:

Florida courts may see an increase in case filings under this law, which may result in extra costs.¹⁵

VI. Technical Deficiencies:

None.

VII. Related Issues:

- It is possible that a prevailing party to an action pursuant to s. 501.155(4)(a), F.S., may never recover the fees and costs ordered by a court because of lack of personal jurisdiction over the offending party, which results in an inability to enforce the order.
- It is unclear if Florida could assert jurisdiction over foreign websites should an aggrieved party attempt to enforce the disclosure requirements of this bill against a website owner or operator located outside of Florida. It can be assumed that website owners or operators located outside of Florida are not expected to respond to lawsuits or submit willingly to jurisdiction in Florida courts. As such, any proceedings against owners or operators of websites located outside of Florida would be expected to end in default judgments.

¹² See *Caiazza v. American Royal Arts Corp.*, 73 So. 3d 245, (Fla. 4th DCA 2011); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹³ *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180,189 (U.S. 1997).

¹⁴ *U.S. v. Stevens*, 559 U.S. 460 (2010), quoting, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, (2008).

¹⁵ State Courts Administrator, *SB 604 Agency Analysis* (March 2, 2015) (on file with the Senate Committee on Commerce & Tourism).

- Following a default or other declaratory judgment, the aggrieved party could proceed with third party injunctions to discourage Internet service providers, hosting services, payment services, or other Internet website services from working with websites that fail to disclose their personal information required by this bill. For example, ISP Terms of Service Agreements frequently forbid the user website from engaging in illegal activity.
- Due to the broad definitions of the terms “commercial recording or audiovisual work” and electronic dissemination,” with each word connoting the broadest sense of its meaning, a broad net appears to be cast. It appears many, if not all, private individuals having a website may be required to disclose their true and correct name, physical address, and telephone number or e-mail address. For example, under these definitions, a teenager who creates her own website for the purpose of posting self-produced recordings or audiovisual works would be required to provide the identifying information. Moreover, it appears that the true target for the injunction and further consequences are those websites that do not provide the identifying information.
- Requiring identifying information on a website makes easier the pursuit of a lawsuit against someone who is posting illegally on a website; for instance, copyrighted material. However, someone who is illegally posting copyrighted material would probably not provide identifying information on his or her website. Thus, a person harmed by copyright violation could get an injunction against a website that is illegally publishing the copyrighted material, and assuming the jurisdiction is obtained, and use the injunction as proof of violation of the ISP, credit card, or other similar agreement to have the website blocked. Most websites that comply with the identification requirement are not the target of the bill and the only enforcement for compliance probably would be if the website was posting illegally.

VIII. Statutes Affected:

This bill creates section 501.155, 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 Commerce and Tourism on March 2, 2015:

- Clarifies that an owner, assignee, authorized agent, or licensee of a commercial recording or audiovisual work may only pursue an injunction against a website that electronically disseminates his or her commercial recording or audiovisual work, versus any commercial recording or audiovisual work;
- Requires that a website must knowingly commit, or be likely to commit a violation of the committee substitute to be subject to the civil action provided for in the committee substitute;
- Provides that an aggrieved party must make reasonable efforts to place the violating website on notice of its alleged violation and allow 14 days for the violating website to cure the violation before the aggrieved party may file for an injunction under the bill; and
- Defines the term, “website,” which excludes “channels” or homepages that are not operated by the top-level domain or website on which the channel or homepage

appears. This ensures that the owner or operator of, e.g., YouTube itself, rather than users who post information to a channel on YouTube, will be subject to the civil action provided for in this committee substitute.

B. Amendments:

None.

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

By the Committee on Commerce and Tourism; and Senator Flores

577-01820-15

2015604c1

A bill to be entitled

An act relating to consumer protection; creating s. 501.155, F.S.; providing a short title; providing applicability; providing definitions; requiring owners and operators of specified websites and online services to disclose certain information; providing for injunctive relief; providing an effective date.

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

Section 1. Section 501.155, Florida Statutes, is created to read:

501.155 Electronic dissemination of commercial recordings or audiovisual works; required disclosures; injunctive relief.-

(1) SHORT TITLE.-This section may be cited as the "True Origin of Digital Goods Act."

(2) APPLICABILITY.-This section is supplemental to those provisions of state and federal criminal and civil law which impose prohibitions or provide penalties, sanctions, or remedies against the same conduct prohibited by this section. This section does not:

(a) Bar any cause of action or preclude the imposition of sanctions or penalties that would otherwise be available under state or federal law.

(b) Impose liability on providers of an interactive computer service, communications service as defined in s. 202.11(1), commercial mobile service, or information service, including, but not limited to, an Internet access service provider and a hosting service provider, if they provide the

Page 1 of 4

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

577-01820-15

2015604c1

transmission, storage, or caching of electronic communications or messages of others or provide another related telecommunications service, commercial mobile radio service, or information service, for use of such services by another person in violation of this section. This exemption from liability is consistent with and in addition to any liability exemption provided under 47 U.S.C. s. 230.

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

(a) "Commercial recording or audiovisual work" means a recording or audiovisual work whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate such recording or audiovisual work for sale, for rental, or for performance or exhibition to the public, including under license, but does not include an excerpt consisting of less than substantially all of a recording or audiovisual work. A recording or audiovisual work may be commercial regardless of whether a person who electronically disseminates it seeks commercial advantage or private financial gain from the dissemination. The term does not include video games, depictions of video game play, or the streaming of video game activity.

(b) "Electronic dissemination" means initiating a transmission of, making available, or otherwise offering a commercial recording or audiovisual work for distribution through the Internet or other digital network, regardless of whether another person has previously electronically disseminated the same commercial recording or audiovisual work.

(c) "E-mail address" means an electronic mail address as defined in s. 668.602.

(d) "Website" means a set of related web pages served from

Page 2 of 4

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59 a single web domain. The term does not include a home page or
 60 channel page for the user account of a person who is not the
 61 owner or operator of the website upon which such user home page
 62 or channel page appears.

63 (4) DISCLOSURE OF INFORMATION.—

64 (a) A person who owns or operates a website or online
 65 service dealing in substantial part in the electronic
 66 dissemination of commercial recordings or audiovisual works,
 67 directly or indirectly, and who electronically disseminates such
 68 works to consumers in this state shall clearly and conspicuously
 69 disclose his or her true and correct name, physical address, and
 70 telephone number or e-mail address on his or her website or
 71 online service in a location readily accessible to a consumer
 72 using or visiting the website or online service.

73 (b) The following locations are deemed readily accessible
 74 for purposes of this subsection:

- 75 1. A landing or home web page or screen;
- 76 2. An "about" or "about us" web page or screen;
- 77 3. A "contact" or "contact us" web page or screen;
- 78 4. An information web page or screen; or
- 79 5. Another place on the website or online service commonly
 80 used to display identifying information to consumers.

81 (5) INJUNCTIVE RELIEF.—

82 (a) An owner, assignee, authorized agent, or licensee of a
 83 commercial recording or audio visual work electronically
 84 disseminated by a website or online service in violation of this
 85 section may bring a private cause of action to obtain a
 86 declaratory judgment that an act or practice violates this
 87 section and enjoin any person who knowingly has violated, is

577-01820-15

2015604c1

88 violating, or is otherwise likely to violate this section. As a
 89 condition precedent to filing a civil action under this section,
 90 the aggrieved party must make reasonable efforts to place an
 91 individual alleged to be in violation of this section on notice
 92 that the individual may be in violation of this section and that
 93 failure to cure within 14 days may result in a civil action
 94 filed in a court of competent jurisdiction.

95 (b) Upon motion of the party instituting the action, the
 96 court may make appropriate orders to compel compliance with this
 97 section.

98 (c) The prevailing party in a cause under this section is
 99 entitled to recover necessary expenses and reasonable attorney
 100 fees.

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



The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 4, 2015

I respectfully request that **Senate Bill #604**, relating to Consumer Protection, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

Anitere Flores

Senator Anitere Flores
Florida Senate, District 37

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 656

INTRODUCER: Judiciary Committee and Senator Latvala

SUBJECT: Landlords and Tenants

DATE: March 11, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Fav/CS
2.			RI	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 656 establishes a new remedy for homeowners or rightful residents to remove a transient occupant who has no legal right to the property.

This bill identifies a number of factors for a court, property owner, or other rightful resident, to consider in determining whether a person is a transient occupant. These factors include whether the person:

- Has an ownership or financial interest in the property;
- Has property utility subscriptions;
- Lists the property as the address of record with governmental agencies;
- Receives mail at the property;
- Has designated space at the property; and
- Has no apparent permanent residence elsewhere.

Instead of pursuing legal action for unlawful detainer, a person who is rightfully in possession of a residence has the option of providing a law enforcement officer with a sworn affidavit that the person they wish to be removed is a transient occupant. If the transient occupant does not leave, the law enforcement officer may charge him or her with criminal trespassing. Alternatively, if a person pursues legal action and a court finds that a defendant is properly a tenant rather than a transient occupant, the court must allow the plaintiff the opportunity to provide notice and amend pleadings to pursue eviction.

II. Present Situation:

Unlawful Detainer

An unlawful detainer is the “unjustifiable retention of the possession of real property by one whose original entry was lawful”¹ The party entitled to possession has a cause of action for unlawful detainer if a person enters a property in a peaceable manner and stays without consent.²

The party who is the rightful possessor is entitled to have an action resolved through summary procedure, or expedited review by the court.³ If the person to be served is not found at the usual place of residence, the process server may serve a summons by posting a copy in a conspicuous place on the property.⁴

If the plaintiff prevails, the court must enter judgment that the plaintiff recover possession of the property described in the complaint, along with damages and costs, and award a writ of possession without delay.⁵ Upon a showing that the defendant is willful and knowingly wrongful, damages are double the rental value of the premises from the time of the unlawful holding.⁶

An action for unlawful detainer is not available to residential tenancies.

⁷

The Florida Residential Landlord and Tenant Act

Residential tenancies are governed by the Florida Residential Landlord and Tenant Act (Act).⁸

The landlord is the owner or lessor of a dwelling unit. The tenant is a person entitled to occupy a dwelling unit under a rental agreement, in which the tenant makes periodic payments of rent to the landlord.⁹ When people enter into a landlord and tenant relationship, as evidenced by a rental agreement, each party commits to abide by certain legal obligations and responsibilities. Rental agreements may be written or oral.¹⁰ Every rental agreement carries with it an obligation of good faith in both performance and enforcement.¹¹ Landlords are entitled to collect security deposits from tenants and hold the deposits as security against the performance of the rental agreement.¹²

Landlords and tenants have different obligations to maintain the property. Landlords must comply with building, housing, and health codes, and for dwelling units other than a single-family home or a duplex, a landlord must provide for:

¹ BLACK’S LAW DICTIONARY (10th ed. 2014).

² Section 82.04(1), F.S.

³ Section 51.011, F.S.; s. 8204(1), F.S.

⁴ Section 82.061, F.S.

⁵ Section 82.091, F.S.

⁶ Section 82.071, F.S.

⁷ Section 82.04(2), F.S.

⁸ Part II of Chapter 83, F.S., s. 83.40, F.S.

⁹ Sections 83.43(3), (4), and (6), F.S.

¹⁰ Section 83.43(7), F.S.

¹¹ Section 83.44, F.S.

¹² Section 83.43(12), F.S.

- The extermination of insects and rodents;
- Locks and keys;
- The clean and safe condition of common areas;
- Garbage removal; and
- Heat during winter, running water, and hot water.¹³

Tenants, in turn, must:

- Comply with building, housing and health codes that apply to tenants;
- Keep the premises clean and sanitary;
- Keep plumbing fixtures clean and sanitary and in repair;
- Use and operate electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other appliances in a reasonable manner;
- Not destroy or damage the premises or property or allow others to do so; and
- Not disturb the peace.¹⁴

A landlord or tenant may petition the court to enforce rights and duties through a civil action.¹⁵

If a tenant fails to materially comply with the rental agreement, or with his or her legal obligation to maintain the dwelling, a landlord may begin eviction proceedings. Prior to initiating eviction proceedings, for both residential and nonresidential tenancies, the landlord generally must provide the tenant written notice of the violation and an opportunity to correct the problem.¹⁶

If the tenant fails to correct the problem, the landlord may bring an action in the county court where the property is located.¹⁷ The filing fee for the removal of a tenant is \$180.¹⁸ If the court enters a judgment for the landlord, the clerk will issue a writ of possession to the sheriff.¹⁹ 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.²⁰

Criminal Trespass

Section 810.08, F.S., establishes the offense of trespass for anyone who:

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.²¹

¹³ Sections 83.51(1)(a) and (2)(a), F.S.

¹⁴ Section 83.52, F.S.

¹⁵ Section 83.54, F.S.

¹⁶ 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).

¹⁷ Section 83.59(2), F.S.

¹⁸ Section 34.041(1)(a)7., F.S.

¹⁹ Section 83.62(1), F.S.

²⁰ Section 83.62(2), F.S.

²¹ Section 810.08(1), F.S.

Charges range from a second degree misdemeanor for simple trespass to a first degree misdemeanor if a person is in the structure or conveyance at the time the offender trespassed or attempted to trespass.²²

Media on Unwelcome House Guests

News articles report that an increasing number of property owners or tenants are inviting guests into their homes and having difficulty getting them to leave.²³ If a law enforcement agency is called for assistance to remove guests who have overstayed their welcome, the property owner or person having a written lease is typically told that the law enforcement agency is not authorized to remove the guest because the matter is a civil matter, not criminal trespassing. Additionally, law enforcement agencies reportedly advise property owners and tenants that the law requires a court order prior to changing the locks on the property or taking other actions to remove the person from the home.

A legal action to remove a guest who has overstayed his or her welcome at a residence is known as an unlawful detainer action. In Hillsborough County alone, filings for unlawful detainer increased from 14 in 1999 to 67 in 2003.²⁴

III. Effect of Proposed Changes:

This bill establishes a new remedy for homeowners or rightful residents to remove a transient occupant from the residence.

Transient Occupancy and Unlawful Detention

The bill defines a transient occupant as a person whose residency in a residential dwelling is not subject to a lease, is intended to be transient, and has occurred for a brief length of time.

Transient occupancy can be shown by the following:

- The person has no ownership or financial interest in the property;
- The person has no property utility subscriptions;
- The person does not list the property address as an address of record with any governmental agency, including the Department of Highway Safety and Motor Vehicles or the supervisor of elections;
- The person does not get mail at the property;
- The person pays little or no rent;

²² 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. A third degree felony is punishable by a term of imprisonment of up to 5 years. Section 775.082 (4)(a) and (b), F.S. Section 775.083(1)(d) and (e), F.S., authorizes fines of up to \$500 for a second degree misdemeanor and up to \$1,000 for a first degree misdemeanor.

²³ TAMPA BAY TIMES, *In Florida, Evicting Unwelcome Guest is no Simple Matter* (Apr. 2, 2009), <http://www.tampabay.com/news/humaninterest/in-florida-evicting-unwelcome-guest-is-no-simple-matter/989264>; TAMPA BAY ONLINE, *Only Court Order Will Rid You of Unwanted House Guest* (Sept. 22, 2014), <http://tbo.com/news/business/only-court-order-will-rid-you-of-unwanted-house-guest-255859>.

²⁴ ST. PETERSBURG TIMES ONLINE, *Law Slanted in Favor of Unwanted Guests* (Feb. 17, 2004); online at http://www.sptimes.com/2004/02/17/Tampabay/Law_slanted_in_favor_.shtml.

- The person has no designated space of his or her own or keeps minimal personal belongings at the property;
- The person has an apparent permanent residence somewhere else.

The bill provides that minor contributions towards household goods or expenses do not establish residency.

The stay at the property becomes an unlawful detention if the transient occupant remains at the property after the party rightfully in possession has asked the transient occupant to leave.

Process to Remove Transient Occupant

The party entitled to possession must provide to a law enforcement officer a sworn affidavit that a transient occupant is unlawfully detaining residential property. The law enforcement officer may then order the transient occupant to surrender possession of the residential property.

A transient occupant who fails to surrender possession of property is subject to the criminal charge of trespassing. In any prosecution for trespassing, the state only need prove the elements of trespass and not that the defendant is actually a transient occupant.

Additionally, the bill creates a cause of action for unlawful detainer and removal of a transient occupant. If the court determines that the defendant is a transient occupant, the court may award the plaintiff compensatory damages. Under existing s. 82.07, F.S., a court in an unlawful detainer action may award a prevailing plaintiff damages equal to double the rental value of the premises if the detention is willful and knowingly wrongful.²⁵ Whether the damages available under the bill are intended to be less than those under existing s. 82.07, F.S, is unclear.

If the court finds that the defendant is not a transient occupant but is instead a tenant, the court must allow the plaintiff an opportunity to proceed under an eviction action. The filing fee is \$180, the same as for removal of a tenant.

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not impact cities or counties.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²⁵ Section 82.071, F.S.

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

None.

B. Private Sector Impact:

This bill provides an option to a rightful owner or possessor of property to provide a sworn affidavit with a law enforcement officer to have the transient occupant removed from the property. In situations in which a transient occupant is financially unable to pay the plaintiff's legal costs or damages, this bill provides a financial advantage to a plaintiff in avoiding the need for costly litigation, including the initial \$180 filing fee.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Legislature may wish to clarify whether the damages available under existing s. 82.071, F.S., apply to the unlawful detainer actions authorized by the bill.

VIII. Statutes Affected:

This bill substantially creates section 82.045, F.S.

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 Committee on March 10, 2015:

This CS:

- Provides a remedy for persons who are in rightful possession of a residential property to have transient occupants removed based on unlawful detainer;
- Provides a process for a law enforcement officer, upon receipt of a sworn affidavit from a person in rightful possession of a property to remove a transient occupant or charge that person with criminal trespass;
- Authorizes persons the option to pursue legal action against a transient occupant or file a sworn affidavit with a law enforcement officer to have the person removed or charged with criminal trespass; and
- Authorizes a plaintiff who pursues legal action based on unlawful detainer law the opportunity to provide notice to the defendant and amend pleadings to pursue eviction if the court finds that the defendant is a tenant.

B. Amendments:

None.

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



506468

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

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



506468

12 pursuant to a written lease, and whose occupancy was intended as
13 transient in nature.

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

16 1. The person does not have ownership or financial interest
17 in the property entitling him or her to occupancy of the
18 property.

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

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

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

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

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

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

32 8. The person has an apparent permanent residence
33 elsewhere.

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

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



506468

41 (3) Any law enforcement officer may, upon receipt of a
42 sworn affidavit of the party entitled to possession that a
43 person who is a transient occupant is unlawfully detaining
44 residential property, direct a transient occupant to surrender
45 possession of residential property. A person who fails to comply
46 with the direction of the law enforcement officer to surrender
47 possession or occupancy violates s. 810.08. In any prosecution
48 of a violation of s. 810.08 related to this section, whether the
49 defendant was properly classified as a transient occupant is not
50 an element of the offense, the state is not required to prove
51 that the defendant was in fact a transient occupant, and the
52 status as a permanent resident is not an affirmative defense. A
53 person wrongfully removed pursuant to this subsection has a
54 cause of action for wrongful removal against the person who
55 requested the removal, and may recover injunctive relief and
56 compensatory damages. However, a wrongfully removed person does
57 not have a cause of action against the law enforcement officer
58 or the agency employing the law enforcement officer absent a
59 showing of bad faith by the law enforcement officer.

60 (4) A party entitled to possession of a dwelling has a
61 cause of action for unlawful detainer and removal of a transient
62 occupant. The party entitled to possession is entitled to the
63 summary procedure of s. 51.011 to remove a transient occupant.
64 The party entitled to possession is not required to notify the
65 transient occupant before filing the action. If the court finds
66 that the defendant is a transient occupant the court shall order
67 the clerk to issue a writ of possession placing the plaintiff in
68 possession of the premises, and may award compensatory damages.
69 If the court finds the defendant is not a transient occupant but



506468

70 is instead a tenant of residential property entitled to the
71 protections of part II of chapter 83, the court may not dismiss
72 the action without first allowing the plaintiff to give notice
73 required by that part and to thereafter amend the complaint to
74 pursue eviction under that part. County courts have jurisdiction
75 over actions authorized under this subsection. The filing fee
76 for an action under this subsection is the fee established in s.
77 34.041(1)(a)7. for removal of a tenant.

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

79
80 ===== T I T L E A M E N D M E N T =====

81 And the title is amended as follows:

82 Delete everything before the enacting clause
83 and insert:

84 A bill to be entitled
85 An act relating to unlawful detention by a transient
86 occupant; creating s. 82.045, F.S.; defining the term
87 "transient occupant"; providing factors that establish
88 a transient occupancy; providing for removal of a
89 transient occupant by a law enforcement officer;
90 providing a cause of action for wrongful removal;
91 limiting actions for wrongful removal; providing a
92 civil action for removal of a transient occupant;
93 providing an effective date.

By Senator Latvala

20-00454-15

2015656__

A bill to be entitled

An act relating to landlords and tenants; amending s. 83.42, F.S.; excluding transient occupancy in a dwelling unit or premises from the regulation of residential tenancies; amending s. 83.43, F.S.; revising the definition of the term "transient occupancy"; providing an effective date.

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

Section 1. Present subsections (4) and (5) of section 83.42, Florida Statutes, are redesignated as subsections (5) and (6), respectively, and a new subsection (4) is added to that section, to read:

83.42 Exclusions from application of part.—This part does not apply to:

(4) Transient occupancy in a dwelling unit or premises.

Section 2. Subsection (10) of section 83.43, Florida Statutes, is amended to read:

83.43 Definitions.—As used in this part, the following words and terms shall have the following meanings unless some other meaning is plainly indicated:

(10) "Transient occupancy" means occupancy that is intended by when it is the intention of the parties to that the occupancy will be temporary. There is a rebuttable presumption that, when the dwelling unit or premises is occupied by a person for 30 days or less, the occupancy is transient and not subject to this act. If the dwelling unit or premises is occupied by a person for more than 30 days, factors that may be used in determining

Page 1 of 2

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

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2015656__

whether residency is transient include, but are not limited to:

(a) The length of time the person occupies the property.

(b) Whether the person has an ownership or financial interest in the property.

(c) Whether the person is a subscriber to any of the utilities that are used on the property.

(d) Whether the person uses 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, the supervisor of elections, and the United States Postal Service.

(e) Whether the person routinely receives United States mail at the property.

(f) Whether the person has a written agreement or contract that entitles him or her to occupancy of the property.

(g) Whether the rent paid by the person for his or her stay at the property is paid at fair market value. A person who makes minor contributions to household expenses, such as groceries, does not establish residency that is regulated under this part.

(h) Whether the person has a designated space of his or her own, such as a room, on the property.

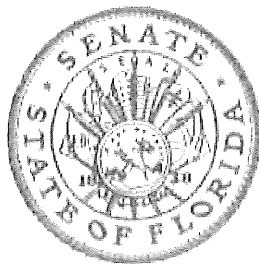
Section 3. This act shall take effect July 1, 2015.

Page 2 of 2

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

PROCTOR.SHIRLEY

From: CADDELL.TRACY
Sent: Friday, February 06, 2015 4:26 PM
To: CIBULA.THOMAS; PROCTOR.SHIRLEY
Subject: Agenda request ltr



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR JACK LATVALA
20th District

February 6, 2015

The Honorable Senator Miguel Diaz del la Portilla, Chair
Senate Committee Judiciary
515 Knott Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chair Diaz de la Portilla:

I respectfully request consideration of Senate Bill 656 regarding Landlord a greatly appreciate the opportunity to present this legislation to the Committ soon as possible.

This bill provides for protection of homeowners and clarity for law enforce can defuse and resolve potentially violent disputes involving unwanted visi

If you have any questions regarding this legislation, please contact me. Tha for your consideration.

Sincerely,



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on
Transportation, Tourism, and Economic
Development, *Chair*
Appropriations
Commerce and Tourism
Governmental Oversight and Accountability
Regulated Industries
Rules

SENATOR JACK LATVALA

20th District

March 10, 2015

The Honorable Diaz de la Portilla, Chairman
Senate Judiciary Committee
515 Knott Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Dear Chairman Diaz de la Portilla:

This letter shall serve as authorization to allow my Legislation Assistant Tracy Caddell to present SB656/Landlord Tenant Act to the Senate Judiciary Committee on Tuesday, March 10th

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Jack" with a long, sweeping underline.

Jack Latvala
State Senator
District 20

Cc: Tom Cibula, Staff Director; Shirley Proctor, Administrative Assistant

REPLY TO:

- 26133 U.S. Highway 19 North, Suite 201, Clearwater, Florida 33763 (727) 793-2797 FAX: (727) 793-2799
- 408 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5020

Senate's Website: www.flsenate.gov

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: SB 656
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 10, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE			3/10/2015 1 Motion to consider late-filed A506468		3/10/2015 2 Late-Filed Amendment 506468			
Yea	Nay	SENATORS	Yea	Nay	Yea	Nay	Yea	Nay
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
X		Ring, VICE CHAIR						
X		Díaz de la Portilla, CHAIR						
10	0							
Yea	Nay	TOTALS	FAV	-	RCS	-	Yea	Nay
			Yea	Nay	Yea	Nay	Yea	Nay

CODES: FAV=Favorable RCS=Replaced by Committee Substitute TP=Temporarily Postponed WD=Withdrawn
 UNF=Unfavorable RE=Replaced by Engrossed Amendment VA=Vote After Roll Call OO=Out of Order
 -R=Reconsidered RS=Replaced by Substitute Amendment VC=Vote Change After Roll Call AV=Abstain from Voting

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/CS/SB 224

INTRODUCER: Judiciary Committee; Governmental Oversight and Accountability Committee; and Senator Simpson

SUBJECT: Public Records/Public Agency Contracts

DATE: March 11, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS/CS</u>
3.	_____	_____	<u>FP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 224 amends s. 119.0701, F.S., to revise procedures for obtaining records relating to a public agency's contract for services with a private contractor.

Under the bill, requests for records relating to a public agency's contract for services must be made to the public agency instead of the contractor. An agency who receives a request for records possessed by a contractor must attempt to obtain the records from the contractor.

In an action to compel the production of records, a court may not award attorney fees or costs to the requestor unless notice of an unfulfilled records request is sent to the agency at least 5 days before filing suit. If attorney fees or costs are awarded, the court may assess the award against the responsible agency or contractor.

The bill also requires contractors to maintain the confidentiality of any confidential public records that are retained by the contractor after the termination of a contract with a public agency.

The bill requires each public agency contract for services to include the contact information of the agency's public records custodian if the contractor has questions regarding the applicability of public records law.

The contract for services must also include language providing that:

- The contractor must either provide the public agency a copy of requested public records in the possession of the contractor, or allow records to be inspected or copied within a reasonable time;
- Public records that are exempt or confidential and exempt from public records disclosure cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records; and
- The contractor has the option of transferring all public records to the public agency upon completion of the contract, or keeping and maintaining the records and complying with public records law and requests.

The bill requires all requests to inspect or copy public records relating to a contract for services to be made directly to a public agency. The agency must notify the contractor if the agency does not have the records. The contractor, in turn, must provide the records to the agency or allow inspection and copying within a reasonable time.

A contractor may be subject to criminal penalties for failing to comply with a public records request within a reasonable time.

If a person files a motion to compel production of records, the court may assess and award reasonable costs, including attorney fees against the public agency or contractor. To do so, the court must receive from the plaintiff written notice of the public records request, including a statement that the public agency has failed to comply with the request. At least 5 business days before filing the action, the plaintiff must send notice by certified mail to the public agency's custodian of public records and the contractor if the contractor is a defendant.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ This includes the records of the legislative, executive, and judicial branches.² The Florida Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.³ Florida law specifies conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government

¹ Article I, s. 24(a), FLA. CONST.

² *Id.*

³ Article I, s. 24(b), FLA. CONST.

⁴ Chapter 119, F.S.

public record⁵ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.⁶ The Sunshine Law⁷ 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.⁸

Enforcing Public Records Laws and Attorney Fees

Article I, Section 24(c), Florida Constitution authorizes the legislature to enact laws governing the enforcement of public records requirements, including the “maintenance, control, destruction, disposal, and disposition of records made public by this section”

Section 119.11, F.S., provides that if a public agency unlawfully fails to provide a public record, the person making the public records request may sue for enforcement. The court must set the case for an accelerated hearing.⁹ If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay for the requestor’s costs and attorney fees.¹⁰ A court will not consider as relevant intent by a records custodian to violate public records laws, incompetence,¹¹ or that the records custodian did not willfully refuse to provide a public record.¹²

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is a legal consequence independent of the public records request.¹³ Once an enforcement action has been filed, a public agency can be assessed attorney fees even after the agency has produced the records.¹⁴

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 Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁶ Section 119.07(1), F.S.

⁷ Section 286.011, F.S.

⁸ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Article III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All 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.

⁹ Section 119.11(1), F.S.

¹⁰ Section 119.12, F.S.

¹¹ *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225, (Fla. 5th DCA 1996).

¹² *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014).

¹³ *Id.*

¹⁴ *Mazer v. Orange County*, 811 So.2d 857, 860 (Fla. 5th DCA 2002). *Barfield v. Town of Eatonville*, 675 So. 2d (Fla. 5th DCA 1996). *Althouse v. Palm Beach County Sheriff’s Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.¹⁵ Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests.¹⁶

Public Records and Private Contractors

Public agencies, including local and statewide governmental entities and municipal officers, are permitted to hire contractors to provide services or act on behalf of the public agency.¹⁷ Contractors can be individuals or business entities.¹⁸ Private contractors who act on behalf of a public agency are required by law and the terms of their contracts to comply with public records laws in the same manner as a public agency.¹⁹ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.²⁰ A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²¹

Contracts for services must include language that upon of the completion of the contract, the contractor will transfer all public records to the public agency at no cost. The contractor is not permitted to retain any public records that are confidential and exempt or exempt from public records disclosure. Records that are stored electronically must be transferred to the public agency in a format that is compatible with the public agency's information technology systems.

Although certain contractors are obligated to abide by Florida's public records laws, some contractors fail to do so. At times, contractors unlawfully place conditions on the release of records, refuse to provide public records, or unlawfully delay in providing records.

If a contractor fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to records.²² If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the enforcement lawsuit and the requestor's attorney fees in the same manner that a public agency would be liable.²³ Therefore, once a lawsuit is filed, a contractor may also be held liable for attorney fees even after providing the requested records. The fees provision, however, "was not intended to force private entities to comply with the inspection requirements of [the Public Records Act] by threatening to award attorney's fees against them."²⁴

¹⁵ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

¹⁶ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

¹⁷ Section 119.0701(1)(a)-(b), F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). Op. Att'y Gen. Fla. Informal Opinion dated December 31, 2014.

¹⁸ Section 119.0701(1)(a), F.S.

¹⁹ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

²⁰ Section 119.0701(1)-(2), F.S.

²¹ Section 119.0701(3), F.S.

²² Section 119.0701(2), F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27 (Fla. 1993).

²³ Section 119.12, F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

²⁴ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

Recent Attorney General Opinion and Litigation

Attorney General Opinion

On June 18, 2014, the Attorney General issued an opinion on whether a contractor who enters into a contract for services with an agency is automatically acting on behalf of the agency and subject to public record law, or whether application of public records law is determined by the nature and scope of the services provided by the contractor.²⁵ Section 119.0701(1)(a), F.S., defines a contractor as an “individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency”

The AGO concludes that a court must additionally examine the nature and scope of services provided, citing in support *Parsons & Whittemore*, which held that a contract with a public agency alone is insufficient to trigger public records requirements.²⁶ In *Stanfield v. Salvation Army*, the Salvation Army contracted with the county to provide all of the county’s probation services. Here, the court held that the Salvation Army took the place of the agency in this regard, acted on behalf of the agency, and was therefore subject to public records law.²⁷

Litigation

On December 1, 2014, a circuit court judge in Duval County denied relief to a plaintiff in a lawsuit to enforce a public records request and to assess attorney fees.²⁸ According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The contract manager refused to provide a document because the contract manager believed that the document was not a public record. The court found that the manner in which the plaintiff (and his companions) made the request ensured that “they obtained exactly what they wanted, namely, an initial denial of an unreasonable and bogus request.”²⁹

The court found that the plaintiff’s method of requesting public records was an abuse of the public records laws and “nothing more than a scam.”³⁰ The Final Order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had “a financial interest in assuring that his requests for public records [were] refused.”³¹ Generally, an attorney may not share his or her fees with someone who is not a lawyer.³² The court noted that in 2014, the plaintiff had filed 18 public records lawsuits in Duval County, and the same attorney represented the plaintiff in approximately 13 of those cases.

The court further opined:

If a private entity must pay an attorney’s fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private

²⁵ AGO 2014-06 (June 18, 2014).

²⁶ *Parsons & Whittemore*, 429 So. 2d 343, 346 (Fla. 3d DCA 1983).

²⁷ *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

²⁸ Final Order Denying Relief Under Public Records Act, *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. 2014).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Florida State Bar Rule 4-5.4.

entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called “civil rights activists” or others who seek to abuse the Act for financial gain.³³

The case is currently on appeal.³⁴

III. Effect of Proposed Changes:

Changes to Contract Provisions

CS/CS/SB 224 requires a person seeking public records relating to a public agency’s contract for services to request the records from the agency instead of the private contractor. The bill also requires contractors to maintain the confidentiality of any confidential public records that are retained by the contractor after the termination of a contract with a public agency.

The bill requires each public agency contract for services to include the contact information of the agency’s public records custodian if the contractor has questions regarding the applicability of public records law.

The contract for services must also include language providing that:

- The contractor must either provide the public agency a copy of requested public records in the possession of the contractor, or allow records to be inspected or copied within a reasonable time;
- Public records that are exempt or confidential and exempt from public records disclosure cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records; and
- The contractor has the option of transferring all public records to the public agency upon completion of the contract, or keeping and maintaining the records and complying with public records law and requests.

The bill requires all requests to inspect or copy public records relating to a contract for services to be made directly to a public agency. The agency must notify the contractor if the agency does not have the records. The contractor, in turn, must provide the records to the agency or allow inspection and copying within a reasonable time.

If a person files a motion to compel production of records, the court may assess and award reasonable costs, including attorney fees against the public agency or contractor. To do so, the court must receive from the plaintiff written notice of the public records request, including a statement that the public agency has failed to comply with the request. At least 5 business days before filing the action, the plaintiff must send notice by certified mail to the public agency’s custodian of public records and the contractor if the contractor is a defendant.

³³ *Jeffery Marcus Gray, supra* note 28, at 7.

³⁴ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014).

Under s. 119.10, F.S., the contractor may be subject to a criminal charge of a first degree misdemeanor for failing to comply with a public records request within a reasonable time.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require counties or municipalities to take an action requiring the significant expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill substantially amends the public records law by shifting the burden to produce public records to the agency, even when records are not in the agency's possession.

The bill also makes it possible for former private contractors to become public records custodians even when the contractor is no longer acting on behalf of an agency.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact of the bill is indeterminate, but a fiscal impact may result from:

- The requirement that members of the public send certified letters before filing suit if they intend to recover attorney fees in a public records enforcement action.
- The costs incurred by the former contractor if the contractors retains the public records after termination of a contract.

C. Government Sector Impact:

If the contractor keeps public records upon termination of a contract, an agency may have to rely on the former contractor to provide records upon request. An agency may be liable for attorney fees because the contractor has failed to produce records in a timely manner.

VI. Technical Deficiencies:

None.

VII. Related Issues:

If a terminated contractor goes out of business, whether the contractor is required to deliver the public records to the agency is unknown.

VIII. Statutes Affected:

This bill substantially amends section 119.0701, 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/CS/SB 224 by Judiciary on March 10, 2015:

The CS:

- Removes authority which appeared to place a duty on the custodian of public records to determine whether a contractor was subject to public records law.
- Clarifies that public records that are exempt or confidential and exempt from public records disclosure cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records.
- Increases to 5 business days, the number of days required for notice to be provided by certified mail from a plaintiff in a motion to compel production action to the defendants in order to be eligible for costs and attorney fees.

CS/SB 224 by Governmental Oversight and Accountability on February 3, 2015:

The CS differs from the original bill in the following ways:

- The CS removes the definition of contractor and “acting on behalf of a public agency.”
- The CS alters statements and terms which must be placed in each contract.
- The CS shortens the notice requirement from five days to three days.
- Removes a bad faith or willful refusal element from enforcement cases.

- B. **Amendments:**

None.



474230

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 119.0701, Florida Statutes, is amended
to read:

119.0701 Contracts; public records.—

(1) DEFINITIONS.—For purposes of this section, the term:

(a) "Contractor" means an individual, partnership,
corporation, or business entity that enters into a contract for
services with a public agency and is acting on behalf of the



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12 public agency as provided under s. 119.011(2).

13 (b) "Public agency" means a state, county, district,
14 authority, or municipal officer, or department, division, board,
15 bureau, commission, or other separate unit of government created
16 or established by law.

17 (2) CONTRACT REQUIREMENTS.—In addition to other contract
18 requirements provided by law, each public agency contract for
19 services must include:

20 (a) The following statement, in substantially the following
21 form, identifying the contact information of the public agency's
22 custodian of public records in at least 14-point boldfaced type:

23
24 IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF
25 SECTION 119.0701, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO
26 PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT
27 ...(custodian of public records)... AT ...(telephone number, e-
28 mail address, and mailing address)....

29
30 (b) A provision that requires the contractor to comply with
31 public records laws, specifically to:

32 1.(a) Keep and maintain public records ~~that ordinarily and~~
33 ~~necessarily would be~~ required by the public agency ~~in order~~ to
34 perform the service.

35 2.(b) Upon request from the public agency's custodian of
36 public records, provide the public agency with a copy of the
37 requested records or allow the ~~access to public records to be~~
38 ~~inspected or copied within a reasonable time on the same terms~~
39 ~~and conditions that the public agency would provide the records~~
40 ~~and~~ at a cost that does not exceed the cost provided in this



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41 chapter or as otherwise provided by law.

42 3.(e) Ensure that public records that are exempt or
43 confidential and exempt from public records disclosure
44 requirements are not disclosed except as authorized by law for
45 the duration of the contract term and following completion of
46 the contract if the contractor does not transfer the records to
47 the public agency.

48 4.(d) Upon completion of the contract, Meet all
49 requirements for retaining public records and transfer, at no
50 cost, to the public agency all public records in possession of
51 the contractor or keep and maintain public records required by
52 the public agency to perform the service. If the contractor
53 transfers all public records to the public agency upon
54 completion of the contract, the contractor shall upon
55 termination of the contract and destroy any duplicate public
56 records that are exempt or confidential and exempt from public
57 records disclosure requirements. If the contractor keeps and
58 maintains public records upon completion of the contract, the
59 contractor shall meet all applicable requirements for retaining
60 public records and provide requested records to a public agency
61 pursuant to the requirements of this section. All records stored
62 electronically must be provided to the public agency, upon
63 request from the public agency's custodian of public records, in
64 a format that is compatible with the information technology
65 systems of the public agency.

66 (3) REQUEST FOR RECORDS; NONCOMPLIANCE.-

67 (a) A request to inspect or copy public records relating to
68 a public agency's contract for services must be made directly to
69 the public agency. If the public agency does not possess the



474230

70 requested records, the public agency shall immediately notify
71 the contractor of the request, and the contractor must provide
72 the records to the public agency or allow the records to be
73 inspected or copied within a reasonable time.

74 (b) If a contractor does not comply with the public
75 agency's ~~a public records~~ request for records, the public agency
76 shall enforce the contract provisions in accordance with the
77 contract.

78 (c) A contractor who fails to provide the public records to
79 the public agency within a reasonable time may be subject to
80 penalties under s. 119.10.

81 (4) CIVIL ACTION.—If a civil action is filed to compel
82 production of public records relating to the public agency's
83 contract for services, the court may assess and award against
84 the responsible public agency or contractor the reasonable costs
85 of enforcement, including reasonable attorney fees, if the party
86 filing the action provides written notice of the public records
87 request, including a statement that the public agency has not
88 complied with the request. This notice must be sent by certified
89 mail to the public agency's custodian of public records or
90 general counsel at least 5 business days before filing the
91 action, and must be provided to the contractor if the contractor
92 is a named party in the action.

93 Section 2. This act shall take effect upon becoming a law.

94
95 ===== T I T L E A M E N D M E N T =====

96 And the title is amended as follows:

97 Delete everything before the enacting clause
98 and insert:



474230

99

A bill to be entitled

100

An act relating to public records; amending s.

101

119.0701, F.S.; requiring that a public agency

102

contract for services include a statement providing

103

the contact information of the public agency's

104

custodian of records; prescribing the form of the

105

statement; revising required provisions in a public

106

agency contract for services regarding a contractor's

107

compliance with public records laws; requiring that a

108

public records request relating to records for a

109

public agency's contract for services be made directly

110

to the public agency; requiring a contractor to

111

provide requested records to the public agency or

112

allow inspection or copying of requested records under

113

specified circumstances; specifying applicable

114

penalties for a contractor who fails to provide

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requested records; specifying circumstances under

116

which a court may assess and award reasonable costs of

117

enforcement against a public agency or contractor;

118

providing an effective date.



861978

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment to Amendment (474230)

Delete lines 89 - 90

and insert:

mail to the public agency's custodian of public records at least
5 business days before filing the



234664

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
03/12/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simpson) recommended the following:

1 **Senate Amendment to Amendment (474230) (with title**
2 **amendment)**

3
4 Between lines 92 and 93

5 insert:

6 Section 2. Section 119.12, Florida Statutes, is amended to
7 read:

8 119.12 Attorney ~~Attorney's~~ fees.-

9 (1) When ~~If~~ a civil action is filed against an agency to
10 enforce the provisions of this chapter, ~~and~~ if the court
11 determines that the complainant provided written notice of the



234664

12 public records request to the agency's custodian of public
13 records using contact information provided by the agency at
14 least 3 business days before filing the action and that the such
15 agency unlawfully refused to permit a public record to be
16 inspected or copied, the court shall assess and award, against
17 the responsible agency ~~responsible~~, the reasonable costs of
18 enforcement including reasonable attorney ~~attorneys'~~ fees.

19 (2) A complainant is not required to provide written notice
20 to the agency's custodian of public records if:

21 (a) The agency does not post contact information for its
22 custodian of public records in an office accessible to the
23 public where public records are either routinely maintained or
24 requested, or both; and

25 (b) The agency does not post contact information for its
26 custodian of public records on the agency's website, if the
27 agency has a website.

28 (3) The court may assess and award reasonable attorney fees
29 against the complainant filing such an action if the court
30 determines that it was filed in bad faith or was frivolous.

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

33 And the title is amended as follows:

34 Between lines 117 and 118

35 insert:

36 amending s. 119.12, F.S.; requiring a court to
37 determine if a complainant provided certain written
38 notice to an agency's custodian of public records in
39 order to assess and award attorney fees in a civil
40 action to enforce ch. 119, F.S.; providing exceptions;



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41 authorizing a court to assess and award attorney fees
42 against a complainant if the action was filed in bad
43 faith or was frivolous;

By the Committee on Governmental Oversight and Accountability;
and Senators Simpson, Margolis, Gibson, and Hays

585-01484-15

2015224c1

1 A bill to be entitled
2 An act relating to public records; amending s.
3 119.0701, F.S.; requiring that a public agency
4 contract for services include a statement providing
5 the name and contact information of the public
6 agency's custodian of records; prescribing the form of
7 the statement; revising required provisions in a
8 public agency contract for services regarding a
9 contractor's compliance with public records laws;
10 requiring that a public records request relating to
11 records for a public agency's contract for services be
12 made directly to the agency; requiring a contractor to
13 produce requested records under specified
14 circumstances; specifying applicable penalties for a
15 contractor who fails to produce requested records;
16 specifying circumstances under which a court may
17 assess and award reasonable costs of enforcement
18 against a public agency or contractor; providing an
19 effective date.

20
21 Be It Enacted by the Legislature of the State of Florida:

22
23 Section 1. Section 119.0701, Florida Statutes, is amended
24 to read:

25 119.0701 Contracts; public records.—

26 (1) For purposes of this section, the term:

27 (a) "Contractor" means an individual, partnership,
28 corporation, or business entity that enters into a contract for
29 services with a public agency and is acting on behalf of the

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

585-01484-15

2015224c1

30 public agency as provided under s. 119.011(2).

31 (b) "Public agency" means a state, county, district,
32 authority, or municipal officer, or department, division, board,
33 bureau, commission, or other separate unit of government created
34 or established by law.

35 (2) In addition to other contract requirements provided by
36 law, each public agency contract for services must include:

37 (a) The following statement, in substantially the following
38 form, identifying the name and contact information of the public
39 agency's custodian of public records in at least 14-point,
40 boldface type:

41
42 THE REQUIREMENTS OF SECTION 119.0701, FLORIDA STATUTES, APPLY TO
43 THIS CONTRACT UNLESS ...(name of public agency)... HAS
44 DETERMINED AND EXPRESSLY STATED IN THIS CONTRACT THAT ...(name
45 of individual, partnership, corporation, or business entity)...
46 IS NOT A CONTRACTOR. IF YOU HAVE QUESTIONS REGARDING THE
47 APPLICATION OF SECTION 119.0701, FLORIDA STATUTES, TO YOUR DUTY
48 TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT
49 ...(name of custodian of public records)... AT ...(telephone
50 number, e-mail address, and mailing address)....

51
52 (b) A provision that requires the contractor to comply with
53 public records laws, specifically to:

54 1. ~~(a)~~ Keep and maintain public records that ordinarily and
55 necessarily would be required by the public agency in order to
56 perform the service.

57 2. ~~(b)~~ Upon request from the public agency's custodian of
58 public records, provide the public with access to public records

Page 2 of 4

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

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59 on the same terms and conditions that the public agency would
60 provide the records and at a cost that does not exceed the cost
61 provided in this chapter or as otherwise provided by law.

62 ~~3.(e)~~ Ensure that public records that are exempt or
63 confidential and exempt from public records disclosure
64 requirements are not disclosed except as authorized by law.

65 ~~4.(d)~~ Keep and maintain public records, upon completion of
66 the contract, which ordinarily would be required by the public
67 agency in order to perform the service, or ~~Meet all requirements~~
68 ~~for retaining public records and transfer, at no cost, to the~~
69 ~~public agency all public records in possession of the contractor~~
70 ~~upon termination of the contract and destroy any duplicate~~
71 ~~public records that are exempt or confidential and exempt from~~
72 ~~public records disclosure requirements. Upon request from the~~
73 ~~public agency's custodian of public records, all records stored~~
74 ~~electronically must be provided to the public agency in a format~~
75 ~~that is compatible with the information technology systems of~~
76 ~~the public agency.~~

77 (3) A records request for public records relating to a
78 public agency's contract for services must be made directly to
79 the public agency. If the public agency does not possess the
80 requested records, the public agency shall immediately notify
81 the contractor of the request, and the contractor must produce
82 the records within a reasonable time. A contractor who fails to
83 produce the records within a reasonable time is subject to
84 penalties under s. 119.10.

85 ~~(4)(3)~~ If a contractor does not comply with a public
86 records request, the public agency shall enforce the contract
87 provisions in accordance with the contract.

Page 3 of 4

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

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88 (5) If a civil action is filed against a public agency or a
89 contractor who continues to possess public records to compel
90 production of such records relating to the public agency's
91 contract for services, the court shall assess and award against
92 the responsible public agency or contractor the reasonable costs
93 of enforcement, including reasonable attorney fees, if the party
94 filing the action provided written notice of the public records
95 request, including a statement that the contractor has not
96 complied with the request. This notice must be sent by certified
97 mail to the public agency's custodian of public records at least
98 3 business days before filing the action, and must be provided
99 to the contractor if the contractor is a named party in the
100 action.

101 Section 2. This act shall take effect upon becoming a law.

Page 4 of 4

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



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:

Community Affairs, *Chair*
Environmental Preservation and Conservation,
Vice Chair
Appropriations Subcommittee on General Government
Finance and Tax
Judiciary
Transportation

JOINT COMMITTEE:

Joint Legislative Auditing Committee

SENATOR WILTON SIMPSON

18th District

February 3, 2015

Senator Miguel Diaz de la Portilla
Committee on Judiciary
515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399-1100

Chairman Diaz de la Portilla,

Please place CS/SB 224 relating to public records and public agency contracts, on the next Committee on Judiciary agenda.

Please contact my office with any questions. Thank you.

A handwritten signature in black ink, appearing to read "Wilton Simpson".

Wilton Simpson
Senator, 18th District

CC: Tom Cibula, Staff Director

REPLY TO:

- 322 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5018
- Post Office Box 938, Brooksville, Florida 34605
- Post Office Box 787, New Port Richey, Florida 34656-0787 (727) 816-1120 FAX: (888) 263-4821

Senate's Website: www.flsenate.gov

ANDY GARDINER
President of the Senate

GARRETT RICHTER
President Pro Tempore

The Florida Senate
COMMITTEE VOTE RECORD

COMMITTEE: Judiciary
ITEM: CS/SB 224
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 10, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE		SENATORS	3/10/2015 1		3/10/2015 2		3/10/2015 3	
			Amendment 474230		Amendment 861978		Amendment 234664	
Yea	Nay		Simpson		Simpson		Simpson	
			Yea	Nay	Yea	Nay	Yea	Nay
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
X		Ring, VICE CHAIR						
X		Díaz de la Portilla, CHAIR						
10	0	TOTALS	RCS	-	RCS	-	-	WD
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay

CODES: FAV=Favorable
 UNF=Unfavorable
 -R=Reconsidered
 RCS=Replaced by Committee Substitute
 RE=Replaced by Engrossed Amendment
 RS=Replaced by Substitute Amendment
 TP=Temporarily Postponed
 VA=Vote After Roll Call
 VC=Vote Change After Roll Call
 WD=Withdrawn
 OO=Out of Order
 AV=Abstain from Voting

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 794

INTRODUCER: Senator Ring

SUBJECT: Prejudgment Interest

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Pre-meeting
2.			ACJ	
3.			AP	

I. Summary:

SB 794 requires a court, in its final judgment, to include prejudgment interest on the amount of money damages, including court costs and attorney fees, awarded to a plaintiff. Prejudgment interest accrues from the date of the plaintiff's injury or loss. As provided in current law, the applicable interest rate is based on the discount rate of the Federal Reserve Bank of New York plus 400 basis points.

The bill provides that it applies retroactively to all actions that are pending on the effective date of the act and any actions that are initiated on or after that date.

II. Present Situation:

Prejudgment interest is the interest on a judgment that is calculated from the date of the injury or loss until a final judgment is entered for the plaintiff. In contrast, post-judgment interest is interest on a judgment that is calculated from the date of the final judgment until the plaintiff collects the award from the defendant.

Under English common law, prejudgment interest was permitted for claims that were "liquidated" but not for claims that were "unliquidated." A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount. In personal injury law, examples of these types of damages include pain and suffering, mental anguish, loss of enjoyment of life, and permanent injury.

In assessing prejudgment interest, a claim becomes liquidated when a verdict has the effect of fixing damages as of a prior date.¹

Florida does not generally allow the award of prejudgment interest for plaintiffs in personal injury² and wrongful death claims, but does allow it in some tort areas.³ The theory for denying prejudgment interest is that damages in personal injury cases are too speculative to liquidate before a final judgment is rendered. An exception to that rule is when a plaintiff can establish that he or she suffered the loss of a vested property right.⁴

One theory of prejudgment interest is that it is not awarded to penalize the losing party but to compensate the claimant for losing the use of the money between the date he or she was entitled to it and the date of the judgment.⁵ Proponents of prejudgment interest assert that it promotes fairness by allowing a plaintiff to be fully compensated for his or her injury, including the time span that litigation took place, particularly if the litigation was protracted because the defendant had no incentive to settle the case.⁶

III. Effect of Proposed Changes:

This bill requires a court, in its final judgment, to include prejudgment interest on the amount of money damages, including court costs and attorney fees, awarded to a plaintiff.

The rate of interest is established by the Chief Financial Officer pursuant to s. 55.03, F.S., and accrues from the date of the plaintiff's injury or loss. Pursuant to s. 55.03, F.S., the Chief Financial Officer is required to establish the rate of interest payable on judgments or decrees each quarter using a formula prescribed in statute. The Chief Financial Officer is then responsible for communicating that interest rate to the clerk of courts and chief judge of each judicial circuit for the upcoming quarter. The current quarterly interest rate is 4.75 percent.⁷

The bill also applies retroactively to all actions that are pending on the effective date of the act and any actions that are initiated on or after that date.

This bill takes effect upon becoming law.

¹ *Argonaut Insurance Company, et al., v. May Plumbing Company, et al.*, 474 So. 2d 212 (Fla. 1985).

² *Parker v. Brinson Construction Company and Florida Industrial Commission*, 78 So. 2d 873 (1955).

³ *Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993). The Court held that a claimant in a personal injury action is entitled to prejudgment interest on past medical expenses when a trial court finds that the claimant had made actual, out-of-pocket payments on the medical bills at a date before the entry of judgment.

⁴ *Amerace Corporation v. Stallings*, 823 So. 2d 110 (Fla. 2002).

⁵ *Kearney v. Kearney*, 129 So. 3d 381, 391 (Fla. 1st DCA 2013) rehearing denied January 17, 2014.

⁶ According to the Florida Justice Association, 32 states and the District of Columbia now allow for prejudgment interest in personal injury and wrongful death cases. Florida Justice Association, *Prejudgment Interest*, (2015) (on file with the Senate Committee on Judiciary).

⁷ Division of Accounting and Auditing, Office of the Chief Financial Officer, *Judgment on Interest Rates*, <http://www.myfloridacfo.com/division/AA/Vendors/#.VPtaBk0cSUI> (last visited March 7, 2015).

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

This bill does not appear to affect the spending, revenues, or tax authority of cities or counties. As such, the bill does not appear to be a mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill is retroactive to the extent that it increases the amount of damages that may be recoverable for personal injuries that occur before the effective date of the bill. Although the Legislature may enact statutory changes that are procedural or remedial, a statute may not apply retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.⁸ By increasing the amount of damages authorized for causes of action that accrue before the effective date of the bill, this bill potentially could be construed as an unconstitutional penalty.

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

None.

B. Private Sector Impact:

Plaintiffs who are successful in their claims and entitled to prejudgment interest will benefit financially from this bill by being permitted to receive prejudgment interest from the date of their loss or injury.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁸ *State Farm Mutual Automobile Insurance Co. v Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

VIII. Statutes Affected:

This bill creates s. 55.031, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

By Senator Ring

29-00635-15

2015794__

A bill to be entitled

An act relating to prejudgment interest; creating s. 55.031, F.S.; requiring a court to include prejudgment interest on the amount of money damages awarded to a plaintiff in a final judgment; providing for retroactive application; providing an effective date.

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

Section 1. Section 55.031, Florida Statutes, is created to read:

55.031 Prejudgment interest.—In an action in which a plaintiff is entitled to recover money damages, including, but not limited to, court costs or attorney fees, the court shall, in the final judgment, include interest on the amount of the money damages awarded at the rate established pursuant to s. 55.03, with such interest accruing from the date of injury or loss.

Section 2. Section 55.031, Florida Statutes, as created by this act, shall apply retroactively to all actions pending on the effective date of this act and any action initiated on or after such date.

Section 3. This act shall take effect upon becoming a law.



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Governmental Oversight and Accountability, *Chair*
Appropriations Subcommittee on Finance and
Tax, *Vice Chair*
Appropriations
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Banking and Insurance
Commerce and Tourism
Judiciary
Rules

JOINT COMMITTEE:
Joint Legislative Auditing Committee

SENATOR JEREMY RING
29th District

February 17, 2015

Honorable Miguel Diaz de la Portilla
Committee on Judiciary
515 Knott Building
404 South Monroe Street
Tallahassee, FL 32399

Dear Mr. Chairman,

I am writing to respectfully request your cooperation in placing Senate Bill 794, relating to Prejudgment Interest, on the Judiciary agenda at your earliest convenience. I would greatly appreciate the opportunity to discuss the bill at greater length before your committee.

Thank you in advance for your assistance. As always, please do not hesitate to contact me with any questions or comments you may have.

Very Truly Yours,

A handwritten signature in cursive script that reads "Jeremy Ring".

Jeremy Ring
Senator District 29

cc: Tom Cibula, Staff Director
Shirley Proctor, Committee Administrative Assistant

REPLY TO:

- 5790 Margate Boulevard, Margate, Florida 33063 (954) 917-1392 FAX: (954) 917-1394
- 405 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5029

Senate's Website: www.flsenate.gov

DON GAETZ
President of the Senate

GARRETT RICHTER
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: CS/SB 872

INTRODUCER: Judiciary Committee and Senator Hukill

SUBJECT: Estates

DATE: March 11, 2015

REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 872 amends the Florida Probate Code and the Florida Trust Code to revise provisions governing the areas of attorney fees and costs, lawyers serving as fiduciaries, personal representatives and notices of administration, and the apportionment of estate taxes. The bill:

- Authorizes a court to assess attorney fees and costs against one or more persons' part of an estate or trust in proportions it finds just and proper in estate and trust proceedings and to direct payment for assessments against a portion of an estate from a trust under certain circumstances.
- Provides factors that a court may consider when assessing costs and attorney fees against a person's share of an estate or trust in estate and trust proceedings.
- Prohibits compensation to an attorney or certain persons for fiduciary services unless special circumstances exist or a written disclosure is executed by the client before the execution of the document.
- Revises requirements regarding the time to make objections to the validity of a will, qualifications of a personal representative, the venue, or jurisdiction of a court in estate proceedings;
- Requires that personal representatives who are not qualified at the time of appointment resign or be removed by the court and have their letters of administration revoked;
- Extends personal liability for attorney fees and costs in a removal proceeding to personal representatives who do not know but should have known of facts requiring them to immediately resign or provide notice of ineligibility to serve as personal representative to interested persons.

- Substantially revises current law regarding the allocation and apportionment of estate taxes to update the statute for consistency with changes in federal estate tax laws, codify case law governing estate tax apportionment, and address gaps in the current statutory apportionment framework.

II. Present Situation:

The Florida Probate Code and the Florida Trust Code govern the administration of estates and trusts under Florida law.¹ The codes establish the procedures for collecting and distributing the assets to the beneficiaries of wills and trusts. This bill amends statutes in the codes that involve:

- Attorney fees and costs;
- Lawyers serving as fiduciaries;
- Personal representatives and notices of administration; and
- The apportionment of estates taxes.

Assessing Attorney Fees and Costs for Estates and Trusts

The probate² and trust³ codes provide that an attorney who has rendered services to an estate or trust may be awarded reasonable compensation from the estate or trust for those services. The statutes further provide that the court, in its discretion, may direct from what part of the estate⁴ or trust⁵ those fees, as well as costs,⁶ may be paid.

Case law interpreting the assessment of attorney fees and costs under the Probate Code, however, is in conflict. The Fourth District Court of Appeal has interpreted the statute to mean that the trial court must find bad faith, wrongdoing, or frivolousness to assess attorney fees and costs against a part of the estate.⁷ The Fifth District Court of Appeal, however, does not require a finding of frivolousness to assess attorney fees and costs against a portion of the estate.⁸ In a Florida Supreme Court case involving an unsuccessful will dispute and the assessment of fees and costs against a portion of an estate, the Court noted that the trial court has “discretion to direct that the resulting costs and attorney fees be charged against the contestant’s bequest under the will.”⁹

The Real Property, Probate, and Trust Law Section of The Florida Bar has noted that the lack of detailed statutory factors for courts to consider when exercising discretion to assess attorney fees and costs has created inconsistent results in the application of the law. The section has noted that

¹ The Florida Probate Code is contained in chs. 731 through 735, F.S., and the Florida Trust Code is contained in ch. 736, Florida Statutes.

² Section 733.106(3), F.S.

³ Section 736.1005(1), F.S.

⁴ Section 733.106(4), F.S.

⁵ Section 736.1005(2), F.S.

⁶ Section 733.106(4), F.S. authorizes the court, in probate, to direct from what portion of the probate estate the costs are to be paid. Section 736.1006(2), F.S., authorizes the court, in its discretion, to direct from what part of the trust the costs shall be paid.

⁷ *Levin v. Levin*, 67 So. 3d 429 (Fla. 4th DCA 2011).

⁸ *Williams v. King*, 711 So. 2d 1285 (Fla. 5th DCA 1998).

⁹ *Carman v. Gilbert*, 641 So. 2d 1323, 1326 (Fla. 1994).

a detailed but flexible standard would provide courts direction and would result in a more consistent application of the law.¹⁰

Lawyers Serving as Fiduciaries

The law currently provides that a personal representative who is a member of The Florida Bar and provides legal services administering an estate is allowed a fee for the personal representative services and a fee for his or her legal services.¹¹ While there is no statutory or ethical prohibition against lawyers preparing documents that appoint themselves as fiduciaries, it is important for lawyers to document any disclosure made to a client so as to avoid future allegations that they overreached or were involved in improper conduct.¹²

Personal Representatives and Notice of Administration

Personal Representatives

A personal representative is a person or business entity¹³ appointed by a circuit court to administer a decedent's estate. If an individual serves as a personal representative, he or she must be at least 18 years old, have full capacity,¹⁴ and be a resident of Florida¹⁵ at the time of the death of the person whose estate he or she is administering.¹⁶ A person is not qualified to serve as a personal representative if he or she has been convicted of a felony and is mentally or physically unable to perform the duties of a personal representative.¹⁷

Notice of Administration and Filing of Objections

Section 733.212, F.S., establishes, among other things, a list of people upon whom the personal representative must serve a copy of the notice of administration and specific information that the notice of administration must contain. Section 733.212(2)(c), F.S., specifies a 3 month time frame for filing objections to the validity of the will, the qualifications of the personal representative, the venue, or the jurisdiction of the court.

Apart from detailing what the notice of administration must contain, s. 733.212(3), F.S., is directed to a person on whom the notice is served and who wants to file an objection. It provides that any interested person upon whom a notice of administration is served must object by filing a petition on or before the date that is 3 months after he or she is served with a copy of the notice of administration or be forever barred from asserting an objection to:

¹⁰ The Real Property, Probate, & Trust Law Section of The Florida Bar, *Legislative White Paper: Proposed F.S. 733.106(4), 736.1005(2), and 736.1006(2)* (2015) (on file with the Senate Committee on Judiciary).

¹¹ Section 733.617(6), F.S.

¹² The Real Property, Probate, & Trust Law Section of The Florida Bar, *White paper: Proposed Legislation Regarding Lawyers Serving as Fiduciaries* (2015) (on file with the Senate Committee on Judiciary).

¹³ See s. 733.305, F.S., for a list of business entities authorized to serve. Generally, those entities are certain trust companies and banking and savings institutions.

¹⁴ Section 733.302, F.S., states that the person is "sui juris." Black's Law Dictionary defines "sui juris" as being independent, of full age and capacity, and possessing full social and civil rights.

¹⁵ A non-resident of the state may qualify if he or she is a legally adopted child or adoptive parent of the decedent, related by lineal consanguinity, one of certain enumerated relatives of the decedent, or the spouse of a person otherwise qualified to be the personal representative. Section 733.304, F.S.

¹⁶ Section 733.302, F.S.

¹⁷ Section 733.303, F.S.

- The validity of the will;
- The qualifications of the personal representative;
- The venue; or
- The jurisdiction of the court.

In the recent case of *Hill v. Davis*,¹⁸ the Florida Supreme Court addressed whether an objection to the qualifications of a personal representative is barred by the 3 month deadline. The Court held that s. 733.212(3), F.S., bars an objection that the personal representative¹⁹ was never qualified to serve in that capacity if the objection was not timely filed. The Court, however, created an exception to the 3 month deadline “except where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame.”²⁰ Some attorneys believe that this exception created by the Supreme Court could, as written, be expanded to apply to objections to the validity of a will, jurisdiction, or venue unless clarifying language is added to limit the 3 month exception.²¹

Apportionment of Estate Taxes

Just as Florida’s intestate successions laws function as a default mechanism to distribute property that was not properly devised in a will, s. 733.817, F.S., provides default rules for determining the apportionment of an estate tax among the various interests when the decedent has not otherwise specified. Section 733.817, F.S., governs:

- The apportionment of estate taxes if a decedent has not effectively provided for the apportionment of those taxes; and
- The collection of the tax.

The estate tax apportionment statute has not been substantially revised in many years and needs updating and clarification to address federal estate tax laws enacted after the statute was last amended. Changes also need to be made to address tax issues that are not currently covered in the existing statute. Under current federal law, the estate tax only applies to an estate valued in excess of \$5,430,000.²² Florida does not have a state level estate tax. However, when estate taxes are due to the federal government or to another state from a Florida decedent, s. 733.817, F.S., determines how much tax is attributable to each interest affected by the tax. The statute also determines who is charged with payment of the tax attributable to various interests affected by the tax, determines whether a decedent has effectively directed against statutory apportionment and resolves conflicting apportionment provisions in governing instruments

¹⁸ *Hill v. Davis*, 70 So. 3d 572 (Fla. 2011).

¹⁹ Section 733.3101, F.S., states that any time a personal representative knows or should have known that he or she is not qualified, the personal representative shall promptly file and serve a notice setting forth the reasons. Whoever fails to comply with that requirement shall be personally liable for costs, including attorney fees incurred in a removal proceeding, if he or she is removed.

²⁰ *Id.*, at 573.

²¹ The Real Property, Probate, & Trust Law Section of The Florida Bar, *Legislative White Paper: Regarding Objections to Probate and Qualifications of Personal Representatives* (2015) (on file with the Senate Committee on Judiciary).

²² This amount applies to the 2015 tax year. The value is adjusted annually for inflation. 26 U.S.C. s. 2010(c)(3) and Rev. Proc. 2014-61, 2014-47 I.R.B. 860.

Estate Tax

According to the Internal Revenue Service, an estate tax is a tax on your right to transfer property at your death. The tax is generally computed by assessing the fair market value of all properties owned or controlled by the decedent at his or her death, which is the “gross estate,” and then subtracting certain allowable deductions, which is the “taxable estate.” The value of lifetime taxable gifts is added to this amount and the tax is computed. The tax is then reduced by the available unified credit.²³

Background Information on the Apportionment of Estate Taxes, s. 733.817, F.S.

The statute generally provides for a modified equitable apportionment system. Property interests generally bear their share of the taxes with the exception that there are special provisions for property passing under a will or trust and for protected homestead. Residuary interests passing under a will or trust are first charged with taxes on non-residuary interests, then with taxes on residuary interests themselves, with the non-residuary interests bearing their pro rata share of any remaining taxes. The decedent’s probate estate and revocable trust are generally charged with the estate tax on protected homestead. Property qualifying for the marital and charitable deduction does not bear any part of the tax unless it is charged with the payment of tax on other property as a part of the residuary under the will or trust. The default apportionment provisions apply only if the decedent does not direct otherwise. The statute provides rules for determining whether a decedent has overridden the default rules.²⁴

For an analysis of specific provisions in the current statute and how those provisions are changed by this bill, please see the “Effect of Proposed Changes” section of this bill analysis.

III. Effect of Proposed Changes:**Assessing Attorney Fees and Costs for Estates and Trusts (Sections 1, 9, and 10)**

The bill amends the following three statutes relating to the assessment of attorney fees and costs against a person’s part of an estate or trust.

Sections 733.106 F.S. – Costs and Attorney Fees in Probate Matters (Section 1)

The bill amends this section to provide that if costs and attorney fees are to be paid from the estate under any of four statutes²⁵ permitting the payment of attorney fees, the court has discretion to direct from which part of the estate the fees shall be paid. If the court directs an assessment against a person’s part of an estate and the part is insufficient to completely pay the assessment, the court may direct that the payment be made from the person’s part of a trust, if any, if a pourover will²⁶ is involved and the matter is interrelated with the trust.

²³ <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax>. Last visited March 7, 2015.

²⁴ Email from Pamela O. Price, Attorney, Florida Real Property, Probate, & Tax Law Section of The Florida Bar (March 6, 2015) (on file with the Senate Committee on Judiciary).

²⁵ Those sections are ss. 733.106, 733.6171, 736.1005, or 736.1006, F.S.

²⁶ A pourover will is defined as “a will giving money or property to an existing trust.” BLACK’S LAW DICTIONARY (7th ed. 1999).

The court is also authorized, to direct that all or any part of the costs and attorney fees to be paid from an estate may be assessed against one or more persons' part of the estate in the proportions that the court finds to be fair and just.

In exercising its discretion to assess attorney fees and costs, the court may consider:

- The relative impact an assessment will have on the estimated value of each person's part of the estate;
- The amount of costs and attorney fees to be assessed against someone's part of the estate;
- The extent to which a person whose part of the estate is to be assessed actively participated in the proceeding;
- The potential benefit or harm to a person's part of the estate;
- The relative strength or weakness of the merits of the claims, defenses, or objections, if any, that were asserted by someone whose part of the estate is to be assessed;
- Whether the person to be assessed was a prevailing party with regard to any claims, defenses, or objections;
- Whether the person whose part is to be assessed unjustly caused an increase in the costs and attorney fees that were incurred by the personal representative or another interested person in the proceeding; and
- Any other relevant fact, circumstance, or equity.

In an effort to resolve the varying statutory interpretations between the different district courts of appeal, the statute is amended to provide that a court does not need to find that the person whose part is to be assessed engaged in bad faith, wrongdoing, or frivolousness.

Section 736.1005, F.S. - Attorney Fees for Services to the Trust (Section 9)

The bill amends this section to provide that if attorney fees are to be paid under any of three statutes,²⁷ the court, in its discretion, may direct from what part of the trust the fees shall be paid.

The court is also authorized, to direct that all or any part of the attorney fees to be paid from a trust may be assessed against one or more persons' part of the trust in the proportions that the court finds to be just and fair.

The statute then tracks, in almost identical amendatory language as that set out above for s. 733.106, F.S., the factors the court may consider in its discretion when assessing attorney fees for services to the trust. The court may also assess a person's part of the trust without finding that he or she engaged in bad faith, wrongdoing, or frivolousness.

Section 736.1006, F.S. – Costs in Trust Proceedings (Section 10)

The bill amends this section to provide that, if costs are to be paid from certain trusts,²⁸ all or part of the costs may be assessed against one or more persons' part of the trust in the proportions the court finds to be just and proper. The statute then provides that the court, in its discretion, may consider the newly enumerated factors in s. 736.1005(2), F.S.

²⁷ Sections 736.1005(1), 726.1007(5)(a), or 733.106(4)(a), F.S.

²⁸ The bill cross-references trust proceedings under this statute or under "s. 736.106(4)(a)" but the second reference is a technical error because that statute does not exist. The reference needs to be corrected to read "s. 733.106(4)(a)."

Lawyers Serving as Fiduciaries (Sections 6 and 8)

This bill amends s. 733.617, F.S., relating to the compensation of personal representatives, and s. 736.0708, F.S., relating to the compensation of trustees. The bill provides that an attorney, or person related to the attorney, is not entitled to receive compensation for serving as a fiduciary if the attorney prepared or supervised the execution of a will or trust unless the attorney or person appointed is related to the client or the attorney discloses to the client in writing before the will or trust is signed that:

- Subject to certain limited exceptions, most family members, persons who are residents of Florida, including friends, and corporate fiduciaries are eligible to serve as a fiduciary;
- Any person, including an attorney, who serves as a fiduciary is entitled to receive reasonable compensation for his or her personal representative services; and
- Compensation payable to the fiduciary is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services.

The client must execute a written statement acknowledging that the disclosures were made before the execution of the will or trust. The written acknowledgement must be a separate writing from the will or trust but may be annexed to the will or trust. It may be executed before or after the execution of the will or trust.

An attorney is deemed to have prepared or supervised the execution of a will or trust if the preparation or the supervision of the execution of the will or trust was performed by an employee or attorney employed by the same firm as the attorney when the will was executed.

The bill defines the term "related" and copies the language found in s. 732.806, F.S., the "Gifts to lawyers and other disqualified persons." An employee or attorney employed by the same firm as the attorney when the will or trust instrument is executed is deemed to be related to the attorney.

This statute applies to all appointments, including nominations as a successor or alternate fiduciary, and to all powers to appoint that the attorney may exercise if they are used to appoint the attorney.

The failure to obtain a written acknowledgement for the testator or settlor does not disqualify a personal representative or trustee from serving or affect the validity of the will or trust document. Accordingly, an attorney may serve without the signed acknowledgment, but he or she will not be compensated by the fiduciary.

The statute provides a written acknowledgement form that is deemed to comply with the disclosure requirements provided in this section.

This subsection applies to each nomination or appointment made pursuant to a will or trust which is executed or amended on or after October 1, 2015, by a resident of Florida.

Personal Representatives and Notices of Administration (Sections 2, 3, 4, and 5)

The bill amends ss. 733.212(2)(c), 733.212(3), and 733.2123, F.S., to remove the 3 month limitation period for objections to be raised about the qualifications of a personal representative after service of a notice of administration.²⁹

The bill amends s. 733.212(3), F.S., to remove objections to the qualifications of a personal representative from the provisions of the notice of administration. The section is also amended to permit an extension of time for filing an objection to the validity of the will, the venue, or the jurisdiction of the court for estoppel based solely on a misstatement by the personal representative regarding the time period within which an objection must be filed. The amendatory language clarifies that the time period may not be extended for any other reason, including affirmative representation, failure to disclose information, or misconduct by the personal representative or any other person. The subsection is also amended to create the outermost boundary by which an objection must be filed. That limit is the earlier of the entry of an order of final discharge of the personal representative or 1 year after service of the notice of administration.

The bill amends s. 733.2123, F.S., to remove “qualifications of the personal representative” from the list of objections that must be filed within the limitations period of the statute. As such, an interested person is not barred by limitations for failing to object to the qualifications of a personal representative within the time frame of this section.

Section 733.3101, F.S., is amended to now require a personal representative to resign immediately if the personal representative knows that he or she was not qualified to act at the time of appointment. If a personal representative becomes unqualified to serve during the administration of the estate, then he or she must send a notice to interested persons stating the reasons and that any interested person may petition to remove him or her from serving as the personal representative. An interested person on whom the notice is served may file a petition requesting removal within 30 days after the date that the notice is served.

As under current law, the personal representative who fails to comply with this section is personally liable for costs and attorney fees incurred in a removal proceeding if the personal representative is removed. The bill extends the liability to include a personal representative who does not know, but should have known of facts that would have required him or her to resign or file and serve notice of the disqualification. Language is added to s. 733.3101, F.S., to clarify that the term “qualified” means that the personal representative is qualified under ss. 733.302 and 733.303, F.S., rather than a more general meaning that might involve other grounds for removing the personal representative.

The bill amends s. 33.504, F.S., to require a court to remove a personal representative if he or she was not qualified to act at the time he or she was appointed. Language is added to clarify that a court may remove a personal representative who was qualified to act when appointed, but is not later entitled to serve.

²⁹ See discussion at footnote 21 above.

Estate Taxes (Section 7)

Section 733.817, F.S., provides a framework for determining how the estate tax is apportioned to various interests which pass as a result of a decedent's death and for the orderly collection of the estate tax. This bill is a substantial rewording of s. 733.817, F.S. The changes are made to update, clarify, and improve the section by making it compatible with the Internal Revenue Code, address tax issues not dealt with in the current statute, codify existing case law, and amend the default rules so that they reflect what would have been the intent of most decedents. The changes are made by reorganizing the statute, adding titles for better understanding, and making other clarifying changes.

Allocation of Estate Taxes on Gifts Made Just Prior to Death

Section 733.817(3), F.S. provides that, in determining the amount of tax attributable to an interest in property, only interests included in the measure of the particular tax³⁰ are considered. The tax is determined by the proportion that the value of each interest included in the measure of the tax bears to the total value of all interests included in the measure of the tax. The decedent's gross estate for estate tax purposes includes gift taxes paid on gifts made within 3 years after death³¹ and, if the decedent dies within 5 years of a gift to a qualified tuition program (commonly known as a "529 Plan") that exceeds the gift tax annual exclusion,³² his or her gross estate also includes the portion of such contributions properly allocable to periods after the date of death.³³

Presently, ss. 733.817(5)(a)-(c), F.S., do not apportion the estate tax on those gift taxes, and the gift taxes are not otherwise excluded from the measure of the tax. A majority of decedents do not intend that the recipients of their gift bear the burden of the estate tax as such gifts often consist of contributions to 529 plans for minors or college aged relatives.

The bill amends s. 733.817(1)(d), F.S., the definition of "included in the measure of the tax," to exclude gift taxes paid within 3 years after the decedent's death and gifts to a 529 Plan. Recipients of the gift will not be allocated the estate tax upon such gifts even though the gift taxes remain a part of the amount upon which the estate tax is calculated. The effect is that the allocation of tax on all other interests remaining in the measure of the federal estate tax will be increased. The exclusion of the gift taxes and 529 Plan amounts from the measure of the tax applies only to the estates of decedents dying on or after July 1, 2015.

³⁰ "Included in the measure of the tax" means that for each separate tax that an interest may incur, only interests included in the measure of that particular tax are considered. It does not include any interest, whether passing under the will or not, to the extent the interest is initially deductible from the gross estate, without regard to any subsequent reduction of the deduction by reason of the charge of any part of the applicable tax to the interest or interests or amounts that are not included in the gross estate but are included in the amount upon which the applicable tax is computed, such as adjusted taxable gifts with respect to the federal estate tax. If an election is required for deductibility, an interest is not "initially deductible" unless the election for deductibility is allowed. Section 733.817(1)(d), F.S.

³¹ 26 U.S.C. § 2035(b).

³² Section 529 of the Internal Revenue Code allows a donor to gift an amount in excess of the annual gift tax exclusion to a qualified tuition program on behalf of any designated beneficiary which may then be treated as having been made over a 5 year period.

³³ 26 U.S.C. § 529(c)(4)(C).

Apportionment of Estate Taxes

Statutory Apportionment – Property passing under a will or trust

In the absence of an effective direction by the decedent in a governing instrument, estate taxes are apportioned pursuant to s. 733.817(5), F.S.

For property passing under a will or trust, the net tax attributable to nonresiduary devisees or interests is charged to and paid from the residuary estate or portion whether or not all interests in the residuary estate or portion are included in the measure of the tax. If the residuary estate or portion is insufficient to pay the net tax attributable to all nonresiduary devisees or interests, the balance of the net tax attributable to nonresiduary devisees or interests is apportioned among the recipients of the nonresiduary devisees or interests in the proportion that the value of each nonresiduary devise or interest included in the measure of the tax bears to the total of all nonresiduary devisees or interests included in the measure of the tax. The net tax attributable to residuary devisees or interests are apportioned among the recipients of the residuary devisees or interests included in the measure of tax in the proportion that the value of each residuary devise or interest included in the measure of the tax bears to the total of all residuary devisees or interests included in the measure of the tax.³⁴ The provisions are silent, however, with respect to which devisees or interests would be charged with the tax if the residuary is insufficient.

The bill moves the allocation to subsection (3) and provides that if the residuary estate or portion of a will or trust is insufficient to pay the net tax attributable to all residuary devisees or interests, the tax must be apportioned among the recipients of the nonresiduary devisees or interests in the proportion that the value of each nonresiduary devise or interest included in the measure of the tax bears to the total of all nonresiduary devisees or interests included in the measure of the tax.

Statutory Apportionment -- Protected Homestead

Section 733.817(5)(c), F.S., provides that the net tax attributable to an interest in protected homestead³⁵ is apportioned against the recipients of other interests in the estate or passing under any revocable trust in the following order of priority:³⁶

- Class I: Recipients of interests not disposed of by the decedent's will or revocable trust that are included in the measure of the federal estate tax. This includes recipients of exempt property, the family allowance, elective share, pretermitted shares, and property passing by intestacy.
- Class II: Recipients of residuary devisees and residuary interests that are included in the measure of the federal estate tax.
- Class III: Recipients of nonresiduary devisees and nonresiduary interests that are included in the measure of the federal estate tax.

³⁴ Section 733.817(5)(a) and (b), F.S.

³⁵ "Protected homestead" means the property described in s. 4(a)(1), Article X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Article X of the State Constitution. For purposes of the code, real property owned in tenancy by the entirety or in joint tenancy with rights of survivorship is not protected homestead. Section 731.201(33), F.S.

³⁶ Section 733.817(5)(c), F.S.

Property that is not included in the measure of the tax, such as property qualifying for the marital or charitable deduction, does not bear the burden of the payment of tax on protected homestead. The purposes of the Probate Code provisions for exempt property, family allowance, and elective share are defeated by charging those interests with the estate tax on the protected homestead. Further, although s. 733.817(2), F.S., provides that protected homestead is exempt from tax, the statute does not specify an additional source of payment if the property designated pursuant to s. 733.817(5)(c), F.S. is insufficient.

For estates of decedents dying on or after July 1, 2015, the bill provides that the tax on exempt property and the family allowance is to be apportioned against other estate and revocable trust property in the same manner as the tax on protected homestead. Elective share property is no longer charged with the payment of estate tax on protected homestead (and now exempt property and family allowance). However, any property passing to the spouse which is in excess of the elective share is not excused from payment of the tax to the extent the excess property is included in Class I, II or III. Under the bill, the classes charged with payment of tax on protected homestead, family allowance and exempt property, in order of priority, are:

- Class I: Recipients of property passing by intestacy.
- Class II: Recipients of residuary devises, residuary interests, and pretermitted shares.
- Class III: Recipients of nonresiduary devises and nonresiduary interests.

If the assets in Classes I, II, and III are exhausted, the remaining tax is apportioned proportionately to the protected homestead, exempt property and family allowance. However, the tax may not be apportioned against the elective share. If the balance of the net tax attributable to protected homestead, exempt property, or the family allowance is not apportioned as provided above, it is to be apportioned according to the proportion that the value of each bears to the total value of taxable interests.

Apportionment at the Direction of a Decedent

Section 733.817(5)(h), F.S., provides that a decedent may direct against statutory apportionment through the terms of a governing instrument such as a will or trust.

Specificity Requirement. For a direction in a governing instrument to be effective to direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument, the governing instrument must expressly refer to s. 733.817, F.S., or expressly indicate that the property passing under the governing instrument is to bear the burden of taxation for property not passing under the governing instrument. A direction in the governing instrument to the effect that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise is effective to direct the payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument.

Effective for decedents dying on or after July 1, 2015, the bill deletes the provision for directing against default apportionment by reference to s. 733.817, F.S., and provides that a direction against default apportionment may only be achieved by "express direction." An express direction in the governing instruments to the effect that all taxes are to be paid from property passing

under the governing instrument whether attributable to property passing under the governing instrument or otherwise is generally effective.

However, such an express general direction is not effective to waive rights of recovery provided in sections 2207A, 2207B, and 2603 of the Internal Revenue Code, all of which require greater specificity. Those sections provide that the decedent may direct otherwise, but they require the decedent to specifically indicate the intent to waive the right of recovery under those sections. The purpose of the Internal Revenue Code provisions requiring greater specificity in directing against a right of recovery is not to raise revenue but to guard against the decedent's inadvertent waiver of those rights for the benefit of the estate.

The bill describes and codifies what is sufficient to comply with the specificity requirements of sections 2207A, 2207B, and 2603 of the Internal Revenue Code. It also provides that a general statement in a decedent's will or revocable trust waiving all rights of recovery under the Internal Revenue Code is not an express waiver of the rights of recovery provided in sections 2207A or 2207B of the Internal Revenue Code. This provision reflects current law.

Adopting Tax Apportionment Provisions in a Revocable Trust. The Internal Revenue Code enables the personal representative of an estate to recover the estate tax attributable to life insurance or property subject to a general power of appointment from the beneficiaries of those interests, but provides that the decedent may direct otherwise by will. Many decedents put their tax apportionment provisions in their revocable trusts. Section 733.817(5)(h)2., F.S., provides that a provision in the will that the tax is to be apportioned as provided in the revocable trust is deemed to be a direction in the will as well as the revocable trust.

The bill requires that the provision in the will adopting the apportionment provisions of the revocable trust and the apportionment provision of the revocable trust must be express in order to be effective.

Directing that taxes are paid from a revocable trust. Current law permits the decedent's will to direct that estate taxes be paid from the decedent's revocable trust unless the trust contains a contrary provision.³⁷ It is implicit in current law that the revocable trust that is to pay the tax must be specifically identified and that for an apportionment provision in the revocable trust to be contrary, it must be express. The bill requires that a direction in a will to pay estate taxes from a revocable trust must contain a specific reference to the trust, and that for an apportionment provision in a revocable trust to be considered contrary, it must be an express direction.

Conflicting Provisions. If there is a conflict as to payment of taxes between the decedent's will and the governing instrument, the decedent's will controls, except that the governing instrument will be given effect with respect to any tax remaining unpaid after the application of the decedent's will and a direction in a governing instrument to pay the tax attributable to assets that pass pursuant to the governing instrument from assets that pass pursuant to that governing instrument is effective notwithstanding any conflict with the decedent's will, unless the tax

³⁷ Section 733.817(5)(h)3., F.S.

provision in the decedent's will expressly overrides the conflicting provision in the governing instrument.³⁸

The bill provides that apportionment conflicts between all governing instruments (whether a conflicting instrument is a will or other instrument) are controlled by the last executed governing instrument containing an effective tax apportionment clause to the extent of the conflict. If a will or trust is amended, the date of the amendment is the controlling date only if the amendment contains an express tax apportionment provision. Only tax apportionment provisions that would be effective, but for the conflict, create a conflict. The new rule applies to estates of decedents dying on or after July 1, 2015.

Construction

Apportionment of Property Received By a Will or Trust as a Beneficiary

Property passing under a will or trust is apportioned under the provisions of s. 733.817(5)(a) and (b), F.S. This is the case even if the will or trust received the property as beneficiary of an annuity, insurance policy, IRA, or similar interest, or as recipient of appointed property. This has caused some uncertainty among practitioners as the general "catch-all" apportionment provision in s. 733.817(5)(f), F.S., would seem to apply to these interests. However, the general provisions do not apply if the recipient is the estate or trust. The statute does not contemplate a double tax on what is essentially the same property. However, property subject to a power of appointment does not pass under the will simply because the power is exercised by the will unless the property passes to the estate.³⁹

The bill provides that the beneficiary of an annuity or insurance policy or the recipient of property subject to a power of appointment is the "recipient" as defined in s. 733.817(1)(i), F.S. If those interests are paid to the estate or a trust, and subsequently disposed of pursuant to the will or trust, the tax on them is to be apportioned in the manner provided for interests passing from the estate or the trust. Property passing under a general power of appointment to the decedent's creditors (or the creditors of the decedent's estate) benefits the estate and is treated as if it were apportioned to the estate.

Common Instrument Construction

Section 733.817(5)(d), F.S., provides that a decedent's will and revocable trust are construed together to apportion the tax as if all recipients of the estate and trust (other than the estate and trust themselves) were taking under one common instrument for the purpose of apportioning tax to recipients of residuary and non-residuary interests under the provisions regarding wills, trusts and protected homesteads. However, the statute applies to a will and revocable trust in which one does not pour into the other, an application that serves no purpose.

For estates of decedents dying on or after July 1, 2015, the bill requires that a decedent's will or revocable trust (or two revocable trusts, if applicable) must pour into the other for the common instrument construction to apply. The purpose of this provision is to determine which interests

³⁸ Section 733.817(5)(h)5., F.S.

³⁹ *In re Estate of Wylie*, 342 So.2d 996 (Fla. 4th DCA 1977); *Smith v. Bank of Clearwater*, 479 So.2d 755 (Fla. 2nd DCA 1985).

are in effect pre-residuary interests and which are residuary interests where a will or trust (or another trust) pours into the other so that the tax attributable to those interests may be apportioned accordingly.

Updates in Response to Changes in Federal Tax Law

In 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001.⁴⁰ That federal legislation phased out over a 5-year period, starting in 2002, the credit for state death taxes and effectively eliminated the Florida estate tax. The credit was replaced by a deduction for state death taxes.⁴¹ This bill reflects the changes in federal tax law as follows:

- The definition of “net tax” is amended to take into account the deduction for state death taxes that replaced the credit for state death taxes. Additionally, s. 733.817(2)(c), F.S., was created to allocate the state death tax deduction to the interests producing the deduction for the purpose of determining the tax attributable to the interest. This is a curative revision intended to clarify existing law and applies retroactively to all proceedings in which the apportionment of taxes has not been finally determined or agreed for estates of decedents dying on or after January 1, 2005. It does not affect any tax payable to the state of Florida.
- Provisions regarding the allocation of the reduction of the Florida estate tax for tax paid to others states are made contingent upon the reinstatement of the Florida estate tax.

Other Changes Related to the Apportionment of the Estate Tax

The bill defines the terms “generation skipping transfer tax” and “Section 2044 interest” as used in s. 733.817, F.S. The definitions are consistent with the terms as used in the Internal Revenue Code.⁴²

The bill provides that the generation-skipping transfer tax be apportioned in accordance with s. 2603 of the Internal Revenue Code.⁴³ Section 2603(b) charges the tax to the property constituting the transfer in effect charging it to the transferee.

The definition of the term “tax” as used in s. 733.817, F.S. is amended to explicitly exclude any additional estate tax that may be imposed by s. 2032A(c) or s. 2057(f) of the Internal Revenue Code to recapture tax savings related to family owned farms and businesses. The payment of the recaptured tax is imposed upon the applicable beneficiaries by ss. 2032(A) and 2057 of the Internal Revenue Code and is not a part of the “tax” apportioned by s. 733.817, F.S.

The bill fills a current gap in the statute by providing that if the apportionment statute does not apportion part of the tax that was not effectively directed by a governing instrument, the court may assess liability for payment of the tax in the manner it finds equitable.

⁴⁰ Pub. L. 107-16 (June 7, 2001); 115 Stat. 38.

⁴¹ 26 U.S.C. s. 2058.

⁴² See 26 USC ss. 2611-2612 and 26 USC § 2044.

⁴³ The generation-skipping transfer tax is based on the value of property received by the beneficiary, i.e., net of the estate tax charged against that property. Accordingly, the estate tax apportionment provisions must be determined first. Section 733.817, F.S., does not currently give any guidance on this matter.

The bill clarifies that the taxes on property that would pass to others but for the elective share pursuant to s. 732.2075(2), F.S., are apportioned under the general “catch all” provision of the statute, to the extent those assets do not qualify for the marital deduction. It further provides that this provision applies only to interests passing by reason of the exercise or non-exercise of a general power of appointment.

Currently, the net tax attributable to property over which the decedent held a general power of appointment is calculated in the same manner as other property included in the measure of the tax. For estates of decedents dying on or after July 1, 2015, the bill authorizes the power holder to direct that the property subject to the general power of appointment bear the additional tax incurred by reason of the inclusion of the property subject to the general power of appointment in the power holder's gross estate. This only applies if the direction is express and is in the will.

Effective for decedents dying on or after July 1, 2015, the bill provides that if property is included in the gross estate under both sections 2044 and 2041 of the Internal Revenue Code, the property is deemed included under section 2044 for the purposes of s. 733.817, F.S.

The bill codifies existing law that a grant of permission or authority to pay or collect taxes is not a direction against statutory apportionment⁴⁴ and that an effective direction for payment of tax on a type of interest in a manner different from that provided in s. 733.817, F.S., is not effective as an express direction for payment of tax on other types of interests.⁴⁵

Effective for decedents dying on or after July 1, 2015, the bill updates references regarding notice of a petition for an order of apportionment to provide that the personal representative must give notice "in the manner of formal notice" instead of simply "formal notice" as "formal notice" is not currently required by the Florida Probate Rules.

Except as otherwise noted in this analysis, the amendments to s. 733.817, F.S., apply retroactively to all estate proceedings pending on July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed.

Effective Date

Except as otherwise provided in sections of the bill, the bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not appear to have an impact on cities or counties and as such, it does not appear to be a mandate for constitutional purposes.

⁴⁴ *Nations Bank v. Brenner*, 756 So. 2d 203 (Fla. 3d DCA 2000); *In re Estate of McClaran*, 811 So.2d 799 (Fla. 2d DCA 2002).

⁴⁵ *In re Estate of McClaran*, 811 So. 2d. 799 (Fla. 2d DCA 2002).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Several provisions in this bill have retroactive applications. A bill may apply retroactively provided that it does not impair vested rights.

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: 733.106, 733.212, 733.2123, 733.3101, 733.504, 733.617, 733.817, 736.0708, 736.1005, 736.1006, and 738.302.

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 on March 10, 2015:

The changes made by the committee substitute were technical, not substantive, changes.

The effective date of the bill was changed from “upon becoming a law” to July 1, 2015, which necessitated deleting effective date provisions of July 1, 2015 in sections 1, 7, 9, and 10, but adding an effective date of July 1, 2015 for retroactive provisions in the new section 11. An additional date change in new section 13 is clarified to read ‘July 1, 2015.’”

Additional stylistic and statutory cross-references are made and the phrase “trust agreement” is changed to “trust instrument.” Previous section 11, involving the reenactment of s. 738.802, F.S., is deleted at the suggestion of Senate Bill Drafting.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
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	.	

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Section 733.106, Florida Statutes, is amended to
read:

733.106 Costs and attorney ~~attorney's~~ fees.—

(1) In all probate proceedings, costs may be awarded as in
chancery actions.

(2) A person nominated as personal representative, or any
proponent of a will if the person so nominated does not act



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12 within a reasonable time, if in good faith justified in offering
13 the will in due form for probate, shall receive costs and
14 attorney ~~attorney's~~ fees from the estate even though probate is
15 denied or revoked.

16 (3) Any attorney who has rendered services to an estate may
17 be awarded reasonable compensation from the estate.

18 (4) If ~~When~~ costs and attorney ~~attorney's~~ fees are to be
19 paid from the estate under this section, s. 733.6171(4), s.
20 736.1005, or s. 736.1006, the court, in its discretion, may
21 direct from what part of the estate they shall be paid.

22 (a) If the court directs an assessment against a person's
23 part of the estate and such part is insufficient to fully pay
24 the assessment, the court may direct payment from the person's
25 part of a trust, if any, if a pourover will is involved and the
26 matter is interrelated with the trust.

27 (b) All or any part of the costs and attorney fees to be
28 paid from the estate may be assessed against one or more
29 persons' part of the estate in such proportions as the court
30 finds to be just and proper.

31 (c) In the exercise of its discretion, the court may
32 consider the following factors:

33 1. The relative impact of an assessment on the estimated
34 value of each person's part of the estate.

35 2. The amount of costs and attorney fees to be assessed
36 against a person's part of the estate.

37 3. The extent to which a person whose part of the estate is
38 to be assessed, individually or through counsel, actively
39 participated in the proceeding.

40 4. The potential benefit or detriment to a person's part of



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41 the estate expected from the outcome of the proceeding.

42 5. The relative strength or weakness of the merits of the
43 claims, defenses, or objections, if any, asserted by a person
44 whose part of the estate is to be assessed.

45 6. Whether a person whose part of the estate is to be
46 assessed was a prevailing party with respect to one or more
47 claims, defenses, or objections.

48 7. Whether a person whose part of the estate is to be
49 assessed unjustly caused an increase in the amount of costs and
50 attorney fees incurred by the personal representative or another
51 interested person in connection with the proceeding.

52 8. Any other relevant fact, circumstance, or equity.

53 (d) The court may assess a person's part of the estate
54 without finding that the person engaged in bad faith,
55 wrongdoing, or frivolousness.

56 Section 2. Paragraph (c) of subsection (2) and subsection
57 (3) of section 733.212, Florida Statutes, are amended to read:

58 733.212 Notice of administration; filing of objections.—

59 (2) The notice shall state:

60 (c) That any interested person on whom a copy of the notice
61 of administration is served must file on or before the date that
62 is 3 months after the date of service of a copy of the notice of
63 administration on that person any objection that challenges the
64 validity of the will, ~~the qualifications of the personal~~
65 ~~representative,~~ the venue, or the jurisdiction of the court. The
66 3-month time period may only be extended for estoppel based upon
67 a misstatement by the personal representative regarding the time
68 period within which an objection must be filed. The time period
69 may not be extended for any other reason, including affirmative



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70 representation, failure to disclose information, or misconduct
71 by the personal representative or any other person. Unless
72 sooner barred by subsection (3), all objections to the validity
73 of a will, venue, or the jurisdiction of the court must be filed
74 no later than the earlier of the entry of an order of final
75 discharge of the personal representative or 1 year after service
76 of the notice of administration.

77 (3) Any interested person on whom a copy of the notice of
78 administration is served must object to the validity of the
79 will, ~~the qualifications of the personal representative,~~ the
80 venue, or the jurisdiction of the court by filing a petition or
81 other pleading requesting relief in accordance with the Florida
82 Probate Rules on or before the date that is 3 months after the
83 date of service of a copy of the notice of administration on the
84 objecting person, or those objections are forever barred. The 3-
85 month time period may only be extended for estoppel based upon a
86 misstatement by the personal representative regarding the time
87 period within which an objection must be filed. The time period
88 may not be extended for any other reason, including affirmative
89 representation, failure to disclose information, or misconduct
90 by the personal representative or any other person. Unless
91 sooner barred by this subsection, all objections to the validity
92 of a will, venue, or the jurisdiction of the court must be filed
93 no later than the earlier of the entry of an order of final
94 discharge of the personal representative or 1 year after service
95 of the notice of administration.

96 Section 3. Section 733.2123, Florida Statutes, is amended
97 to read:

98 733.2123 Adjudication before issuance of letters.-A



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99 petitioner may serve formal notice of the petition for
100 administration on interested persons. A person who is served
101 with such notice before the issuance of letters or who has
102 waived notice may not challenge the validity of the will,
103 testacy of the decedent, ~~qualifications of the personal~~
104 ~~representative~~, venue, or jurisdiction of the court, except in
105 the proceedings before issuance of letters.

106 Section 4. Section 733.3101, Florida Statutes, is amended
107 to read:

108 733.3101 Personal representative not qualified.-

109 (1) A personal representative shall resign immediately if
110 the personal representative knows that he or she was not
111 qualified to act at the time of appointment.

112 (2) Any time a personal representative, who was qualified
113 to act at the time of appointment, knows or should have known
114 that he or she would not be qualified for appointment if
115 application for appointment were then made, the personal
116 representative shall promptly file and serve a notice setting
117 forth the reasons. The personal representative's notice shall
118 state that any interested person may petition to remove the
119 personal representative. An interested person on whom a copy of
120 the personal representative's notice is served may file a
121 petition requesting the personal representative's removal within
122 30 days after the date on which such notice is served.

123 (3) A personal representative who fails to comply with this
124 section shall be personally liable for costs, including attorney
125 attorney's fees, incurred in any removal proceeding, if the
126 personal representative is removed. This liability extends to a
127 personal representative who does not know, but should have



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128 known, of the facts that would have required him or her to
129 resign under subsection (1) or to file and serve notice under
130 subsection (2). This liability shall be cumulative to any other
131 provided by law.

132 (4) As used in this section, the term "qualified" means
133 that the personal representative is qualified under ss. 733.302
134 -733.305.

135 Section 5. Section 733.504, Florida Statutes, is amended to
136 read:

137 733.504 Removal of personal representative; causes for
138 removal.-A personal representative shall be removed and the
139 letters revoked if he or she was not qualified to act at the
140 time of appointment. A personal representative may be removed
141 and the letters revoked for any of the following causes,~~and the~~
142 ~~removal shall be in addition to any penalties prescribed by law:~~

143 (1) Adjudication that the personal representative is
144 incapacitated.

145 (2) Physical or mental incapacity rendering the personal
146 representative incapable of the discharge of his or her duties.

147 (3) Failure to comply with any order of the court, unless
148 the order has been superseded on appeal.

149 (4) Failure to account for the sale of property or to
150 produce and exhibit the assets of the estate when so required.

151 (5) Wasting or maladministration of the estate.

152 (6) Failure to give bond or security for any purpose.

153 (7) Conviction of a felony.

154 (8) Insolvency of, or the appointment of a receiver or
155 liquidator for, any corporate personal representative.

156 (9) Holding or acquiring conflicting or adverse interests



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157 against the estate that will or may interfere with the
158 administration of the estate as a whole. This cause of removal
159 shall not apply to the surviving spouse because of the exercise
160 of the right to the elective share, family allowance, or
161 exemptions, as provided elsewhere in this code.

162 (10) Revocation of the probate of the decedent's will that
163 authorized or designated the appointment of the personal
164 representative.

165 (11) Removal of domicile from Florida, if domicile was a
166 requirement of initial appointment.

167 (12) The personal representative was qualified to act at
168 the time of appointment, but is ~~would~~ not now ~~be~~ entitled to
169 appointment.

170
171 Removal under this section is in addition to any penalties
172 prescribed by law.

173 Section 6. Effective October 1, 2015, subsection (6) of
174 section 733.617, Florida Statutes, is amended, and subsection
175 (8) is added to that section, to read:

176 733.617 Compensation of personal representative.—

177 (6) Except as provided in subsection (8), a ~~If the~~ personal
178 representative who is a member of The Florida Bar and who has
179 rendered legal services in connection with the administration of
180 the estate, ~~then in addition to a fee as personal~~
181 ~~representative, there also~~ shall be allowed a fee for the legal
182 services rendered in addition to a fee as personal
183 representative.

184 (8) (a) An attorney, or a person related to the attorney, is
185 not entitled to compensation for serving as personal



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186 representative if the attorney prepared or supervised the
187 execution of the will that nominates the attorney or person
188 related to the attorney as personal representative, unless the
189 attorney or person nominated is related to the testator or the
190 attorney makes the following disclosures to the testator in
191 writing before the will is executed:

192 1. Subject to certain statutory limitations, most family
193 members regardless of their residence, other persons who are
194 residents of Florida, including friends, and corporate
195 fiduciaries are eligible to serve as a personal representative.

196 2. Any person, including an attorney, who serves as a
197 personal representative is entitled to receive reasonable
198 compensation for serving as personal representative.

199 3. Compensation payable to the personal representative is
200 in addition to any attorney fees payable to the attorney or the
201 attorney's firm for legal services rendered to the personal
202 representative.

203 (b) The testator must execute a written statement
204 acknowledging that the disclosures required by this subsection
205 were made prior to the execution of the will. The written
206 acknowledgment must be in a separate writing from the will, but
207 may be annexed to the will. The written acknowledgment may be
208 executed before or after the execution of the will in which the
209 attorney or related person is nominated as the personal
210 representative.

211 (c) For purposes of this subsection:

212 1. An attorney is deemed to have prepared or supervised the
213 execution of a will if the preparation or the supervision of the
214 execution of the will was performed by an employee or attorney



215 employed by the same firm as the attorney at the time the will
216 was executed.

217 2.a. A person is "related" to an individual if, at the time
218 the attorney prepared or supervised the execution of the will,
219 the person is:

220 (I) A spouse of the individual;

221 (II) A lineal ascendant or descendant of the individual;

222 (III) A sibling of the individual;

223 (IV) A relative of the individual or of the individual's
224 spouse with whom the attorney maintains a close, familial
225 relationship;

226 (V) A spouse of a person described in sub-sub-subparagraphs
227 (I)-(IV); or

228 (VI) A person who cohabits with the individual.

229 b. An employee or attorney employed by the same firm as the
230 attorney at the time the will is executed is deemed to be
231 related to the attorney.

232 3. An attorney or person related to the attorney is deemed
233 to be nominated in the will if the will provided the attorney or
234 a person related to the attorney with the power to nominate the
235 personal representative and the attorney or person related to
236 the attorney was nominated using that power.

237 (d) This subsection applies to provisions nominating an
238 attorney or a person related to the attorney as personal
239 representative, copersonal representative, or successor or
240 alternate personal representative if the person nominated is
241 unable or unwilling to serve.

242 (e) Other than compensation payable to the personal
243 representative, this subsection does not limit any rights or



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244 remedies that an interested person may have at law or equity.

245 (f) The failure to obtain a written acknowledgment from the
246 testator under this subsection does not disqualify a personal
247 representative from serving and does not affect the validity of
248 a will.

249 (g) A written acknowledgment signed by the testator that is
250 in substantially the following form is deemed to comply with the
251 disclosure requirements of this subsection:

252
253 I, ... (Name)..., declare that:

254 I have designated ... (my attorney, an attorney employed in
255 the same law firm as my attorney, or a person related to my
256 attorney)... as a nominated personal representative in my will
257 (or codicil) dated ... (Date)... .

258 Before executing the will (or codicil), I was informed
259 that:

260 (1) Subject to certain statutory limitations, most family
261 members regardless of their residence, other persons who are
262 residents of Florida, including friends, and corporate
263 fiduciaries are eligible to serve as a personal representative.

264 (2) Any person, including an attorney, who serves as a
265 personal representative is entitled to receive reasonable
266 compensation for serving as personal representative.

267 (3) Compensation payable to the personal representative is
268 in addition to any attorney fees payable to the attorney or the
269 attorney's firm for legal services rendered to the personal
270 representative.

271
272 ... (Testator)...



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273
274 ... (Dated) ...

275
276 (h) This subsection applies to each nomination made
277 pursuant to a will that is:

278 1. Executed by a resident of this state on or after October
279 1, 2015.

280 2. Republished by a resident of this state on or after
281 October 1, 2015, if the republished will nominates the attorney
282 who prepared or supervised the execution of the instrument that
283 republished the will, or a person related to such attorney, as
284 personal representative.

285 Section 7. Section 733.817, Florida Statutes, is amended to
286 read:

287 (Substantial rewording of section. See
288 s. 733.817, F.S., for present text.)

289 733.817 Apportionment of estate taxes.-

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

291 (a) "Fiduciary" means a person, other than the personal
292 representative in possession of property included in the measure
293 of the tax, who is liable to the applicable taxing authority for
294 payment of the entire tax to the extent of the value of the
295 property in possession.

296 (b) "Generation-skipping transfer tax" means the
297 generation-skipping transfer tax imposed by chapter 13 of the
298 Internal Revenue Code on direct skips of interests includible in
299 the federal gross estate or a corresponding tax imposed by any
300 state or country or political subdivision of the foregoing. The
301 term does not include the generation-skipping transfer tax on



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302 taxable distributions, taxable terminations, or any other
303 generation-skipping transfer. The terms "direct skip," "taxable
304 distribution," and "taxable termination" have the same meanings
305 as provided in s. 2612 of the Internal Revenue Code.

306 (c) "Governing instrument" means a will, trust instrument,
307 or any other document that controls the transfer of property on
308 the occurrence of the event with respect to which the tax is
309 being levied.

310 (d) "Gross estate" means the gross estate, as determined by
311 the Internal Revenue Code with respect to the federal estate tax
312 and the Florida estate tax, and as that concept is otherwise
313 determined by the estate, inheritance, or death tax laws of the
314 particular state, country, or political subdivision whose tax is
315 being apportioned.

316 (e) "Included in the measure of the tax" means for each
317 separate tax that an interest may incur, only interests included
318 in the measure of that particular tax are considered. As used in
319 this section, the term does not include:

320 1. Any interest, whether passing under the will or not, to
321 the extent the interest is initially deductible from the gross
322 estate, without regard to any subsequent reduction of the
323 deduction by reason of the charge of any part of the applicable
324 tax to the interest. If an election is required for
325 deductibility, an interest is not initially deductible unless
326 the election for deductibility is allowed.

327 2. Interests or amounts that are not included in the gross
328 estate but are included in the amount upon which the applicable
329 tax is computed, such as adjusted taxable gifts pursuant to s.
330 2001 of the Internal Revenue Code.



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331 3. Gift taxes included in the gross estate pursuant to s.
332 2035 of the Internal Revenue Code and the portion of any inter
333 vivos transfer included in the gross estate pursuant to s. 529
334 of the Internal Revenue Code, notwithstanding inclusion in the
335 gross estate.

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

338 (g) "Net tax" means the net tax payable to the particular
339 state, country, or political subdivision whose tax is being
340 apportioned, after taking into account all credits against the
341 applicable tax except as provided in this section. With respect
342 to the federal estate tax, net tax is determined after taking
343 into account all credits against the tax except for the credit
344 for foreign death taxes and except for the credit or deduction
345 for state taxes imposed by states other than this state.

346 (h) "Nonresiduary devise" means any devise that is not a
347 residuary devise.

348 (i) "Nonresiduary interest," in connection with a trust,
349 means any interest in a trust which is not a residuary interest.

350 (j) "Recipient" means, with respect to property or an
351 interest in property included in the gross estate, an heir at
352 law in an intestate estate, devisee in a testate estate,
353 beneficiary of a trust, beneficiary of a life insurance policy,
354 annuity, or other contractual right, surviving tenant, taker as
355 a result of the exercise or in default of the exercise of a
356 general power of appointment, person who receives or is to
357 receive the property or an interest in the property, or person
358 in possession of the property, other than a creditor.

359 (k) "Residuary devise" has the meaning in s. 731.201.



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360 (l) "Residuary interest," in connection with a trust, means
361 an interest in the assets of a trust which remain after
362 provision for any distribution that is to be satisfied by
363 reference to a specific property or type of property, fund, sum,
364 or statutory amount.

365 (m) "Revocable trust" means a trust as described in s.
366 733.707(3).

367 (n) "Section 2044 interest" means an interest included in
368 the measure of the tax by reason of s. 2044 of the Internal
369 Revenue Code.

370 (o) "State" means any state, territory, or possession of
371 the United States, the District of Columbia, or the Commonwealth
372 of Puerto Rico.

373 (p) "Tax" means any estate tax, inheritance tax,
374 generation-skipping transfer tax, or other tax levied or
375 assessed under the laws of this or any other state, the United
376 States, any other country, or any political subdivision of the
377 foregoing, as finally determined, which is imposed as a result
378 of the death of the decedent. The term also includes any
379 interest or penalties imposed in addition to the tax. Unless the
380 context indicates otherwise, the term means each separate tax.
381 The term does not include any additional estate tax imposed by
382 s. 2032A(c) or s. 2057(f) of the Internal Revenue Code or a
383 corresponding tax imposed by any state or country or political
384 subdivision of the foregoing. The additional estate tax imposed
385 shall be apportioned as provided in s. 2032A or s. 2057 of the
386 Internal Revenue Code.

387 (q) "Temporary interest" means an interest in income or an
388 estate for a specific period of time, for life, or for some



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389 other period controlled by reference to extrinsic events,
390 whether or not in trust.

391 (r) "Tentative Florida tax" with respect to any property
392 means the net Florida estate tax that would have been
393 attributable to that property if no tax were payable to any
394 other state in respect of that property.

395 (s) "Value" means the pecuniary worth of the interest
396 involved as finally determined for purposes of the applicable
397 tax after deducting any debt, expense, or other deduction
398 chargeable to it for which a deduction was allowed in
399 determining the amount of the applicable tax. A lien or other
400 encumbrance is not regarded as chargeable to a particular
401 interest to the extent that it will be paid from other
402 interests. The value of an interest is not reduced by reason of
403 the charge against it of any part of the tax, except as provided
404 in paragraph (3) (a).

405 (2) ALLOCATION OF TAX.—Except as effectively directed in
406 the governing instrument pursuant to subsection (4), the net tax
407 attributable to the interests included in the measure of each
408 tax shall be determined by the proportion that the value of each
409 interest included in the measure of the tax bears to the total
410 value of all interests included in the measure of the tax.

411 Notwithstanding the foregoing provision of this subsection and
412 except as effectively directed in the governing instrument:

413 (a) The net tax attributable to section 2044 interests
414 shall be determined in the manner provided for the federal
415 estate tax in s. 2207A of the Internal Revenue Code, and the
416 amount so determined shall be deducted from the tax to determine
417 the net tax attributable to all other interests included in the



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418 measure of the tax.

419 (b) The foreign tax credit allowed with respect to the
420 federal estate tax shall be allocated among the recipients of
421 interests finally charged with the payment of the foreign tax in
422 reduction of any federal estate tax chargeable to the recipients
423 of the foreign interests, whether or not any federal estate tax
424 is attributable to the foreign interests. Any excess of the
425 foreign tax credit shall be applied to reduce proportionately
426 the net amount of federal estate tax chargeable to the remaining
427 recipients of the interests included in the measure of the
428 federal estate tax.

429 (c) The reduction in the net tax attributable to the
430 deduction for state death taxes allowed by s. 2058 of the
431 Internal Revenue Code shall be allocated to the recipients of
432 the interests that produced the deduction. For this purpose, the
433 reduction in the net tax shall be calculated in the manner
434 provided for interests other than those described in paragraph
435 (a).

436 (d) The reduction in the Florida tax, if one is imposed, on
437 the estate of a Florida resident for tax paid to another state
438 shall be allocated as follows:

439 1. If the net tax paid to another state is greater than or
440 equal to the tentative Florida tax attributable to the property
441 subject to tax in the other state, none of the Florida tax shall
442 be attributable to that property.

443 2. If the net tax paid to another state is less than the
444 tentative Florida tax attributable to the property subject to
445 tax in the other state, the net Florida tax attributable to the
446 property subject to tax in the other state shall be the excess



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447 of the amount of the tentative Florida tax attributable to the
448 property over the net tax payable to the other state with
449 respect to the property.

450 3. Any remaining net Florida tax shall be attributable to
451 property included in the measure of the Florida tax exclusive of
452 the property subject to tax in another state.

453 4. The net federal tax attributable to the property subject
454 to tax in the other state shall be determined as if the property
455 were located in that state.

456 (e) The net tax attributable to a temporary interest, if
457 any, is regarded as attributable to the principal that supports
458 the temporary interest.

459 (3) APPORTIONMENT OF TAX.—Except as otherwise effectively
460 directed in the governing instrument pursuant to subsection (4),
461 the net tax attributable to each interest shall be apportioned
462 as follows:

463 (a) Generation-skipping transfer tax.—Any federal or state
464 generation-skipping transfer tax shall be apportioned as
465 provided in s. 2603 of the Internal Revenue Code after the
466 application of the remaining provisions of this subsection to
467 taxes other than the generation-skipping transfer tax.

468 (b) Section 2044 interests.—The net tax attributable to
469 section 2044 interests shall be apportioned among the recipients
470 of the section 2044 interests in the proportion that the value
471 of each section 2044 interest bears to the total of all section
472 2044 interests. The net tax apportioned by this paragraph to
473 section 2044 interests that pass in the manner described in
474 paragraph (c) or paragraph (d) shall be apportioned to the
475 section 2044 interests in the manner described in those



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476 paragraphs before the apportionment of the net tax attributable
477 to the other interests passing as provided in those paragraphs.
478 The net tax attributable to the interests other than the section
479 2044 interests which pass in the manner described in paragraph
480 (c) or paragraph (d) shall be apportioned only to such other
481 interests pursuant to those paragraphs.

482 (c) *Wills*.—The net tax attributable to property passing
483 under the decedent's will shall be apportioned in the following
484 order of priority:

485 1. The net tax attributable to nonresiduary devises shall
486 be charged to and paid from the residuary estate, whether or not
487 all interests in the residuary estate are included in the
488 measure of the tax. If the residuary estate is insufficient to
489 pay the net tax attributable to all nonresiduary devises, the
490 balance of the net tax attributable to nonresiduary devises
491 shall be apportioned among the recipients of the nonresiduary
492 devises in the proportion that the value of each nonresiduary
493 devise included in the measure of the tax bears to the total of
494 all nonresiduary devises included in the measure of the tax.

495 2. The net tax attributable to residuary devises shall be
496 apportioned among the recipients of the residuary devises
497 included in the measure of the tax in the proportion that the
498 value of each residuary devise included in the measure of the
499 tax bears to the total of all residuary devises included in the
500 measure of the tax. If the residuary estate is insufficient to
501 pay the net tax attributable to all residuary devises, the
502 balance of the net tax attributable to residuary devises shall
503 be apportioned among the recipients of the nonresiduary devises
504 in the proportion that the value of each nonresiduary devise



505 included in the measure of the tax bears to the total of all
506 nonresiduary devises included in the measure of the tax.

507 (d) Trusts.—The net tax attributable to property passing
508 under the terms of any trust other than a trust created in the
509 decedent's will shall be apportioned in the following order of
510 priority:

511 1. The net tax attributable to nonresiduary interests of
512 the trust shall be charged to and paid from the residuary
513 portion of the trust, whether or not all interests in the
514 residuary portion are included in the measure of the tax. If the
515 residuary portion is insufficient to pay the net tax
516 attributable to all nonresiduary interests, the balance of the
517 net tax attributable to nonresiduary interests shall be
518 apportioned among the recipients of the nonresiduary interests
519 in the proportion that the value of each nonresiduary interest
520 included in the measure of the tax bears to the total of all
521 nonresiduary interests included in the measure of the tax.

522 2. The net tax attributable to residuary interests of the
523 trust shall be apportioned among the recipients of the residuary
524 interests of the trust included in the measure of the tax in the
525 proportion that the value of each residuary interest included in
526 the measure of the tax bears to the total of all residuary
527 interests of the trust included in the measure of the tax. If
528 the residuary portion is insufficient to pay the net tax
529 attributable to all residuary interests, the balance of the net
530 tax attributable to residuary interests shall be apportioned
531 among the recipients of the nonresiduary interests in the
532 proportion that the value of each nonresiduary interest included
533 in the measure of the tax bears to the total of all nonresiduary



534 interests included in the measure of the tax.

535

536 Except as provided in paragraph (g), this paragraph applies
537 separately for each trust.

538 (e) Protected homestead, exempt property, and family
539 allowance.—

540 1. The net tax attributable to an interest in protected
541 homestead, exempt property, and the family allowance determined
542 under s. 732.403 shall be apportioned against the recipients of
543 other interests in the estate or passing under any revocable
544 trust in the following order of priority:

545 a. Class I.—Recipients of interests passing by intestacy
546 that are included in the measure of the federal estate tax.

547 b. Class II.—Recipients of residuary devises, residuary
548 interests, and pretermitted shares under ss. 732.301 and 732.302
549 that are included in the measure of the federal estate tax.

550 c. Class III.—Recipients of nonresiduary devises and
551 nonresiduary interests that are included in the measure of the
552 federal estate tax.

553 2. Any net tax apportioned to a class pursuant to this
554 paragraph shall be apportioned among each recipient in the class
555 in the proportion that the value of the interest of each bears
556 to the total value of all interests included in that class. A
557 tax may not be apportioned under this paragraph to the portion
558 of any interest applied in satisfaction of the elective share
559 whether or not included in the measure of the tax. For purposes
560 of this paragraph, if the value of the interests described in s.
561 732.2075(1) exceeds the amount of the elective share, the
562 elective share shall be treated as satisfied first from



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563 interests other than those described in classes I, II, and III,
564 and to the extent that those interests are insufficient to
565 satisfy the elective share, from the interests passing to or for
566 the benefit of the surviving spouse described in classes I, II,
567 and III, beginning with those described in class I, until the
568 elective share is satisfied. This paragraph has priority over
569 paragraphs (a) and (h).

570 3. The balance of the net tax attributable to any interest
571 in protected homestead, exempt property, and the family
572 allowance determined under s. 732.403 which is not apportioned
573 under the preceding provisions of this paragraph shall be
574 apportioned to the recipients of those interests included in the
575 measure of the tax in the proportion that the value of each
576 bears to the total value of those interests included in the
577 measure of the tax.

578 (f) Construction.—For purposes of this subsection:

579 1. If the decedent's estate is the beneficiary of a life
580 insurance policy, annuity, or contractual right included in the
581 decedent's gross estate, or is the taker as a result of the
582 exercise or default in exercise of a general power of
583 appointment held by the decedent, that interest shall be
584 regarded as passing under the terms of the decedent's will for
585 the purposes of paragraph (c) or by intestacy if not disposed of
586 by will. Additionally, any interest included in the measure of
587 the tax by reason of s. 2041 of the Internal Revenue Code
588 passing to the decedent's creditors or the creditors of the
589 decedent's estate shall be regarded as passing to the decedent's
590 estate for the purpose of this subparagraph.

591 2. If a trust is the beneficiary of a life insurance



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592 policy, annuity, or contractual right included in the decedent's
593 gross estate, or is the taker as a result of the exercise or
594 default in exercise of a general power of appointment held by
595 the decedent, that interest shall be regarded as passing under
596 the trust for purposes of paragraph (d).

597 (g) Common instrument construction.—In the application of
598 this subsection, paragraphs (b)-(f) shall be applied to
599 apportion the net tax to the recipients under certain governing
600 instruments as if all recipients under those instruments, other
601 than the estate or revocable trust itself, were taking under a
602 common instrument. This construction applies to the following:

603 1. The decedent's will and revocable trust if the estate is
604 a beneficiary of the revocable trust or if the revocable trust
605 is a beneficiary of the estate.

606 2. A revocable trust of the decedent and another revocable
607 trust of the decedent if either trust is the beneficiary of the
608 other trust.

609 (h) Other interests.—The net tax that is not apportioned to
610 interests under paragraphs (b)-(g), including, but not limited
611 to, the net tax attributable to interests passing by intestacy,
612 interests applied in satisfaction of the elective share pursuant
613 to s. 732.2075(2), interests passing by reason of the exercise
614 or nonexercise of a general power of appointment, jointly held
615 interests passing by survivorship, life insurance, properties in
616 which the decedent held a reversionary or revocable interest,
617 annuities, and contractual rights, shall be apportioned among
618 the recipients of the remaining interests included in the
619 measure of the tax in the proportion that the value of each such
620 interest bears to the total value of all remaining interests



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621 included in the measure of the tax.

622 (i) Assessment of liability by court.—If the court finds
623 that:

624 1. It is inequitable to apportion interest or penalties, or
625 both, in the manner provided in paragraphs (a)-(h), the court
626 may assess liability for the payment thereof in the manner that
627 the court finds equitable.

628 2. The payment of any tax was not effectively directed in
629 the governing instrument pursuant to subsection (4) and that
630 such tax is not apportioned by this subsection, the court may
631 assess liability for the payment of such tax in the manner that
632 the court finds equitable.

633 (4) DIRECTION AGAINST APPORTIONMENT.—

634 (a) Except as provided in this subsection, a governing
635 instrument may not direct that taxes be paid from property other
636 than that passing under the governing instrument.

637 (b) For a direction in a governing instrument to be
638 effective to direct payment of taxes attributable to property
639 passing under the governing instrument in a manner different
640 from that provided in this section, the direction must be
641 express.

642 (c) For a direction in a governing instrument to be
643 effective to direct payment of taxes attributable to property
644 not passing under the governing instrument from property passing
645 under the governing instrument, the governing instrument must
646 expressly direct that the property passing under the governing
647 instrument bear the burden of taxation for property not passing
648 under the governing instrument. Except as provided in paragraph
649 (d), a direction in the governing instrument to the effect that



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650 all taxes are to be paid from property passing under the
651 governing instrument whether attributable to property passing
652 under the governing instrument or otherwise shall be effective
653 to direct payment from property passing under the governing
654 instrument of taxes attributable to property not passing under
655 the governing instrument.

656 (d) In addition to satisfying the other provisions of this
657 subsection:

658 1.a. For a direction in the decedent's will or revocable
659 trust to be effective in waiving the right of recovery provided
660 in s. 2207A of the Internal Revenue Code for the tax
661 attributable to section 2044 interests, and for any tax imposed
662 by Florida based upon such section 2044 interests, the direction
663 must expressly waive that right of recovery. An express
664 direction that property passing under the will or revocable
665 trust bear the tax imposed by s. 2044 of the Internal Revenue
666 Code is deemed an express waiver of the right of recovery
667 provided in s. 2207A of the Internal Revenue Code. A reference
668 to "qualified terminable interest property," "QTIP," or property
669 in which the decedent had a "qualifying income interest for
670 life" is deemed to be a reference to property upon which tax is
671 imposed by s. 2044 of the Internal Revenue Code which is subject
672 to the right of recovery provided in s. 2207A of the Internal
673 Revenue Code.

674 b. If property is included in the gross estate pursuant to
675 ss. 2041 and 2044 of the Internal Revenue Code, the property is
676 deemed included under s. 2044, and not s. 2041, for purposes of
677 allocation and apportionment of the tax.

678 2. For a direction in the decedent's will or revocable



679 trust to be effective in waiving the right of recovery provided
680 in s. 2207B of the Internal Revenue Code for tax imposed by
681 reason of s. 2036 of the Internal Revenue Code, and any tax
682 imposed by Florida based upon s. 2036 of the Internal Revenue
683 Code, the direction must expressly waive that right of recovery.
684 An express direction that property passing under the will or
685 revocable trust bear the tax imposed by s. 2036 of the Internal
686 Revenue Code is deemed an express waiver of the right of
687 recovery provided in s. 2207B of the Internal Revenue Code. If
688 property is included in the gross estate pursuant to ss. 2036
689 and 2038 of the Internal Revenue Code, the property is deemed
690 included under s. 2038, not s. 2036, for purposes of allocation
691 and apportionment of the tax, and there is no right of recovery
692 under s. 2207B of the Internal Revenue Code.

693 3. A general statement in the decedent's will or revocable
694 trust waiving all rights of reimbursement or recovery under the
695 Internal Revenue Code is not an express waiver of the rights of
696 recovery provided in s. 2207A or s. 2207B of the Internal
697 Revenue Code.

698 4. For a direction in a governing instrument to be
699 effective to direct payment of generation-skipping transfer tax
700 in a manner other than as provided in s. 2603 of the Internal
701 Revenue Code, and any tax imposed by Florida based on s. 2601 of
702 the Internal Revenue Code, the direction must specifically
703 reference the tax imposed by s. 2601 of the Internal Revenue
704 Code. A reference to the generation-skipping transfer tax or s.
705 2603 of the Internal Revenue Code is deemed to be a reference to
706 property upon which tax is imposed by reason of s. 2601 of the
707 Internal Revenue Code.



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708 (e) If the decedent expressly directs by will, the net tax
709 attributable to property over which the decedent held a general
710 power of appointment may be determined in a manner other than as
711 provided in subsection (2) if the net tax attributable to that
712 property does not exceed the difference between the total net
713 tax determined pursuant to subsection (2), determined without
714 regard to this paragraph, and the total net tax that would have
715 been payable if the value of the property subject to such power
716 of appointment had not been included in the decedent's gross
717 estate. If tax is attributable to one or more section 2044
718 interests pursuant to subsection (2), the net tax attributable
719 to the section 2044 interests shall be calculated before the
720 application of this paragraph unless the decedent expressly
721 directs otherwise by will.

722 (f) If the decedent's will expressly provides that the tax
723 is to be apportioned as provided in the decedent's revocable
724 trust by specific reference to the revocable trust, an express
725 direction in the revocable trust is deemed to be a direction
726 contained in the will as well as the revocable trust.

727 (g) An express direction in the decedent's will to pay tax
728 from the decedent's revocable trust by specific reference to the
729 revocable trust is effective unless a contrary express direction
730 is contained in the revocable trust.

731 (h) If governing instruments contain effective directions
732 that conflict as to payment of taxes, the most recently executed
733 tax apportionment provision controls to the extent of the
734 conflict. For the purpose of this subsection, if a will or other
735 governing instrument is amended, the date of the codicil to the
736 will or amendment to the governing instrument is regarded as the



737 date of the will or other governing instrument only if the
738 codicil or amendment contains an express tax apportionment
739 provision or an express modification of the tax apportionment
740 provision. A general statement ratifying or republishing all
741 provisions not otherwise amended does not meet this condition.
742 If the decedent's will and another governing instrument were
743 executed on the same date, the will is deemed executed after the
744 other governing instrument. The earlier conflicting governing
745 instrument controls as to any tax remaining unpaid after the
746 application of the later conflicting governing instrument.

747 (i) A grant of permission or authority in a governing
748 instrument to request payment of tax from property passing under
749 another governing instrument is not a direction apportioning the
750 tax to the property passing under the other governing
751 instrument. A grant of permission or authority in a governing
752 instrument to pay tax attributable to property not passing under
753 the governing instrument is not a direction apportioning the tax
754 to property passing under the governing instrument.

755 (j) This section applies to any tax remaining to be paid
756 after the application of any effective express directions. An
757 effective express direction for payment of tax on specific
758 property or a type of property in a manner different from that
759 provided in this section is not effective as an express
760 direction for payment of tax on other property or other types of
761 property included in the measure of the tax.

762 (5) TRANSFER OF PROPERTY.—A personal representative or
763 fiduciary shall not be required to transfer to a recipient any
764 property reasonably anticipated to be necessary for the payment
765 of taxes. Further, the personal representative or fiduciary is



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766 not required to transfer any property to the recipient until the
767 amount of the tax due from the recipient is paid by the
768 recipient. If property is transferred before final apportionment
769 of the tax, the recipient shall provide a bond or other security
770 for his or her apportioned liability in the amount and form
771 prescribed by the personal representative or fiduciary.

772 (6) ORDER OF APPORTIONMENT.—

773 (a) The personal representative may petition at any time
774 for an order of apportionment. If administration of the
775 decedent's estate has not commenced at any time after 90 days
776 from the decedent's death, any fiduciary may petition for an
777 order of apportionment in the court in which venue would be
778 proper for administration of the decedent's estate. Notice of
779 the petition for order of apportionment must be served on all
780 interested persons in the manner provided for service of formal
781 notice. At any time after 6 months from the decedent's death,
782 any recipient may petition the court for an order of
783 apportionment.

784 (b) The court shall determine all issues concerning
785 apportionment. If the tax to be apportioned has not been finally
786 determined, the court shall determine the probable tax due or to
787 become due from all interested persons, apportion the probable
788 tax, and retain jurisdiction over the parties and issues to
789 modify the order of apportionment as appropriate until after the
790 tax is finally determined.

791 (7) DEFICIENCY.—

792 (a) If the personal representative or fiduciary does not
793 have possession of sufficient property otherwise distributable
794 to the recipient to pay the tax apportioned to the recipient,



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795 whether under this section, the Internal Revenue Code, or the
796 governing instrument, if applicable, the personal representative
797 or fiduciary shall recover the deficiency in tax so apportioned
798 to the recipient:

799 1. From the fiduciary in possession of the property to
800 which the tax is apportioned, if any; and

801 2. To the extent of any deficiency in collection from the
802 fiduciary, or to the extent collection from the fiduciary is
803 excused pursuant to subsection (8) and in all other cases, from
804 the recipient of the property to which the tax is apportioned,
805 unless relieved of this duty as provided in subsection (8).

806 (b) In any action to recover the tax apportioned, the order
807 of apportionment is prima facie correct.

808 (c) In any action for the enforcement of an order of
809 apportionment, the court shall award taxable costs as in
810 chancery actions, including reasonable attorney fees, and may
811 award penalties and interest on the unpaid tax in accordance
812 with equitable principles.

813 (d) This subsection does not authorize the recovery of any
814 tax from a company issuing life insurance included in the gross
815 estate, or from a bank, trust company, savings and loan
816 association, or similar institution with respect to any account
817 in the name of the decedent and any other person which passed by
818 operation of law at the decedent's death.

819 (8) RELIEF FROM DUTY.—

820 (a) A personal representative or fiduciary who has the duty
821 under this section of collecting the apportioned tax from
822 recipients may be relieved of the duty to collect the tax by an
823 order of the court finding that:



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824 1. The estimated court costs and attorney fees in
825 collecting the apportioned tax from a person against whom the
826 tax has been apportioned will approximate or exceed the amount
827 of the recovery;

828 2. The person against whom the tax has been apportioned is
829 a resident of a foreign country other than Canada and refuses to
830 pay the apportioned tax on demand; or

831 3. It is impracticable to enforce contribution of the
832 apportioned tax against a person against whom the tax has been
833 apportioned in view of the improbability of obtaining a judgment
834 or the improbability of collection under any judgment that might
835 be obtained, or otherwise.

836 (b) A personal representative or fiduciary is not liable
837 for failure to attempt to enforce collection if the personal
838 representative or fiduciary reasonably believes that collection
839 would have been economically impracticable.

840 (9) UNCOLLECTED TAX.—Any apportioned tax that is not
841 collected shall be reapportioned in accordance with this section
842 as if the portion of the property to which the uncollected tax
843 had been apportioned had been exempt.

844 (10) CONTRIBUTION.—This section does not limit the right of
845 any person who has paid more than the amount of the tax
846 apportionable to that person, calculated as if all apportioned
847 amounts would be collected, to obtain contribution from those
848 who have not paid the full amount of the tax apportionable to
849 them, calculated as if all apportioned amounts would be
850 collected, and that right is hereby conferred. In any action to
851 enforce contribution, the court shall award taxable costs as in
852 chancery actions, including reasonable attorney fees.



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853 (11) FOREIGN TAX.—This section does not require the
854 personal representative or fiduciary to pay any tax levied or
855 assessed by a foreign country unless specific directions to that
856 effect are contained in the will or other instrument under which
857 the personal representative or fiduciary is acting.

858 Section 8. Effective October 1, 2015, subsection (4) is
859 added to section 736.0708, Florida Statutes, to read:

860 736.0708 Compensation of trustee.—

861 (4) (a) An attorney, or a person related to the attorney, is
862 not entitled to compensation for serving as trustee if the
863 attorney prepared or supervised the execution of the trust
864 instrument that appoints the attorney or person related to the
865 attorney as trustee, unless the attorney or person appointed is
866 related to the settlor or the attorney makes the following
867 disclosures to the settlor in writing before the trust
868 instrument is executed:

869 1. Unless specifically disqualified by the terms of the
870 trust instrument, any person, regardless of his or her
871 residence, including a family member, friend, or corporate
872 fiduciary is eligible to serve as a trustee.

873 2. Any person, including an attorney, who serves as a
874 trustee is entitled to receive reasonable compensation for
875 serving as trustee.

876 3. Compensation payable to the trustee is in addition to
877 any attorney fees payable to the attorney or the attorney's firm
878 for legal services rendered to the trustee.

879 (b) The settlor must execute a written statement
880 acknowledging that the disclosures required by this subsection
881 were made before the execution of the trust instrument. The



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882 written acknowledgment must be in a separate writing from the
883 trust instrument, but may be annexed to the trust instrument.
884 The written acknowledgment may be executed before or after the
885 execution of the trust instrument in which the attorney or
886 related person is appointed as the trustee.

887 (c) For purposes of this subsection:

888 1. An attorney is deemed to have prepared or supervised the
889 execution of a trust instrument if the preparation or the
890 supervision of the execution of the trust instrument was
891 performed by an employee or attorney employed by the same firm
892 as the attorney at the time the trust instrument was executed.

893 2.a. A person is "related" to an individual if, at the time
894 the attorney prepared or supervised the execution of the trust
895 instrument, the person is:

896 (I) A spouse of the individual;

897 (II) A lineal ascendant or descendant of the individual;

898 (III) A sibling of the individual;

899 (IV) A relative of the individual or of the individual's
900 spouse with whom the lawyer maintains a close, familial
901 relationship;

902 (V) A spouse of a person described in sub-sub-subparagraphs
903 (I)-(IV); or

904 (VI) A person who cohabitates with the individual.

905 b. An employee or attorney employed by the same firm as the
906 attorney at the time the trust instrument is executed is deemed
907 to be related to the attorney.

908 3. An attorney or person related to the attorney is deemed
909 to be appointed in the trust instrument if the trust instrument
910 provided the attorney or a person related to the attorney with



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911 the power to appoint the trustee and the attorney or person
912 related to the attorney was appointed using that power.

913 (d) This subsection applies to provisions appointing an
914 attorney or a person related to the attorney as trustee,
915 cotrustee, or as successor or alternate trustee if the person
916 appointed is unable or unwilling to serve.

917 (e) Other than compensation payable to the trustee, this
918 subsection does not limit any rights or remedies that an
919 interested person may have at law or equity.

920 (f) The failure to obtain a written acknowledgment from the
921 settlor under this subsection does not disqualify a trustee from
922 serving and does not affect the validity of a trust instrument.

923 (g) A written acknowledgment signed by the settlor that is
924 in substantially the following form is deemed to comply with the
925 disclosure requirements of this subsection:

926
927 I, ...(Name)... declare that:

928 I have designated ...(my attorney, an attorney employed in
929 the same law firm as my attorney, or a person related to my
930 attorney)... as a trustee in my trust instrument dated
931 ...(Date)....

932 Before executing the trust, I was informed that:

933 1. Unless specifically disqualified by the terms of the
934 trust instrument, any person, regardless of his or her
935 residence, including a family member, friend, or corporate
936 fiduciary is eligible to serve as a trustee.

937 2. Any person, including an attorney, who serves as a
938 trustee is entitled to receive reasonable compensation for
939 serving as trustee.



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940 3. Compensation payable to the trustee is in addition to
941 any attorney fees payable to the attorney or the attorney's firm
942 for legal services rendered to the trustee.

943
944 ...(Settlor)...

945
946 ...(Dated)...

947

948 (h) This subsection applies to each appointment made
949 pursuant to a trust instrument that is:

950 1. Executed by a resident of this state on or after October
951 1, 2015.

952 2. Amended by a resident of this state on or after October
953 1, 2015, if the trust instrument appoints the attorney who
954 prepared or supervised the execution of the amendment, or a
955 person related to such attorney, as trustee.

956 Section 9. Section 736.1005, Florida Statutes, is amended
957 to read:

958 736.1005 Attorney ~~attorney's~~ fees for services to the
959 trust.—

960 (1) Any attorney who has rendered services to a trust may
961 be awarded reasonable compensation from the trust. The attorney
962 may apply to the court for an order awarding attorney ~~attorney's~~
963 ~~fees and~~, after notice and service on the trustee and all
964 beneficiaries entitled to an accounting under s. 736.0813, the
965 court shall enter an order on the fee application.

966 (2) If attorney ~~Whenever attorney's~~ fees are to be paid
967 ~~from out of~~ the trust under subsection (1), s. 736.1007(5)(a),
968 or s. 733.106(4)(a), the court, in its discretion, may direct



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969 from what part of the trust the fees shall be paid.

970 (a) All or any part of the attorney fees to be paid from
971 the trust may be assessed against one or more persons' part of
972 the trust in such proportions as the court finds to be just and
973 proper.

974 (b) In the exercise of its discretion, the court may
975 consider the following factors:

976 1. The relative impact of an assessment on the estimated
977 value of each person's part of the trust.

978 2. The amount of attorney fees to be assessed against a
979 person's part of the trust.

980 3. The extent to which a person whose part of the trust is
981 to be assessed, individually or through counsel, actively
982 participated in the proceeding.

983 4. The potential benefit or detriment to a person's part of
984 the trust expected from the outcome of the proceeding.

985 5. The relative strength or weakness of the merits of the
986 claims, defenses, or objections, if any, asserted by a person
987 whose part of the trust is to be assessed.

988 6. Whether a person whose part of the trust is to be
989 assessed was a prevailing party with respect to one or more
990 claims, defenses, or objections.

991 7. Whether a person whose part of the trust is to be
992 assessed unjustly caused an increase in the amount of attorney
993 fees incurred by the trustee or another person in connection
994 with the proceeding.

995 8. Any other relevant fact, circumstance, or equity.

996 (c) The court may assess a person's part of the trust
997 without finding that the person engaged in bad faith,



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998 wrongdoing, or frivolousness.

999 (3) Except when a trustee's interest may be adverse in a
1000 particular matter, the attorney shall give reasonable notice in
1001 writing to the trustee of the attorney's retention by an
1002 interested person and the attorney's entitlement to fees
1003 pursuant to this section. A court may reduce any fee award for
1004 services rendered by the attorney prior to the date of actual
1005 notice to the trustee, if the actual notice date is later than a
1006 date of reasonable notice. In exercising this discretion, the
1007 court may exclude compensation for services rendered after the
1008 reasonable notice date but before ~~prior to~~ the date of actual
1009 notice.

1010 Section 10. Section 736.1006, Florida Statutes, is amended
1011 to read:

1012 736.1006 Costs in trust proceedings.—

1013 (1) In all trust proceedings, costs may be awarded as in
1014 chancery actions.

1015 (2) If ~~Whenever~~ costs are to be paid ~~from out of~~ the trust
1016 under subsection (1) or s. 733.106(4) (a), the court, in its
1017 discretion, may direct from what part of the trust the costs
1018 shall be paid. All or any part of the costs to be paid from the
1019 trust may be assessed against one or more persons' part of the
1020 trust in such proportions as the court finds to be just and
1021 proper. In the exercise of its discretion, the court may
1022 consider the factors set forth in s. 736.1005(2).

1023 Section 11. The amendments made by this act to ss. 733.212,
1024 733.2123, 733.3101, and 733.504, Florida Statutes, are remedial
1025 in nature, are intended to clarify existing law, and apply
1026 retroactively to all proceedings pending or commenced on or



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1027 after July 1, 2015.

1028 Section 12. (1) The amendment made by this act to s.
1029 733.817(1)(g) and (2)(c), Florida Statutes, is remedial in
1030 nature, is intended to clarify existing law, and applies
1031 retroactively to all proceedings pending or commenced on or
1032 after July 1, 2015, in which the apportionment of taxes has not
1033 been finally determined or agreed for the estates of decedents
1034 who die after December 31, 2004.

1035 (2) The amendment made by this act to s. 733.817(1)(e)3.,
1036 (3)(e), (3)(g), (4)(b), (4)(c), (4)(d)1.b., (4)(e), (4)(h), and
1037 (6), Florida Statutes, applies to the estates of decedents who
1038 die on or after July 1, 2015.

1039 (3) Except as provided in subsections (1) and (2), the
1040 amendment made by this act to s. 733.817, Florida Statutes, is
1041 remedial in nature, is intended to clarify existing law, and
1042 applies retroactively to all proceedings pending or commenced on
1043 or after July 1, 2015, in which the apportionment of taxes has
1044 not been finally determined or agreed and without regard to the
1045 date of the decedent's death.

1046 Section 13. The amendments made by this act to ss. 733.106,
1047 736.1005, and 736.1006, Florida Statutes, apply to proceedings
1048 commenced on or after July 1, 2015. The law in effect before
1049 July 1, 2015, applies to proceedings commenced before that date.

1050 Section 14. Except as otherwise expressly provided in this
1051 act, this act shall take effect July 1, 2015.

1052
1053 ===== T I T L E A M E N D M E N T =====

1054 And the title is amended as follows:

1055 Delete everything before the enacting clause



1056 and insert:

1057 A bill to be entitled
1058 An act relating to estates; amending s. 733.106, F.S.;
1059 authorizing the court, if costs and attorney fees are
1060 to be paid from the estate under specified sections of
1061 law, to direct payment from a certain part of the
1062 estate or, under specified circumstances, to direct
1063 payment from a trust; authorizing costs and fees to be
1064 assessed against one or more persons' part of the
1065 trust in such proportions as the court finds just and
1066 proper; specifying factors that the court may consider
1067 in directing the assessment of such costs and fees;
1068 authorizing a court to assess costs and fees without
1069 finding that the person engaged in specified wrongful
1070 acts; amending s. 733.212, F.S.; revising the required
1071 content for a notice of administration; revising
1072 provisions that require an interested person, who has
1073 been served a notice of administration, to file
1074 specified objections in an estate matter within 3
1075 months after service of such notice; providing that
1076 the 3-month period may only be extended for certain
1077 estoppel; providing that objections that are not
1078 barred by the 3-month period must be filed no later
1079 than a specified date; deleting references to
1080 objections based upon the qualifications of a personal
1081 representative; amending s. 733.2123, F.S.; conforming
1082 provisions to changes made by the act; amending s.
1083 733.3101, F.S.; requiring a personal representative to
1084 resign immediately if he or she knows that he or she



1085 was not qualified to act at the time of appointment;
1086 requiring a personal representative who was qualified
1087 to act at such appointment to file a notice if no
1088 longer qualified; authorizing an interested person
1089 within a specified period to request the removal of a
1090 personal representative who files such notice;
1091 providing that a personal representative is liable for
1092 costs and attorney fees incurred in a removal
1093 proceeding if he or she is removed and should have
1094 known of the facts supporting the removal; defining
1095 the term "qualified"; amending s. 733.504, F.S.;
1096 requiring a personal representative to be removed and
1097 the letters of administration revoked if he or she was
1098 not qualified to act at the time of appointment;
1099 amending s. 733.617, F.S.; prohibiting an attorney or
1100 person related to the attorney from receiving
1101 compensation for serving as a personal representative
1102 if the attorney prepared or supervised execution of
1103 the will unless the attorney or person is related to
1104 the testator or the testator acknowledges in writing
1105 the receipt of certain disclosures; specifying the
1106 disclosures that must be acknowledged; specifying when
1107 an attorney is deemed to have prepared or supervised
1108 the execution of a will; specifying when a person is
1109 "related" to another individual; specifying when an
1110 attorney or person related to the attorney is deemed
1111 to be nominated as personal representative; providing
1112 that the provisions do not limit an interested
1113 person's rights or remedies at law or equity except



1114 for compensation payable to a personal representative;
1115 providing that the failure to obtain a written
1116 acknowledgment of the disclosure does not disqualify a
1117 personal representative from serving or affect the
1118 validity of a will; providing a form for the written
1119 acknowledgment; providing applicability; amending s.
1120 733.817, F.S.; defining and redefining terms; deleting
1121 a provision that exempts an interest in protected
1122 homestead from the apportionment of taxes; providing
1123 for the payment of taxes on protected homestead family
1124 allowance and exempt property by certain other
1125 property to the extent such other property is
1126 sufficient; revising the allocation of taxes; revising
1127 the apportionment of the net tax attributable to
1128 specified interests; authorizing a court to assess
1129 liability in an equitable manner under certain
1130 circumstances; providing that a governing instrument
1131 may not direct that taxes be paid from property other
1132 than property passing under the governing instrument,
1133 except under specified conditions; requiring that
1134 direction in a governing instrument be express to
1135 apportion taxes under certain circumstances; requiring
1136 that the right of recovery provided in the Internal
1137 Revenue Code for certain taxes be expressly waived in
1138 the decedent's will or revocable trust with certain
1139 specificity; specifying the property upon which
1140 certain tax is imposed for allocation and
1141 apportionment of certain tax; providing that a general
1142 statement in the decedent's will or revocable trust



1143 waiving all rights of reimbursement or recovery under
1144 the Internal Revenue Code is not an express waiver of
1145 certain rights of recovery; requiring direction to
1146 specifically reference the generation-skipping
1147 transfer tax imposed by the Internal Revenue Code to
1148 direct its apportionment; authorizing, under certain
1149 circumstances, the decedent to direct by will the
1150 amount of net tax attributable to property over which
1151 the decedent held a general power of appointment under
1152 certain circumstances; providing that an express
1153 direction in a revocable trust is deemed to be a
1154 direction contained in the decedent's will as well as
1155 the revocable trust under certain circumstances;
1156 providing that an express direction in the decedent's
1157 will to pay tax from the decedent's revocable trust by
1158 specific reference to the revocable trust is effective
1159 unless a contrary express direction is contained in
1160 the revocable trust; revising the resolution of
1161 conflicting directions in governing instruments with
1162 regard to payment of taxes; providing that the later
1163 express direction in the will or other governing
1164 instrument controls; providing that the date of an
1165 amendment to a will or other governing instrument is
1166 the date of the will or trust for conflict resolution
1167 only if the codicil or amendment contains an express
1168 tax apportionment provision or an express modification
1169 of the tax apportionment provision; providing that a
1170 will is deemed executed after another governing
1171 instrument if the decedent's will and another



1172 governing instrument were executed on the same date;
1173 providing that an earlier conflicting governing
1174 instrument controls as to any tax remaining unpaid
1175 after the application of the later conflicting
1176 governing instrument; providing that a grant of
1177 permission or authority in a governing instrument to
1178 request payment of tax from property passing under
1179 another governing instrument is not a direction
1180 apportioning the tax to the property passing under the
1181 other governing instrument; providing a grant of
1182 permission or authority in a governing instrument to
1183 pay tax attributable to property not passing under the
1184 governing instrument is not a direction apportioning
1185 the tax to property passing under the governing
1186 instrument; providing application; prohibiting the
1187 requiring of a personal representative or fiduciary to
1188 transfer to a recipient property that may be used for
1189 payment of taxes; amending s. 736.0708, F.S.;

1190 prohibiting an attorney or person related to the
1191 attorney from receiving compensation for serving as a
1192 trustee if the attorney prepared or supervised
1193 execution of the trust instrument unless the attorney
1194 or person is related to the settlor or the settlor
1195 acknowledges in writing the receipt of certain
1196 disclosures; specifying the disclosures that must be
1197 acknowledged; specifying when an attorney is deemed to
1198 have prepared or supervised the execution of a trust
1199 instrument; specifying when a person is "related" to
1200 another individual; specifying when an attorney or



1201 person related to the attorney is deemed to be
1202 appointed as trustee; providing that the provisions do
1203 not limit an interested person's rights or remedies at
1204 law or equity except for compensation payable to a
1205 trustee; providing that the failure to obtain a
1206 written acknowledgment of the disclosure does not
1207 disqualify a trustee from serving or affect the
1208 validity of a trust instrument; providing a form for
1209 the written acknowledgment; providing applicability;
1210 amending s. 736.1005, F.S.; authorizing the court, if
1211 attorney fees are to be paid from the trust under
1212 specified sections of law, to direct payment from a
1213 certain part of the trust; providing that fees may be
1214 assessed against one or more persons' part of the
1215 trust in such proportions as the court finds just and
1216 proper; specifying factors that the court may consider
1217 in directing the assessment of such fees; providing
1218 that a court may assess fees without finding that a
1219 person engaged specified wrongful acts; amending s.
1220 736.1006, F.S.; authorizing the court, if costs are to
1221 be paid from the trust under specified sections of
1222 law, to direct payment from a certain part of the
1223 trust; providing that costs may be assessed against
1224 one or more persons' part of the trust in such
1225 proportions as the court finds just and proper;
1226 specifying factors that the court may consider in
1227 directing the assessment of such costs; providing that
1228 specified sections of the act are remedial and
1229 intended to clarify existing law; providing for



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retroactive and prospective application of specified
portions of the act; providing effective dates.

By Senator Hukill

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1 A bill to be entitled
 2 An act relating to estates; amending s. 733.106, F.S.;
 3 authorizing the court, if costs and attorney fees are
 4 to be paid from the estate under specified sections of
 5 law, to direct payment from a certain part of the
 6 estate or, under specified circumstances, to direct
 7 payment from a trust; authorizing costs and fees to be
 8 assessed against one or more persons' part of the
 9 trust in such proportions as the court finds just and
 10 proper; specifying factors that the court may consider
 11 in directing the assessment of such costs and fees;
 12 authorizing a court to assess costs and fees without
 13 finding that the person engaged in specified wrongful
 14 acts; amending s. 733.212, F.S.; revising the required
 15 content for a notice of administration; revising
 16 provisions that require an interested person, who has
 17 been served a notice of administration, to file
 18 specified objections in an estate matter within 3
 19 months after service of such notice; providing that
 20 the 3-month period may only be extended for certain
 21 estoppel; providing that objections that are not
 22 barred by the 3-month period must be filed no later
 23 than a specified date; deleting references to
 24 objections based upon the qualifications of a personal
 25 representative; amending s. 733.2123, F.S.; conforming
 26 provisions to changes made by the act; amending s.
 27 733.3101, F.S.; requiring a personal representative to
 28 resign immediately if he or she knows that he or she
 29 was not qualified to act at the time of appointment;

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30 requiring a personal representative who was qualified
 31 to act at such appointment to file a notice if no
 32 longer qualified; authorizing an interested person
 33 within a specified period of time to request the
 34 removal of a personal representative who files such
 35 notice; providing that a personal representative is
 36 liable for costs and attorney fees incurred in a
 37 removal proceeding if he or she is removed and should
 38 have known of the facts supporting the removal;
 39 defining the term "qualified"; amending s. 733.504,
 40 F.S.; requiring a personal representative to be
 41 removed and the letters of administration revoked if
 42 he or she was not qualified to act at the time of
 43 appointment; amending s. 733.617, F.S.; prohibiting an
 44 attorney or person related to the attorney from
 45 receiving compensation for serving as a personal
 46 representative if the attorney prepared or supervised
 47 execution of the will unless the attorney or person is
 48 related to the testator or the testator acknowledges
 49 in writing the receipt of certain disclosures;
 50 specifying the disclosures that must be acknowledged;
 51 specifying when an attorney is deemed to have prepared
 52 or supervised the execution of a will; specifying when
 53 a person is "related" to another individual;
 54 specifying when an attorney or person related to the
 55 attorney is deemed to be nominated as personal
 56 representative; providing that the provisions do not
 57 limit an interested person's rights or remedies at law
 58 or equity except for compensation payable to a

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59 personal representative; providing that the failure to
 60 obtain a written acknowledgment of the disclosure does
 61 not disqualify a personal representative from serving
 62 or affect the validity of a will; providing a form for
 63 the written acknowledgment; providing applicability;
 64 amending s. 733.817, F.S.; defining and redefining
 65 terms; deleting a provision that exempts an interest
 66 in protected homestead from the apportionment of
 67 taxes; providing for the payment of taxes on protected
 68 homestead family allowance and exempt property by
 69 certain other property to the extent such other
 70 property is sufficient; revising the allocation of
 71 taxes; revising the apportionment of the net tax
 72 attributable to specified interests; authorizing a
 73 court to assess liability in an equitable manner under
 74 certain circumstances; providing that a governing
 75 instrument may not direct that taxes be paid from
 76 property other than property passing under the
 77 governing instrument, except under specified
 78 conditions; requiring that direction in a governing
 79 instrument be express to apportion taxes under certain
 80 circumstances; requiring that the right of recovery
 81 provided in the Internal Revenue Code for certain
 82 taxes be expressly waived in the decedent's will or
 83 revocable trust with certain specificity;
 84 specifying the property upon which certain tax is
 85 imposed for allocation and apportionment of certain
 86 tax; providing that a general statement in the
 87 decedent's will or revocable trust waiving all rights

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88 of reimbursement or recovery under the Internal
 89 Revenue Code is not an express waiver of certain
 90 rights of recovery; requiring direction to
 91 specifically reference the generation-skipping
 92 transfer tax imposed by the Internal Revenue Code to
 93 direct its apportionment; authorizing, under certain
 94 circumstances, the decedent to direct by will the
 95 amount of net tax attributable to property over which
 96 the decedent held a general power of appointment under
 97 certain circumstances; providing that an express
 98 direction in a revocable trust is deemed to be a
 99 direction contained in the decedent's will as well as
 100 the revocable trust under certain circumstances;
 101 providing that an express direction in the decedent's
 102 will to pay tax from the decedent's revocable trust by
 103 specific reference to the revocable trust is effective
 104 unless a contrary express direction is contained in
 105 the revocable trust; revising the resolution of
 106 conflicting directions in governing instruments with
 107 regard to payment of taxes; providing that the later
 108 express direction in the will or other governing
 109 instrument controls; providing that the date of an
 110 amendment to a will or other governing instrument is
 111 the date of the will or trust for conflict resolution
 112 only if the codicil or amendment contains an express
 113 tax apportionment provision or an express modification
 114 of the tax apportionment provision; providing that a
 115 will is deemed executed after another governing
 116 instrument if the decedent's will and another

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117 governing instrument were executed on the same date;
 118 providing that an earlier conflicting governing
 119 instrument controls as to any tax remaining unpaid
 120 after the application of the later conflicting
 121 governing instrument; providing that a grant of
 122 permission or authority in a governing instrument to
 123 request payment of tax from property passing under
 124 another governing instrument is not a direction
 125 apportioning the tax to the property passing under the
 126 other governing instrument; providing a grant of
 127 permission or authority in a governing instrument to
 128 pay tax attributable to property not passing under the
 129 governing instrument is not a direction apportioning
 130 the tax to property passing under the governing
 131 instrument; providing application; prohibiting the
 132 requiring of a personal representative or fiduciary to
 133 transfer to a recipient property that may be used for
 134 payment of taxes; amending s. 736.0708, F.S.;

135 prohibiting an attorney or person related to the
 136 attorney from receiving compensation for serving as a
 137 trustee if the attorney prepared or supervised
 138 execution of the trust instrument unless the attorney
 139 or person is related to the settlor or the settlor
 140 acknowledges in writing the receipt of certain
 141 disclosures; specifying the disclosures that must be
 142 acknowledged; specifying when an attorney is deemed to
 143 have prepared or supervised the execution of a trust
 144 instrument; specifying when a person is "related" to
 145 another individual; specifying when an attorney or

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146 person related to the attorney is deemed to be
 147 appointed as trustee; providing that the provisions do
 148 not limit an interested person's rights or remedies at
 149 law or equity except for compensation payable to a
 150 trustee; providing that the failure to obtain a
 151 written acknowledgment of the disclosure does not
 152 disqualify a trustee from serving or affect the
 153 validity of a trust instrument; providing a form for
 154 the written acknowledgment; providing applicability;
 155 amending s. 736.1005, F.S.; authorizing the court, if
 156 attorney fees are to be paid from the trust under
 157 specified sections of law, to direct payment from a
 158 certain part of the trust; providing that fees may be
 159 assessed against one or more persons' part of the
 160 trust in such proportions as the court finds just and
 161 proper; specifying factors that the court may consider
 162 in directing the assessment of such fees; providing
 163 that a court may assess fees without finding that a
 164 person engaged specified wrongful acts; amending s.
 165 736.1006, F.S.; authorizing the court, if costs are to
 166 be paid from the trust under specified sections of
 167 law, to direct payment from a certain part of the
 168 trust; providing that costs may be assessed against
 169 one or more persons' part of the trust in such
 170 proportions as the court finds just and proper;
 171 specifying factors that the court may consider in
 172 directing the assessment of such costs; reenacting s.
 173 738.302(4), F.S., relating to the apportionment of
 174 receipts and disbursements when the decedent dies or

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175 income interest begins, to incorporate the amendment
 176 made to s. 733.817, F.S., in a reference thereto;
 177 providing that specified sections of the act are
 178 remedial and intended to clarify existing law;
 179 providing for retroactive and prospective application
 180 of specified portions of the act; providing effective
 181 dates.

182
 183 Be It Enacted by the Legislature of the State of Florida:

184
 185 Section 1. Effective July 1, 2015, section 733.106, Florida
 186 Statutes, is amended to read:

187 733.106 Costs and attorney attorney's fees.-

188 (1) In all probate proceedings, costs may be awarded as in
 189 chancery actions.

190 (2) A person nominated as personal representative, or any
 191 proponent of a will if the person so nominated does not act
 192 within a reasonable time, if in good faith justified in offering
 193 the will in due form for probate, shall receive costs and
 194 attorney attorney's fees from the estate even though probate is
 195 denied or revoked.

196 (3) Any attorney who has rendered services to an estate may
 197 be awarded reasonable compensation from the estate.

198 (4) If ~~when~~ costs and attorney attorney's fees are to be
 199 paid from the estate under this section, s. 733.6171(4), s.
 200 736.1005, or s. 736.1006, the court, in its discretion, may
 201 direct from what part of the estate they shall be paid.

202 (a) If the court directs an assessment against a person's
 203 part of the estate and such part is insufficient to fully pay

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204 the assessment, the court may direct payment from the person's
 205 part of a trust, if any, if a poulover will is involved and the
 206 matter is interrelated with the trust.

207 (b) All or any part of the costs and attorney fees to be
 208 paid from the estate may be assessed against one or more
 209 persons' part of the estate in such proportions as the court
 210 finds to be just and proper.

211 (c) In the exercise of its discretion, the court may
 212 consider the following factors:

213 1. The relative impact of an assessment on the estimated
 214 value of each person's part of the estate.

215 2. The amount of costs and attorney fees to be assessed
 216 against a person's part of the estate.

217 3. The extent to which a person whose part of the estate is
 218 to be assessed, individually or through counsel, actively
 219 participated in the proceeding.

220 4. The potential benefit or detriment to a person's part of
 221 the estate expected from the outcome of the proceeding.

222 5. The relative strength or weakness of the merits of the
 223 claims, defenses, or objections, if any, asserted by a person
 224 whose part of the estate is to be assessed.

225 6. Whether a person whose part of the estate is to be
 226 assessed was a prevailing party with respect to one or more
 227 claims, defenses, or objections.

228 7. Whether a person whose part of the estate is to be
 229 assessed unjustly caused an increase in the amount of costs and
 230 attorney fees incurred by the personal representative or another
 231 interested person in connection with the proceeding.

232 8. Any other relevant fact, circumstance, or equity.

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233 (d) The court may assess a person's part of the estate
 234 without finding that the person engaged in bad faith,
 235 wrongdoing, or frivolousness.

236 Section 2. Paragraph (c) of subsection (2) and subsection
 237 (3) of section 733.212, Florida Statutes, are amended to read:

238 733.212 Notice of administration; filing of objections.-

239 (2) The notice shall state:

240 (c) That any interested person on whom a copy of the notice
 241 of administration is served must file on or before the date that
 242 is 3 months after the date of service of a copy of the notice of
 243 administration on that person any objection that challenges the
 244 validity of the will, ~~the qualifications of the personal~~
 245 ~~representative,~~ the venue, or the jurisdiction of the court. The
 246 3-month time period may only be extended for estoppel based upon
 247 a misstatement by the personal representative regarding the time
 248 period within which an objection must be filed. The time period
 249 may not be extended for any other reason, including affirmative
 250 representation, failure to disclose information, or misconduct
 251 by the personal representative or any other person. Unless
 252 sooner barred by subsection (3), all objections to the validity
 253 of a will, venue, or the jurisdiction of the court must be filed
 254 no later than the earlier of the entry of an order of final
 255 discharge of the personal representative or 1 year after service
 256 of the notice of administration.

257 (3) Any interested person on whom a copy of the notice of
 258 administration is served must object to the validity of the
 259 will, ~~the qualifications of the personal representative,~~ the
 260 venue, or the jurisdiction of the court by filing a petition or
 261 other pleading requesting relief in accordance with the Florida

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262 Probate Rules on or before the date that is 3 months after the
 263 date of service of a copy of the notice of administration on the
 264 objecting person, or those objections are forever barred. The 3-
 265 month time period may only be extended for estoppel based upon a
 266 misstatement by the personal representative regarding the time
 267 period within which an objection must be filed. The time period
 268 may not be extended for any other reason, including affirmative
 269 representation, failure to disclose information, or misconduct
 270 by the personal representative or any other person. Unless
 271 sooner barred by this subsection, all objections to the validity
 272 of a will, venue, or the jurisdiction of the court must be filed
 273 no later than the earlier of the entry of an order of final
 274 discharge of the personal representative or 1 year after service
 275 of the notice of administration.

276 Section 3. Section 733.2123, Florida Statutes, is amended
 277 to read:

278 733.2123 Adjudication before issuance of letters.-A
 279 petitioner may serve formal notice of the petition for
 280 administration on interested persons. A person who is served
 281 with such notice before the issuance of letters or who has
 282 waived notice may not challenge the validity of the will,
 283 testacy of the decedent, ~~qualifications of the personal~~
 284 ~~representative,~~ venue, or jurisdiction of the court, except in
 285 the proceedings before issuance of letters.

286 Section 4. Section 733.3101, Florida Statutes, is amended
 287 to read:

288 733.3101 Personal representative not qualified.-

289 (1) A personal representative shall resign immediately if
 290 the personal representative knows that he or she was not

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291 qualified to act at the time of appointment.

292 (2) Any time a personal representative, who was qualified
 293 to act at the time of appointment, knows or should have known
 294 that he or she would not be qualified for appointment if
 295 application for appointment were then made, the personal
 296 representative shall promptly file and serve a notice setting
 297 forth the reasons. The personal representative's notice shall
 298 state that any interested person may petition to remove the
 299 personal representative. An interested person on whom a copy of
 300 the personal representative's notice is served may file a
 301 petition requesting the personal representative's removal within
 302 30 days after the date on which such notice is served.

303 (3) A personal representative who fails to comply with this
 304 section shall be personally liable for costs, including attorney
 305 attorney's fees, incurred in any removal proceeding, if the
 306 personal representative is removed. This liability extends to a
 307 personal representative who does not know, but should have
 308 known, of the facts that would have required him or her to
 309 resign under subsection (1) or to file and serve notice under
 310 subsection (2). This liability shall be cumulative to any other
 311 provided by law.

312 (4) As used in this section, the term "qualified" means
 313 that the personal representative is qualified under ss. 733.302
 314 and 733.303.

315 Section 5. Section 733.504, Florida Statutes, is amended to
 316 read:

317 733.504 Removal of personal representative; causes for
 318 removal.—A personal representative shall be removed and the
 319 letters revoked if he or she was not qualified to act at the

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320 time of appointment. A personal representative may be removed
 321 and the letters revoked for any of the following causes, ~~and the~~
 322 ~~removal shall be in addition to any penalties prescribed by law:~~

323 (1) Adjudication that the personal representative is
 324 incapacitated.

325 (2) Physical or mental incapacity rendering the personal
 326 representative incapable of the discharge of his or her duties.

327 (3) Failure to comply with any order of the court, unless
 328 the order has been superseded on appeal.

329 (4) Failure to account for the sale of property or to
 330 produce and exhibit the assets of the estate when so required.

331 (5) Wasting or maladministration of the estate.

332 (6) Failure to give bond or security for any purpose.

333 (7) Conviction of a felony.

334 (8) Insolvency of, or the appointment of a receiver or
 335 liquidator for, any corporate personal representative.

336 (9) Holding or acquiring conflicting or adverse interests
 337 against the estate that will or may interfere with the
 338 administration of the estate as a whole. This cause of removal
 339 shall not apply to the surviving spouse because of the exercise
 340 of the right to the elective share, family allowance, or
 341 exemptions, as provided elsewhere in this code.

342 (10) Revocation of the probate of the decedent's will that
 343 authorized or designated the appointment of the personal
 344 representative.

345 (11) Removal of domicile from Florida, if domicile was a
 346 requirement of initial appointment.

347 (12) The personal representative was qualified to act at
 348 the time of appointment, but is ~~would~~ not now be entitled to

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349 appointment.

350

351 Removal under this section is in addition to any penalties
352 prescribed by law.

353 Section 6. Effective October 1, 2015, subsection (6) of
354 section 733.617, Florida Statutes, is amended, and subsection
355 (8) is added to that section, to read:

356 733.617 Compensation of personal representative.—

357 (6) Except as provided in subsection (8), a ~~If the~~ personal
358 representative who is a member of The Florida Bar and who has
359 rendered legal services in connection with the administration of
360 the estate, ~~then in addition to a fee as personal~~
361 ~~representative, there also~~ shall be allowed a fee for the legal
362 services rendered in addition to a fee as personal
363 representative.

364 (8) (a) An attorney, or a person related to the attorney, is
365 not entitled to compensation for serving as personal
366 representative if the attorney prepared or supervised the
367 execution of the will that nominates the attorney or person
368 related to the attorney as personal representative, unless the
369 attorney or person nominated is related to the testator or the
370 attorney makes the following disclosures to the testator in
371 writing before the will is executed:

372 1. Subject to certain statutory limitations, most family
373 members regardless of their residence, other persons who are
374 residents of Florida, including friends, and corporate
375 fiduciaries are eligible to serve as a personal representative.

376 2. Any person, including an attorney, who serves as a
377 personal representative is entitled to receive reasonable

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378 compensation for serving as personal representative.

379

380 3. Compensation payable to the personal representative is
381 in addition to any attorney fees payable to the attorney or the
382 attorney's firm for legal services rendered to the personal
383 representative.

384 (b) The testator must execute a written statement
385 acknowledging that the disclosures required by this subsection
386 were made prior to the execution of the will. The written
387 acknowledgment must be in a separate writing from the will, but
388 may be annexed to the will. The written acknowledgment may be
389 executed before or after the execution of the will in which the
390 attorney or related person is nominated as the personal
391 representative.

392 (c) For purposes of this subsection:

393 1. An attorney is deemed to have prepared or supervised the
394 execution of a will if the preparation or the supervision of the
395 execution of the will was performed by an employee or attorney
396 employed by the same firm as the attorney at the time the will
397 was executed.

398 2.a. A person is "related" to an individual if, at the time
399 the attorney prepared or supervised the execution of the will,
400 the person is:

401 (I) A spouse of the individual;

402 (II) A lineal ascendant or descendant of the individual;

403 (III) A sibling of the individual;

404 (IV) A relative of the individual or of the individual's
405 spouse with whom the attorney maintains a close, familial
406 relationship;

406 (V) A spouse of a person described in sub-sub-subparagraphs

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407 (I)-(IV); or
 408 (VI) A person who cohabits with the individual.
 409 b. An employee or attorney employed by the same firm as the
 410 attorney at the time the will is executed is deemed to be
 411 related to the attorney.
 412 3. An attorney or person related to the attorney is deemed
 413 to be nominated in the will if the will provided the attorney or
 414 a person related to the attorney with the power to nominate the
 415 personal representative and the attorney or person related to
 416 attorney was nominated using that power.
 417 (d) This subsection applies to provisions nominating an
 418 attorney or a person related to the attorney as personal
 419 representative, copersonal representative, or successor or
 420 alternate personal representative if the person nominated is
 421 unable or unwilling to serve.
 422 (e) Other than compensation payable to the personal
 423 representative, this subsection does not limit any rights or
 424 remedies that an interested person may have at law or equity.
 425 (f) The failure to obtain a written acknowledgment from the
 426 testator under this subsection does not disqualify a personal
 427 representative from serving and does not affect the validity of
 428 a will.
 429 (g) A written acknowledgment signed by the testator that is
 430 in substantially the following form is deemed to comply with the
 431 disclosure requirements of this subsection:
 432
 433 I, ... (Name) ..., declare that:
 434 I have designated ... (my attorney, an attorney employed in
 435 the same law firm as my attorney, or a person related to my

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436 attorney)... as a nominated personal representative in my will
 437 (or codicil) dated ... (Date)
 438 Before executing the will (or codicil), I was informed
 439 that:
 440 (1) Subject to certain statutory limitations, most family
 441 members regardless of their residence, other persons who are
 442 residents of Florida, including friends, and corporate
 443 fiduciaries are eligible to serve as a personal representative.
 444 (2) Any person, including an attorney, who serves as a
 445 personal representative is entitled to receive reasonable
 446 compensation for serving as personal representative.
 447 (3) Compensation payable to the personal representative is
 448 in addition to any attorney fees payable to the attorney or the
 449 attorney's firm for legal services rendered to the personal
 450 representative.
 451
 452 ... (Testator) ...
 453
 454 ... (Dated) ...
 455
 456 (h) This subsection applies to each nomination made
 457 pursuant to a will that is:
 458 1. Executed by a resident of this state on or after October
 459 1, 2015.
 460 2. Republished by a resident of this state on or after
 461 October 1, 2015, if the republished will nominates the attorney
 462 who prepared or supervised the execution of the instrument that
 463 republished the will, or a person related to such attorney, as
 464 personal representative.

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465 Section 7. Effective July 1, 2015, section 733.817, Florida
466 Statutes, is amended to read:

467 (Substantial rewording of section. See
468 s. 733.817, F.S., for present text.)
469 733.817 Apportionment of estate taxes.—

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

471 (a) "Fiduciary" means a person, other than the personal
472 representative in possession of property included in the measure
473 of the tax, who is liable to the applicable taxing authority for
474 payment of the entire tax to the extent of the value of the
475 property in possession.

476 (b) "Generation-skipping transfer tax" means the
477 generation-skipping transfer tax imposed by chapter 13 of the
478 Internal Revenue Code on direct skips of interests includible in
479 the federal gross estate or a corresponding tax imposed by any
480 state or country or political subdivision of the foregoing. The
481 term does not include the generation-skipping transfer tax on
482 taxable distributions, taxable terminations, or any other
483 generation-skipping transfer. The terms "direct skip," "taxable
484 distribution," and "taxable termination" have the same meanings
485 as provided in s. 2612 of the Internal Revenue Code.

486 (c) "Governing instrument" means a will, trust agreement,
487 or any other document that controls the transfer of property on
488 the occurrence of the event with respect to which the tax is
489 being levied.

490 (d) "Gross estate" means the gross estate, as determined by
491 the Internal Revenue Code with respect to the federal estate tax
492 and the Florida estate tax, and as that concept is otherwise
493 determined by the estate, inheritance, or death tax laws of the

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494 particular state, country, or political subdivision whose tax is
495 being apportioned.

496 (e) "Included in the measure of the tax" means for each
497 separate tax that an interest may incur, only interests included
498 in the measure of that particular tax are considered. As used in
499 this section, the term does not include:

500 1. Any interest, whether passing under the will or not, to
501 the extent the interest is initially deductible from the gross
502 estate, without regard to any subsequent reduction of the
503 deduction by reason of the charge of any part of the applicable
504 tax to the interest. If an election is required for
505 deductibility, an interest is not initially deductible unless
506 the election for deductibility is allowed.

507 2. Interests or amounts that are not included in the gross
508 estate but are included in the amount upon which the applicable
509 tax is computed, such as adjusted taxable gifts pursuant to s.
510 2001 of the Internal Revenue Code.

511 3. Gift taxes included in the gross estate pursuant to s.
512 2035 of the Internal Revenue Code and the portion of any inter
513 vivos transfer included in the gross estate pursuant to s. 529
514 of the Internal Revenue Code, notwithstanding inclusion in the
515 gross estate.

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

518 (g) "Net tax" means the net tax payable to the particular
519 state, country, or political subdivision whose tax is being
520 apportioned, after taking into account all credits against the
521 applicable tax except as provided in this section. With respect
522 to the federal estate tax, net tax is determined after taking

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523 into account all credits against the tax except for the credit
 524 for foreign death taxes and except for the credit or deduction
 525 for state taxes imposed by states other than this state.

526 (h) "Nonresiduary devise" means any devise that is not a
 527 residuary devise.

528 (i) "Nonresiduary interest," in connection with a trust,
 529 means any interest in a trust which is not a residuary interest.

530 (j) "Recipient" means, with respect to property or an
 531 interest in property included in the gross estate, an heir at
 532 law in an intestate estate, devisee in a testate estate,
 533 beneficiary of a trust, beneficiary of a life insurance policy,
 534 annuity, or other contractual right, surviving tenant, taker as
 535 a result of the exercise or in default of the exercise of a
 536 general power of appointment, person who receives or is to
 537 receive the property or an interest in the property, or person
 538 in possession of the property, other than a creditor.

539 (k) "Residuary devise" has the meaning in s. 731.201.

540 (l) "Residuary interest," in connection with a trust, means
 541 an interest in the assets of a trust which remain after
 542 provision for any distribution that is to be satisfied by
 543 reference to a specific property or type of property, fund, sum,
 544 or statutory amount.

545 (m) "Revocable trust" means a trust as described in s.
 546 733.707(3).

547 (n) "Section 2044 interest" means an interest included in
 548 the measure of the tax by reason of s. 2044 of the Internal
 549 Revenue Code.

550 (o) "State" means any state, territory, or possession of
 551 the United States, the District of Columbia, or the Commonwealth

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552 of Puerto Rico.

553 (p) "Tax" means any estate tax, inheritance tax,
 554 generation-skipping transfer tax, or other tax levied or
 555 assessed under the laws of this or any other state, the United
 556 States, any other country, or any political subdivision of the
 557 foregoing, as finally determined, which is imposed as a result
 558 of the death of the decedent. The term also includes any
 559 interest or penalties imposed in addition to the tax. Unless the
 560 context indicates otherwise, the term means each separate tax.
 561 The term does not include any additional estate tax imposed by
 562 s. 2032A(c) or s. 2057(f) of the Internal Revenue Code or a
 563 corresponding tax imposed by any state or country or political
 564 subdivision of the foregoing. The additional estate tax imposed
 565 shall be apportioned as provided in s. 2032A or s. 2057 of the
 566 Internal Revenue Code.

567 (q) "Temporary interest" means an interest in income or an
 568 estate for a specific period of time, for life, or for some
 569 other period controlled by reference to extrinsic events,
 570 whether or not in trust.

571 (r) "Tentative Florida tax" with respect to any property
 572 means the net Florida estate tax that would have been
 573 attributable to that property if no tax were payable to any
 574 other state in respect of that property.

575 (s) "Value" means the pecuniary worth of the interest
 576 involved as finally determined for purposes of the applicable
 577 tax after deducting any debt, expense, or other deduction
 578 chargeable to it for which a deduction was allowed in
 579 determining the amount of the applicable tax. A lien or other
 580 encumbrance is not regarded as chargeable to a particular

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581 interest to the extent that it will be paid from other
 582 interests. The value of an interest is not reduced by reason of
 583 the charge against it of any part of the tax, except as provided
 584 in paragraph (3) (a).

585 (2) ALLOCATION OF TAX.—Except as effectively directed in
 586 the governing instrument pursuant to subsection (4), the net tax
 587 attributable to the interests included in the measure of each
 588 tax shall be determined by the proportion that the value of each
 589 interest included in the measure of the tax bears to the total
 590 value of all interests included in the measure of the tax.
 591 Notwithstanding the foregoing provision of this subsection and
 592 except as effectively directed in the governing instrument:

593 (a) The net tax attributable to section 2044 interests
 594 shall be determined in the manner provided for the federal
 595 estate tax in s. 2207A of the Internal Revenue Code, and the
 596 amount so determined shall be deducted from the tax to determine
 597 the net tax attributable to all other interests included in the
 598 measure of the tax.

599 (b) The foreign tax credit allowed with respect to the
 600 federal estate tax shall be allocated among the recipients of
 601 interests finally charged with the payment of the foreign tax in
 602 reduction of any federal estate tax chargeable to the recipients
 603 of the foreign interests, whether or not any federal estate tax
 604 is attributable to the foreign interests. Any excess of the
 605 foreign tax credit shall be applied to reduce proportionately
 606 the net amount of federal estate tax chargeable to the remaining
 607 recipients of the interests included in the measure of the
 608 federal estate tax.

609 (c) The reduction in the net tax attributable to the

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610 deduction for state death taxes allowed by s. 2058 of the
 611 Internal Revenue Code shall be allocated to the recipients of
 612 the interests that produced the deduction. For this purpose, the
 613 reduction in the net tax shall be calculated in the manner
 614 provided for interests other than those described in paragraph
 615 (a).

616 (d) The reduction in the Florida tax, if one is imposed, on
 617 the estate of a Florida resident for tax paid to another state
 618 shall be allocated as follows:

619 1. If the net tax paid to another state is greater than or
 620 equal to the tentative Florida tax attributable to the property
 621 subject to tax in the other state, none of the Florida tax shall
 622 be attributable to that property.

623 2. If the net tax paid to another state is less than the
 624 tentative Florida tax attributable to the property subject to
 625 tax in the other state, the net Florida tax attributable to the
 626 property subject to tax in the other state shall be the excess
 627 of the amount of the tentative Florida tax attributable to the
 628 property over the net tax payable to the other state with
 629 respect to the property.

630 3. Any remaining net Florida tax shall be attributable to
 631 property included in the measure of the Florida tax exclusive of
 632 the property subject to tax in another state.

633 4. The net federal tax attributable to the property subject
 634 to tax in the other state shall be determined as if the property
 635 were located in that state.

636 (e) The net tax attributable to a temporary interest, if
 637 any, is regarded as attributable to the principal that supports
 638 the temporary interest.

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639 (3) APPORTIONMENT OF TAX.—Except as otherwise effectively
 640 directed in the governing instrument pursuant to subsection (4),
 641 the net tax attributable to each interest shall be apportioned
 642 as follows:

643 (a) Generation-skipping transfer tax.—Any federal or state
 644 generation-skipping transfer tax shall be apportioned as
 645 provided in s. 2603 of the Internal Revenue Code after the
 646 application of the remaining provisions of this subsection to
 647 taxes other than the generation-skipping transfer tax.

648 (b) Section 2044 interests.—The net tax attributable to
 649 section 2044 interests shall be apportioned among the recipients
 650 of the section 2044 interests in the proportion that the value
 651 of each section 2044 interest bears to the total of all section
 652 2044 interests. The net tax apportioned by this paragraph to
 653 section 2044 interests that pass in the manner described in
 654 paragraph (c) or paragraph (d) shall be apportioned to the
 655 section 2044 interests in the manner described in those
 656 paragraphs before the apportionment of the net tax attributable
 657 to the other interests passing as provided in those paragraphs.
 658 The net tax attributable to the interests other than the section
 659 2044 interests which pass in the manner described in paragraph
 660 (c) or paragraph (d) shall be apportioned only to such other
 661 interests pursuant to those paragraphs.

662 (c) Wills.—The net tax attributable to property passing
 663 under the decedent's will shall be apportioned in the following
 664 order of priority:

665 1. The net tax attributable to nonresiduary devises shall
 666 be charged to and paid from the residuary estate, whether or not
 667 all interests in the residuary estate are included in the

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668 measure of the tax. If the residuary estate is insufficient to
 669 pay the net tax attributable to all nonresiduary devises, the
 670 balance of the net tax attributable to nonresiduary devises
 671 shall be apportioned among the recipients of the nonresiduary
 672 devises in the proportion that the value of each nonresiduary
 673 devise included in the measure of the tax bears to the total of
 674 all nonresiduary devises included in the measure of the tax.

675 2. The net tax attributable to residuary devises shall be
 676 apportioned among the recipients of the residuary devises
 677 included in the measure of the tax in the proportion that the
 678 value of each residuary devise included in the measure of the
 679 tax bears to the total of all residuary devises included in the
 680 measure of the tax. If the residuary estate is insufficient to
 681 pay the net tax attributable to all residuary devises, the
 682 balance of the net tax attributable to residuary devises shall
 683 be apportioned among the recipients of the nonresiduary devises
 684 in the proportion that the value of each nonresiduary devise
 685 included in the measure of the tax bears to the total of all
 686 nonresiduary devises included in the measure of the tax.

687 (d) Trusts.—The net tax attributable to property passing
 688 under the terms of any trust other than a trust created in the
 689 decedent's will shall be apportioned in the following order of
 690 priority:

691 1. The net tax attributable to nonresiduary interests of
 692 the trust shall be charged to and paid from the residuary
 693 portion of the trust, whether or not all interests in the
 694 residuary portion are included in the measure of the tax. If the
 695 residuary portion is insufficient to pay the net tax
 696 attributable to all nonresiduary interests, the balance of the

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697 net tax attributable to nonresiduary interests shall be
 698 apportioned among the recipients of the nonresiduary interests
 699 in the proportion that the value of each nonresiduary interest
 700 included in the measure of the tax bears to the total of all
 701 nonresiduary interests included in the measure of the tax.

702 2. The net tax attributable to residuary interests of the
 703 trust shall be apportioned among the recipients of the residuary
 704 interests of the trust included in the measure of the tax in the
 705 proportion that the value of each residuary interest included in
 706 the measure of the tax bears to the total of all residuary
 707 interests of the trust included in the measure of the tax. If
 708 the residuary portion is insufficient to pay the net tax
 709 attributable to all residuary interests, the balance of the net
 710 tax attributable to residuary interests shall be apportioned
 711 among the recipients of the nonresiduary interests in the
 712 proportion that the value of each nonresiduary interest included
 713 in the measure of the tax bears to the total of all nonresiduary
 714 interests included in the measure of the tax.

715

716 Except as provided in paragraph (g), this paragraph applies
 717 separately for each trust.

718 (e) Protected homestead, exempt property, and family
 719 allowance.-

720 1. The net tax attributable to an interest in protected
 721 homestead, exempt property, and the family allowance determined
 722 under s. 732.403 shall be apportioned against the recipients of
 723 other interests in the estate or passing under any revocable
 724 trust in the following order of priority:

725 a. Class I.—Recipients of interests passing by intestacy

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726 that are included in the measure of the federal estate tax.

727 b. Class II.—Recipients of residuary devises, residuary
 728 interests, and pretermitted shares under ss. 732.301 and 732.302
 729 that are included in the measure of the federal estate tax.

730 c. Class III.—Recipients of nonresiduary devises and
 731 nonresiduary interests that are included in the measure of the
 732 federal estate tax.

733 2. Any net tax apportioned to a class pursuant to this
 734 paragraph shall be apportioned among each recipient in the class
 735 in the proportion that the value of the interest of each bears
 736 to the total value of all interests included in that class. A
 737 tax may not be apportioned under this paragraph to the portion
 738 of any interest applied in satisfaction of the elective share
 739 whether or not included in the measure of the tax. For purposes
 740 of this paragraph, if the value of the interests described in s.
 741 732.2075(1) exceeds the amount of the elective share, the
 742 elective share shall be treated as satisfied first from
 743 interests other than those described in classes I, II, and III,
 744 and to the extent that those interests are insufficient to
 745 satisfy the elective share, from the interests passing to or for
 746 the benefit of the surviving spouse described in classes I, II,
 747 and III, beginning with those described in class I, until the
 748 elective share is satisfied. This paragraph has priority over
 749 paragraphs (a) and (h).

750 3. The balance of the net tax attributable to any interest
 751 in protected homestead, exempt property, and the family
 752 allowance determined under s. 732.403 which is not apportioned
 753 under the preceding provisions of this paragraph shall be
 754 apportioned to the recipients of those interests included in the

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757 measure of the tax in the proportion that the value of each
 758 bears to the total value of those interests included in the
 759 measure of the tax.

760 (f) Construction.—For purposes of this subsection:

761 1. If the decedent's estate is the beneficiary of a life
 762 insurance policy, annuity, or contractual right included in the
 763 decedent's gross estate, or is the taker as a result of the
 764 exercise or default in exercise of a general power of
 765 appointment held by the decedent, that interest shall be
 766 regarded as passing under the terms of the decedent's will for
 767 the purposes of paragraph (c) or by intestacy if not disposed of
 768 by will. Additionally, any interest included in the measure of
 769 the tax by reason of s. 2041 of the Internal Revenue Code
 770 passing to the decedent's creditors or the creditors of the
 771 decedent's estate shall be regarded as passing to the decedent's
 772 estate for the purpose of this subparagraph.

773 2. If a trust is the beneficiary of a life insurance
 774 policy, annuity, or contractual right included in the decedent's
 775 gross estate, or is the taker as a result of the exercise or
 776 default in exercise of a general power of appointment held by
 777 the decedent, that interest shall be regarded as passing under
 778 the trust for purposes of paragraph (d).

779 (g) Common instrument construction.—In the application of
 780 this subsection, paragraphs (b)-(f) shall be applied to
 781 apportion the net tax to the recipients under certain governing
 782 instruments as if all recipients under those instruments, other
 783 than the estate or revocable trust itself, were taking under a
 784 common instrument. This construction applies to the following:

785 1. The decedent's will and revocable trust if the estate is

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784 a beneficiary of the revocable trust or if the revocable trust
 785 is a beneficiary of the estate.

786 2. A revocable trust of the decedent and another revocable
 787 trust of the decedent if either trust is the beneficiary of the
 788 other trust.

789 (h) Other interests.—The net tax that is not apportioned to
 790 interests under paragraphs (b)-(g), including, but not limited
 791 to, the net tax attributable to interests passing by intestacy,
 792 interests applied in satisfaction of the elective share pursuant
 793 to s. 732.2075(2), interests passing by reason of the exercise
 794 or nonexercise of a general power of appointment, jointly held
 795 interests passing by survivorship, life insurance, properties in
 796 which the decedent held a reversionary or revocable interest,
 797 annuities, and contractual rights, shall be apportioned among
 798 the recipients of the remaining interests included in the
 799 measure of the tax in the proportion that the value of each such
 800 interest bears to the total value of all remaining interests
 801 included in the measure of the tax.

802 (i) Assessment of liability by court.—If the court finds
 803 that:

804 1. It is inequitable to apportion interest or penalties, or
 805 both, in the manner provided in paragraphs (a)-(h), the court
 806 may assess liability for the payment thereof in the manner that
 807 the court finds equitable.

808 2. The payment of any tax was not effectively directed in
 809 the governing instrument pursuant to subsection (4) and that
 810 such tax is not apportioned by this subsection, the court may
 811 assess liability for the payment of such tax in the manner that
 812 the court finds equitable.

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813 (4) DIRECTION AGAINST APPORTIONMENT.—

814 (a) Except as provided in this subsection, a governing
815 instrument may not direct that taxes be paid from property other
816 than that passing under the governing instrument.

817 (b) For a direction in a governing instrument to be
818 effective to direct payment of taxes attributable to property
819 passing under the governing instrument in a manner different
820 from that provided in this section, the direction must be
821 express.

822 (c) For a direction in a governing instrument to be
823 effective to direct payment of taxes attributable to property
824 not passing under the governing instrument from property passing
825 under the governing instrument, the governing instrument must
826 expressly direct that the property passing under the governing
827 instrument bear the burden of taxation for property not passing
828 under the governing instrument. Except as provided in paragraph
829 (d), a direction in the governing instrument to the effect that
830 all taxes are to be paid from property passing under the
831 governing instrument, whether attributable to property passing
832 under the governing instrument or otherwise, shall be effective
833 to direct payment from property passing under the governing
834 instrument of taxes attributable to property not passing under
835 the governing instrument.

836 (d) In addition to satisfying the other provisions of this
837 subsection:

838 1.a. For a direction in the decedent's will or revocable
839 trust to be effective in waiving the right of recovery provided
840 in s. 2207A of the Internal Revenue Code for the tax
841 attributable to section 2044 interests, and for any tax imposed

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842 by Florida based upon such section 2044 interests, the direction
843 must expressly waive that right of recovery. An express
844 direction that property passing under the will or revocable
845 trust bear the tax imposed by s. 2044 of the Internal Revenue
846 Code is deemed an express waiver of the right of recovery
847 provided in s. 2207A of the Internal Revenue Code. A reference
848 to "qualified terminable interest property," "QTIP," or property
849 in which the decedent had a "qualifying income interest for
850 life" is deemed to be a reference to property upon which tax is
851 imposed by s. 2044 of the Internal Revenue Code which is subject
852 to the right of recovery provided in s. 2207A of the Internal
853 Revenue Code.

854 b. If property is included in the gross estate pursuant to
855 ss. 2041 and 2044 of the Internal Revenue Code, the property is
856 deemed included under s. 2044, and not s. 2041, for purposes of
857 allocation and apportionment of the tax.

858 2. For a direction in the decedent's will or revocable
859 trust to be effective in waiving the right of recovery provided
860 in s. 2207B of the Internal Revenue Code for tax imposed by
861 reason of s. 2036 of the Internal Revenue Code, and any tax
862 imposed by Florida based upon s. 2036 of the Internal Revenue
863 Code, the direction must expressly waive that right of recovery.
864 An express direction that property passing under the will or
865 revocable trust bear the tax imposed by s. 2036 of the Internal
866 Revenue Code is deemed an express waiver of the right of
867 recovery provided in s. 2207B of the Internal Revenue Code. If
868 property is included in the gross estate pursuant to ss. 2036
869 and 2038 of the Internal Revenue Code, the property is deemed
870 included under s. 2038, not s. 2036, for purposes of allocation

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871 and apportionment of the tax, and there is no right of recovery
872 under s. 2207B of the Internal Revenue Code.

873 3. A general statement in the decedent's will or revocable
874 trust waiving all rights of reimbursement or recovery under the
875 Internal Revenue Code is not an express waiver of the rights of
876 recovery provided in s. 2207A or s. 2207B of the Internal
877 Revenue Code.

878 4. For a direction in a governing instrument to be
879 effective to direct payment of generation-skipping transfer tax
880 in a manner other than as provided in s. 2603 of the Internal
881 Revenue Code, and any tax imposed by Florida based on s. 2601 of
882 the Internal Revenue Code, the direction must specifically
883 reference the tax imposed by s. 2601 of the Internal Revenue
884 Code. A reference to the generation-skipping transfer tax or s.
885 2603 of the Internal Revenue Code is deemed to be a reference to
886 property upon which tax is imposed by reason of s. 2601 of the
887 Internal Revenue Code.

888 (e) If the decedent expressly directs by will the net tax
889 attributable to property over which the decedent held, a general
890 power of appointment may be determined in a manner other than as
891 provided in subsection (2) if the net tax attributable to that
892 property does not exceed the difference between the total net
893 tax determined pursuant to subsection (2), determined without
894 regard to this paragraph, and the total net tax that would have
895 been payable if the value of the property subject to such power
896 of appointment had not been included in the decedent's gross
897 estate. If tax is attributable to one or more section 2044
898 interests pursuant to subsection (2), the net tax attributable
899 to the section 2044 interests shall be calculated before the

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900 application of this paragraph unless the decedent expressly
901 directs otherwise by will.

902 (f) If the decedent's will expressly provides that the tax
903 is to be apportioned as provided in the decedent's revocable
904 trust by specific reference to the revocable trust, an express
905 direction in the revocable trust is deemed to be a direction
906 contained in the will as well as the revocable trust.

907 (g) An express direction in the decedent's will to pay tax
908 from the decedent's revocable trust by specific reference to the
909 revocable trust is effective unless a contrary express direction
910 is contained in the revocable trust.

911 (h) If governing instruments contain effective directions
912 that conflict as to payment of taxes, the most recently executed
913 tax apportionment provision controls to the extent of the
914 conflict. For the purpose of this subsection, if a will or other
915 governing instrument is amended, the date of the codicil to the
916 will or amendment to the governing instrument is regarded as the
917 date of the will or other governing instrument only if the
918 codicil or amendment contains an express tax apportionment
919 provision or an express modification of the tax apportionment
920 provision. A general statement ratifying or republishing all
921 provisions not otherwise amended does not meet this condition.
922 If the decedent's will and another governing instrument were
923 executed on the same date, the will is deemed executed after the
924 other governing instrument. The earlier conflicting governing
925 instrument controls as to any tax remaining unpaid after the
926 application of the later conflicting governing instrument.

927 (i) A grant of permission or authority in a governing
928 instrument to request payment of tax from property passing under

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929 another governing instrument is not a direction apportioning the
 930 tax to the property passing under the other governing
 931 instrument. A grant of permission or authority in a governing
 932 instrument to pay tax attributable to property not passing under
 933 the governing instrument is not a direction apportioning the tax
 934 to property passing under the governing instrument.

935 (j) This section applies to any tax remaining to be paid
 936 after the application of any effective express directions. An
 937 effective express direction for payment of tax on specific
 938 property or a type of property in a manner different from that
 939 provided in this section is not effective as an express
 940 direction for payment of tax on other property or other types of
 941 property included in the measure of the tax.

942 (5) TRANSFER OF PROPERTY.—A personal representative or
 943 fiduciary shall not be required to transfer to a recipient any
 944 property reasonably anticipated to be necessary for the payment
 945 of taxes. Further, the personal representative or fiduciary is
 946 not required to transfer any property to the recipient until the
 947 amount of the tax due from the recipient is paid by the
 948 recipient. If property is transferred before final apportionment
 949 of the tax, the recipient shall provide a bond or other security
 950 for his or her apportioned liability in the amount and form
 951 prescribed by the personal representative or fiduciary.

952 (6) ORDER OF APPORTIONMENT.—

953 (a) The personal representative may petition at any time
 954 for an order of apportionment. If administration of the
 955 decedent's estate has not commenced at any time after 90 days
 956 from the decedent's death, any fiduciary may petition for an
 957 order of apportionment in the court in which venue would be

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958 proper for administration of the decedent's estate. Notice of
 959 the petition for order of apportionment must be served on all
 960 interested persons in the manner provided for service of formal
 961 notice. At any time after 6 months from the decedent's death,
 962 any recipient may petition the court for an order of
 963 apportionment.

964 (b) The court shall determine all issues concerning
 965 apportionment. If the tax to be apportioned has not been finally
 966 determined, the court shall determine the probable tax due or to
 967 become due from all interested persons, apportion the probable
 968 tax, and retain jurisdiction over the parties and issues to
 969 modify the order of apportionment as appropriate until after the
 970 tax is finally determined.

971 (7) DEFICIENCY.—

972 (a) If the personal representative or fiduciary does not
 973 have possession of sufficient property otherwise distributable
 974 to the recipient to pay the tax apportioned to the recipient,
 975 whether under this section, the Internal Revenue Code, or the
 976 governing instrument, if applicable, the personal representative
 977 or fiduciary shall recover the deficiency in tax so apportioned
 978 to the recipient:

979 1. From the fiduciary in possession of the property to
 980 which the tax is apportioned, if any; and

981 2. To the extent of any deficiency in collection from the
 982 fiduciary, or to the extent collection from the fiduciary is
 983 excused pursuant to subsection (8) and in all other cases, from
 984 the recipient of the property to which the tax is apportioned,
 985 unless relieved of this duty as provided in subsection (8).

986 (b) In any action to recover the tax apportioned, the order

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987 of apportionment is prima facie correct.

988 (c) In any action for the enforcement of an order of
 989 apportionment, the court shall award taxable costs as in
 990 chancery actions, including reasonable attorney fees, and may
 991 award penalties and interest on the unpaid tax in accordance
 992 with equitable principles.

993 (d) This subsection does not authorize the recovery of any
 994 tax from a company issuing life insurance included in the gross
 995 estate, or from a bank, trust company, savings and loan
 996 association, or similar institution with respect to any account
 997 in the name of the decedent and any other person which passed by
 998 operation of law at the decedent's death.

999 (8) RELIEF FROM DUTY.—

1000 (a) A personal representative or fiduciary who has the duty
 1001 under this section of collecting the apportioned tax from
 1002 recipients may be relieved of the duty to collect the tax by an
 1003 order of the court finding that:

1004 1. The estimated court costs and attorney fees in
 1005 collecting the apportioned tax from a person against whom the
 1006 tax has been apportioned will approximate or exceed the amount
 1007 of the recovery;

1008 2. The person against whom the tax has been apportioned is
 1009 a resident of a foreign country other than Canada and refuses to
 1010 pay the apportioned tax on demand; or

1011 3. It is impracticable to enforce contribution of the
 1012 apportioned tax against a person against whom the tax has been
 1013 apportioned in view of the improbability of obtaining a judgment
 1014 or the improbability of collection under any judgment that might
 1015 be obtained, or otherwise.

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1016 (b) A personal representative or fiduciary is not liable
 1017 for failure to attempt to enforce collection if the personal
 1018 representative or fiduciary reasonably believes that collection
 1019 would have been economically impracticable.

1020 (9) UNCOLLECTED TAX.—Any apportioned tax that is not
 1021 collected shall be reapportioned in accordance with this section
 1022 as if the portion of the property to which the uncollected tax
 1023 had been apportioned had been exempt.

1024 (10) CONTRIBUTION.—This section does not limit the right of
 1025 any person who has paid more than the amount of the tax
 1026 apportionable to that person, calculated as if all apportioned
 1027 amounts would be collected, to obtain contribution from those
 1028 who have not paid the full amount of the tax apportionable to
 1029 them, calculated as if all apportioned amounts would be
 1030 collected, and that right is hereby conferred. In any action to
 1031 enforce contribution, the court shall award taxable costs as in
 1032 chancery actions, including reasonable attorney fees.

1033 (11) FOREIGN TAX.—This section does not require the
 1034 personal representative or fiduciary to pay any tax levied or
 1035 assessed by a foreign country unless specific directions to that
 1036 effect are contained in the will or other instrument under which
 1037 the personal representative or fiduciary is acting.

1038 Section 8. Effective October 1, 2015, subsection (4) is
 1039 added to section 736.0708, Florida Statutes, to read:
 1040 736.0708 Compensation of trustee.—

1041 (4) (a) An attorney, or a person related to the attorney, is
 1042 not entitled to compensation for serving as trustee if the
 1043 attorney prepared or supervised the execution of the trust
 1044 instrument that appoints the attorney or person related to the

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1045 attorney as trustee, unless the attorney or person appointed is
 1046 related to the settlor or the attorney makes the following
 1047 disclosures to the settlor in writing before the trust
 1048 instrument is executed:

1049 1. Unless specifically disqualified by the terms of the
 1050 trust instrument, any person, regardless of his or her
 1051 residence, including a family member, friend, or corporate
 1052 fiduciary is eligible to serve as a trustee.

1053 2. Any person, including an attorney, who serves as a
 1054 trustee is entitled to receive reasonable compensation for
 1055 servng as trustee.

1056 3. Compensation payable to the trustee is in addition to
 1057 any attorney fees payable to the attorney or the attorney's firm
 1058 for legal services rendered to the trustee.

1059 (b) The settlor must execute a written statement
 1060 acknowledging that the disclosures required by this subsection
 1061 were made before the execution of the trust instrument. The
 1062 written acknowledgment must be in a separate writing from the
 1063 trust instrument, but may be annexed to the trust instrument.
 1064 The written acknowledgment may be executed before or after the
 1065 execution of the trust instrument in which the attorney or
 1066 related person is appointed as the trustee.

1067 (c) For purposes of this subsection:

1068 1. An attorney is deemed to have prepared or supervised the
 1069 execution of a trust instrument if the preparation or the
 1070 supervision of the execution of the trust instrument was
 1071 performed by an employee or attorney employed by the same firm
 1072 as the attorney at the time the trust instrument was executed.

1073 2.a. A person is "related" to an individual if, at the time

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1074 the attorney prepared or supervised the execution of the trust
 1075 instrument, the person is:

1076 (I) A spouse of the individual;
 1077 (II) A lineal ascendant or descendant of the individual;
 1078 (III) A sibling of the individual;
 1079 (IV) A relative of the individual or of the individual's
 1080 spouse with whom the lawyer maintains a close, familial
 1081 relationship;

1082 (V) A spouse of a person described in sub-sub-subparagraphs
 1083 (I)-(IV); or

1084 (VI) A person who cohabitates with the individual.

1085 b. An employee or attorney employed by the same firm as the
 1086 attorney at the time the trust instrument is executed is deemed
 1087 to be related to the attorney.

1088 3. An attorney or person related to the attorney is deemed
 1089 to be appointed in the trust instrument if the trust instrument
 1090 provided the attorney or a person related to the attorney with
 1091 the power to appoint the trustee and the attorney or person
 1092 related to the attorney was appointed using that power.

1093 (d) This subsection applies to provisions appointing an
 1094 attorney or a person related to the attorney as trustee,
 1095 cotrustee, or as successor or alternate trustee if the person
 1096 appointed is unable or unwilling to serve.

1097 (e) Other than compensation payable to the trustee, this
 1098 subsection does not limit any rights or remedies that an
 1099 interested person may have at law or equity.

1100 (f) The failure to obtain a written acknowledgment from the
 1101 settlor under this subsection does not disqualify a trustee from
 1102 servng and does not affect the validity of a trust instrument.

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1103 (g) A written acknowledgment signed by the settlor that is
 1104 in substantially the following form is deemed to comply with the
 1105 disclosure requirements of this subsection:

1106
 1107 I, ... (Name)... declare that:

1108 I have designated ... (my attorney, an attorney employed in
 1109 the same law firm as my attorney, or a person related to my
 1110 attorney)... as a trustee in my trust instrument dated
 1111 ... (Date)....

1112 Before executing the trust, I was informed that:

1113 1. Unless specifically disqualified by the terms of the
 1114 trust instrument, any person, regardless of his or her
 1115 residence, including a family member, friend, or corporate
 1116 fiduciary is eligible to serve as a trustee.

1117 2. Any person, including an attorney, who serves as a
 1118 trustee is entitled to receive reasonable compensation for
 1119 serving as trustee.

1120 3. Compensation payable to the trustee is in addition to
 1121 any attorney fees payable to the attorney or the attorney's firm
 1122 for legal services rendered to the trustee.

1123
 1124 ... (Settlor)...

1125
 1126 ... (Dated)...

1127
 1128 (h) This subsection applies to each appointment made
 1129 pursuant to a trust agreement that is:

1130 1. Executed by a resident of this state on or after October
 1131 1, 2015.

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1132 2. Amended by a resident of this state on or after October
 1133 1, 2015, if the trust agreement appoints the attorney who
 1134 prepared or supervised the execution of the amendment, or a
 1135 person related to such attorney, as trustee.

1136 Section 9. Effective July 1, 2015, section 736.1005,
 1137 Florida Statutes, is amended to read:

1138 736.1005 Attorney ~~attorney's~~ fees for services to the
 1139 trust.-

1140 (1) Any attorney who has rendered services to a trust may
 1141 be awarded reasonable compensation from the trust. The attorney
 1142 may apply to the court for an order awarding attorney ~~attorney's~~
 1143 fees and, after notice and service on the trustee and all
 1144 beneficiaries entitled to an accounting under s. 736.0813, the
 1145 court shall enter an order on the fee application.

1146 (2) If attorney ~~Whenever attorney's~~ fees are to be paid
 1147 from ~~out of~~ the trust under subsection (1), s. 736.1007(5)(a),
 1148 or s. 733.106(4)(a), the court, in its discretion, may direct
 1149 from what part of the trust the fees shall be paid.

1150 (a) All or any part of the attorney fees to be paid from
 1151 the trust may be assessed against one or more persons' part of
 1152 the trust in such proportions as the court finds to be just and
 1153 proper.

1154 (b) In the exercise of its discretion, the court may
 1155 consider the following factors:

1156 1. The relative impact of an assessment on the estimated
 1157 value of each person's part of the trust.

1158 2. The amount of attorney fees to be assessed against a
 1159 person's part of the trust.

1160 3. The extent to which a person whose part of the trust is

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1161 to be assessed, individually or through counsel, actively
 1162 participated in the proceeding.

1163 4. The potential benefit or detriment to a person's part of
 1164 the trust expected from the outcome of the proceeding.

1165 5. The relative strength or weakness of the merits of the
 1166 claims, defenses, or objections, if any, asserted by a person
 1167 whose part of the trust is to be assessed.

1168 6. Whether a person whose part of the trust is to be
 1169 assessed was a prevailing party with respect to one or more
 1170 claims, defenses, or objections.

1171 7. Whether a person whose part of the trust is to be
 1172 assessed unjustly caused an increase in the amount of attorney
 1173 fees incurred by the trustee or another person in connection
 1174 with the proceeding.

1175 8. Any other relevant fact, circumstance, or equity.

1176 (c) The court may assess a person's part of the trust
 1177 without finding that the person engaged in bad faith,
 1178 wrongdoing, or frivolousness.

1179 (3) Except when a trustee's interest may be adverse in a
 1180 particular matter, the attorney shall give reasonable notice in
 1181 writing to the trustee of the attorney's retention by an
 1182 interested person and the attorney's entitlement to fees
 1183 pursuant to this section. A court may reduce any fee award for
 1184 services rendered by the attorney prior to the date of actual
 1185 notice to the trustee, if the actual notice date is later than a
 1186 date of reasonable notice. In exercising this discretion, the
 1187 court may exclude compensation for services rendered after the
 1188 reasonable notice date but before ~~prior to~~ the date of actual
 1189 notice.

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1190 Section 10. Effective July 1, 2015, section 736.1006,
 1191 Florida Statutes, is amended to read:

1192 736.1006 Costs in trust proceedings.—

1193 (1) In all trust proceedings, costs may be awarded as in
 1194 chancery actions.

1195 (2) If ~~Whenever~~ costs are to be paid from ~~out of~~ the trust
 1196 under subsection (1) or s. 736.106(4) (a), the court, in its
 1197 discretion, may direct from what part of the trust the costs
 1198 shall be paid. All or any part of the costs to be paid from the
 1199 trust may be assessed against one or more persons' part of the
 1200 trust in such proportions as the court finds to be just and
 1201 proper. In the exercise of its discretion, the court may
 1202 consider the factors set forth in s. 736.1005(2).

1203 Section 11. For the purpose of incorporating the amendment
 1204 made by this act to section 733.817, Florida Statutes, in a
 1205 reference thereto, subsection (4) of section 738.302, Florida
 1206 Statutes, is reenacted to read:

1207 738.302 Apportionment of receipts and disbursements when
 1208 decedent dies or income interest begins.—

1209 (4) Nothing in this section shall prevent the application
 1210 of s. 733.817 to apportion tax to the income recipient under
 1211 this section.

1212 Section 12. The amendments made by this act to ss. 733.212,
 1213 733.2123, 733.3101, and 733.504, Florida Statutes, are remedial
 1214 in nature, are intended to clarify existing law, and apply
 1215 retroactively to all proceedings pending or commenced on or
 1216 after the date upon which this act becomes a law.

1217 Section 13. (1) The amendment made by this act to s.
 1218 733.817(1) (g) and (2) (c), Florida Statutes, is remedial in

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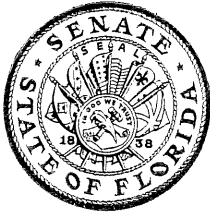
1219 nature, is intended to clarify existing law, and applies
1220 retroactively to all proceedings pending or commenced on or
1221 after July 1, 2015, in which the apportionment of taxes has not
1222 been finally determined or agreed for the estates of decedents
1223 who die after December 31, 2004.

1224 (2) The amendment made by this act to s. 733.817(1)(e)3.,
1225 (3)(e), (3)(g), (4)(b), (4)(c), (4)(d)1.b., (4)(e), (4)(h), and
1226 (6), Florida Statutes, applies to the estates of decedents who
1227 die on or after July 1, 2015.

1228 (3) Except as provided in subsections (1) and (2), the
1229 amendment made by this act to s. 733.817, Florida Statutes, is
1230 remedial in nature, is intended to clarify existing law, and
1231 applies retroactively to all proceedings pending or commenced on
1232 or after July 1, 2015, in which the apportionment of taxes has
1233 not been finally determined or agreed and without regard to the
1234 date of the decedent's death.

1235 Section 14. The amendments made by this act to ss. 733.106,
1236 736.1005, and 736.1006, Florida Statutes, apply to proceedings
1237 commenced on or after July 1, 2015. The law in effect on June
1238 30, 2015, applies to proceedings commenced on or before that
1239 date.

1240 Section 15. Except as otherwise expressly provided in this
1241 act, this act shall take effect upon becoming a law.



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

SENATOR DOROTHY L. HUKILL
8th District

COMMITTEES:

Finance and Tax, *Chair*
Communications, Energy, and Public Utilities,
Vice Chair
Appropriations
Appropriations Subcommittee on Transportation,
Tourism, and Economic Development
Banking and Insurance
Fiscal Policy

JOINT COMMITTEE:

Joint Committee on Public Counsel Oversight

February 24, 2015

The Honorable Miguel Diaz de la Portilla
515 Knott Building
404 S. Monroe Street
Tallahassee, FL 32399

Re: Senate Bill 872 – Estates

Dear Chairman Diaz de la Portilla:

Senate Bill 872, relating Estates has been referred to the Judiciary Committee. I am requesting your consideration on placing SB 872 on your next agenda. Should you need any additional information please do not hesitate to contact my office.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Dorothy L. Hukill".

Dorothy L. Hukill, District 8

cc: Tom Cibulla, Staff Director of the Judiciary Committee
Shirley Proctor, Administrative Assistant of the Judiciary Committee

REPLY TO:

- 209 Dunlawton Avenue, Unit 17, Port Orange, Florida 32127 (386) 304-7630 FAX: (888) 263-3818
- Ocala City Hall, 110 SE Watula Avenue, 3rd Floor, Ocala, Florida 34471 (352) 694-0160

Senate's Website: www.flsenate.gov

ANDY GARDINER
President of the Senate

GARRETT RICHTER
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 1170

INTRODUCER: Senator Bradley

SUBJECT: Problem-solving Courts

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	_____	_____	<u>ACJ</u>	_____
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 1170 authorizes cases in a veterans' court or a mental health court to be transferred between counties in the same manner current law authorizes the transfer of drug court cases. The bill also defines the term "problem-solving court" to include drug courts, veterans' courts, and mental health courts.

Under existing law, drug courts, veterans' courts, and mental health courts enable qualifying defendants to participate in pretrial or post-adjudication diversion programs. Although each court type has a similar function, only drug courts are authorized to transfer a case from one county having a drug court program to another county having a drug court program.

This bill enables veterans' courts and mental health courts to transfer cases to other counties on the same basis and under similar conditions as that provided for cases in which defendants are eligible for drug court treatment programs. As is the case for drug court transfers, the county to which the mental health or veterans' court case is transferred must first approve the transfer. Likewise, the court to which the case has been transferred retains jurisdiction to dispose of the case upon the defendant's successful completion of the program, order continued treatment, or authorize prosecution.

The bill designates drug courts, veterans' courts, and mental health courts as problem-solving courts.

II. Present Situation:

Transfer of Criminal Cases Between Counties

Florida law authorizes the transfer of a criminal case between counties in instances in which:

- An indictment or information is pending in one county and a defendant is arrested or held in another county, if the defendant requests in writing to plea guilty or nolo contendere, waive trial in the county in which the warrant was issued, and consent to disposition of the case in another county. The prosecutor of the court in which the indictment or information is pending must also consent to the transfer.¹
- An indictment or information is not pending and a defendant is arrested on a warrant issued upon a complaint in a county other than the county of arrest and requests in writing that he or she wishes to plea guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and consent to disposition of the case in the county in which the defendant was arrested. The prosecuting attorney must also consent to the transfer.
- A defendant is eligible to participate in a drug court treatment program as part of a pretrial intervention program. Additionally, the drug court must consent and the following conditions must be met:
 - The authorized representatives of the drug court programs consult about the transfer;
 - The trial court accepts a plea from the defendant of nolo contendere and enters a transfer order² for the clerk to transfer the case to the county which has accepted the defendant into its drug court program; and
 - Once the transfer takes place, the clerk must schedule a hearing before the drug court for the defendant to begin the drug court program.³

If a case is transferred to a county where the defendant successfully completes a drug court program, the court that received the transfer will dispose of the case by dismissing the criminal charges.⁴ If the court finds that the defendant failed to successfully complete the program, the court may order the defendant to continue education and treatment including through substance-abuse treatment or jail-based treatment programs, or authorize the prosecution of the criminal charges.⁵

Pre-trial Intervention in Criminal Cases

The Department of Corrections (DOC) supervises pretrial intervention programs for defendants who have criminal charges pending. Pretrial intervention is available to defendants who are charged with a misdemeanor or third degree felony as a first offense or who have previously committed one nonviolent misdemeanor.⁶

¹ The formal charging document in a criminal case is known as an indictment or an information. Indictments are returned by a grand jury and presented to the court, and an information is made by a prosecutor in the absence of an indictment by the grand jury. BLACK'S LAW DICTIONARY (10th ed. 2014).

² The transfer order must include all documents relating to the case, including the probable cause affidavit, charging documents, witness statements, the defendant's written consent to abide by all rules of the drug court program, and the defendant's contact information. Section 910.035(5)(c), F.S.

³ Section 910.035(1), (2), and (5), F.S.

⁴ Section 948.08(6)(c), F.S.

⁵ *Id.*

⁶ A misdemeanor is punishable by up to 1 year term in a county jail and a \$500 to a \$1,000 fine. Sections 775.08(2) and 775.083(1)(d) and (e), F.S. A felony is punishable by a minimum of more than a 1 year term of imprisonment in a state penitentiary and fines that range from \$5,000 to \$15,000. Sections 775.08(1) and 775.083(1)(a) through (d), F.S.

Before a case may be transferred to another county, the following is required:

- Approval from the administrator of the pretrial intervention program, a victim, the state attorney, and the judge who presided at the initial first appearance of the defendant;
- Voluntary and written agreement from the defendant; and
- Knowing and intelligent waiver of speedy trial rights from the defendant during the term of diversion.⁷

While a defendant is in the program, criminal charges remain pending. If the defendant fails to successfully complete the program, the program administrator may recommend further supervision or the state attorney may resume prosecution of the case. The defendant does not have the right to a public defender unless the offender is subject to incarceration if convicted.⁸ If the defendant successfully completes the program, the program administrator may recommend that charges be dismissed without prejudice.⁹

The purpose of pretrial intervention is to offer eligible defendants a sentencing alternative in the form of counseling, education, supervision, and medical and psychological treatment as appropriate.¹⁰

Veterans Programs and Courts for Criminal Offenders

The Use of Veterans' Courts Nationally

A 2012 national survey found that 71 percent of participants in veterans' courts experienced trauma while serving in the military.¹¹ More recently, in 2014 a veterans' court report found that 46 percent of participants were diagnosed with substance abuse and mental health problems.

Veterans' courts are modeled after other specialty courts, such as drug courts and mental health courts. The goal of specialty courts is to provide treatment interventions to resolve underlying causes of criminal behavior to "reintegrate court participants into society, reduce future involvement with the criminal justice system, and promote public safety."¹²

Like other specialty courts, veterans' courts require the defendant to appear before the court over a specified period of time. On average, it takes 12 to 18 months for a veterans' court to dispose of a case.¹³

Veterans' Courts in Florida Law

The 2012 Florida Legislature placed into law the "T. Patt Maney Veterans' Treatment Intervention Act."¹⁴ The law:

⁷ Section 948.08 (2), F.S.

⁸ Section 948.08(3) and (4), F.S.

⁹ Section 948.08(5), F.S. If a case is dismissed without prejudice, the case can be refiled at a later time.

¹⁰ Section 948.08(1), F.S.

¹¹ Office of Program Policy Analysis & Government Accountability, Research Memorandum, *State-Funded Veterans' Courts in Florida*, pg. 1 (Jan. 30, 2015).

¹² *Id.*

¹³ *Id.*

¹⁴ Senate Bill 138 (ch. 2012-159, Laws of Fla.).

- Recognizes veterans' courts;
- Requires courts to hold a pre-sentencing hearing if a combat veteran alleges military-related injury, to determine if the defendant suffers from certain conditions, such as post-traumatic stress disorder, a traumatic brain injury, or substance abuse due to military service;
- Establishes pretrial and post-adjudication intervention programs for combat veterans having pending criminal charges or convictions; and
- Enables counties to establish programs to divert eligible defendants who are veterans into treatment programs.

Veterans' Courts

The chief judge of each judicial circuit may establish a Military Veterans and Servicemembers Court Program to serve the special needs of veterans and servicemembers who are convicted of criminal offenses.¹⁵ In sentencing defendants, these specialty courts will consider whether military-related conditions, such as mental illness, traumatic brain injury, or substance abuse can be addressed through programs designed to serve the specific needs of the participant.¹⁶

As of January 2015, 21 veterans' courts in 20 counties operate in Florida.¹⁷ Seven courts received funding from state general revenue. From July 2013 to October 2014, 45 participants graduated from the state-funded courts.¹⁸ Fifty-two percent of the participants faced felony charges, mainly third-degree felonies.¹⁹ Sixty-two percent of the participants in state-funded veterans' courts between July 2013 and October 2014 had a dual diagnosis of mental health issues and substance abuse.

Pre-trial Intervention Programs

To be eligible to participate in diversion programs, veterans can be charged with misdemeanors²⁰ or felonies²¹. However, veterans must not be charged with a disqualifying felony offense. Disqualifying offenses are serious felony offenses and include:

- Kidnapping and attempted kidnapping;
- Murder or attempted murder;
- Aggravated battery or attempted aggravated battery;
- Sexual battery or attempted sexual battery;
- Lewd or lascivious battery and certain other sexual offenses against children;
- Robbery or attempted robbery;

¹⁵ Section 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions. A servicemember is defined as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces. Section 250.01(19), F.S.

¹⁶ The authority for Veterans' Courts Programs is in ch. 394, F.S., which addresses mental health. Section 394.47891, F.S.

¹⁷ Office of Program Policy Analysis & Government Accountability, *supra* note 11 at 2 and 8. Alachua, Clay, Duval, Okaloosa, Orange, Pasco, and Pinellas counties received state general revenue funding to operate in Fiscal Year 2014-15. Other counties having veterans' courts are Brevard, Broward, Collier, Hillsborough, Indian River, Lake, Lee, Marion, Osceola, Palm Beach, Seminole, St. Lucie, and Volusia counties. Volusia County maintains two veterans' courts.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 5.

²⁰ Section 948.16 (2)(a), F.S., establishes the misdemeanor pretrial veterans' treatment intervention program.

²¹ Section 948.08(7)(a), F.S., authorizes courts to consider veterans charged with non-disqualifying felonies for pretrial veterans' treatment intervention programs.

- Burglary or attempted burglary;
- Aggravated assault;
- Aggravated stalking; and
- Treason.²²

Prior to placement in a program, a veterans' treatment intervention team must develop an individualized coordinated strategy for the veteran. The team must present the coordinated strategy to the veteran in writing before he or she agrees to enter the program. The strategy is modeled after the ten therapeutic jurisprudence principles and key components for treatment-based drug court programs.²³

During the time that the defendant is allotted participation in the treatment program, the court retains jurisdiction in the case. At the end of the program, the court considers recommendations for disposition by the state attorney and the program administrator. If the veteran successfully completes the treatment program, the court must dismiss the criminal charges. If the court finds that the veteran did not successfully complete the program, the court can either order the veteran to continue in education and treatment or authorize the state attorney to proceed with prosecution.

Eligible veterans who successfully complete the diversion program may petition the court to order the expunction of the arrest record and the plea.

Post-adjudication Treatment Programs

Veterans and servicemembers²⁴ on probation or community control who committed a crime on or after July 1, 2012, and who suffer from military-related mental illness, traumatic brain injury, or substance abuse may also qualify for treatment programs. A court may impose, as a condition of probation or community control, successful completion of a mental health or substance abuse treatment program.²⁵

Mental Health Courts

Florida law does not recognize the specialty court of a mental health court.

²² Section 948.06(8)(c), F.S.

²³ Section 948.08(7)(b), F.S., requires a coordinated strategy for veterans charged with felonies who are participating in pretrial intervention programs. Section 948.16(2)(b), F.S., requires a coordinated strategy for veterans charged with misdemeanors. Section 397.334(4), F.S., requires treatment based court programs to include therapeutic jurisprudence principles and components recognized by the United States Department of Justice and adopted by the Florida Supreme Court Treatment-based Drug Court Steering Committee.

²⁴ Section 1.01(14), F.S., defines a veteran as a person who served in active military, naval, or air service who was discharged or released under honorable conditions or who later received an upgraded discharge under honorable conditions. A servicemember is defined as a person serving as a member of the United States Armed Forces on active duty or state active duty and members of the Florida National Guard and United States Reserve Forces. (Section 250.01(19), F.S.)

²⁵ Section 948.21, F.S.

III. Effect of Proposed Changes:

This bill enables veterans' courts and mental health courts to transfer cases to other counties on the same basis, and under similar conditions as that provided for cases in which defendants are eligible for drug court treatment programs.

As is the case for drug court transfers, the county to which the mental health or veterans' court case is transferred must first approve the transfer. Likewise, the court to which the case has been transferred retains jurisdiction to dispose of the case upon the defendant's successful completion of the program, order continued treatment, or authorize prosecution.

The bill establishes the term "problem-solving court" to apply to the specialty courts of drug courts, veterans' courts, and mental health courts.

The bill takes effect July 1, 2015.

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

This bill requires consent from a receiving county prior to transfer. Therefore, a county does not have to accept transfer of a problem-solving court case and provide services.

For this reason, the bill does not appear to create a mandate.

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:

This bill may facilitate a person's participation in a veterans' court program or mental health court program by allowing a defendant to participate in a program in his or her home county instead of the county where a crime occurred.

C. Government Sector Impact:

Although the original legislation creating veterans' courts in 2012 included an appropriation, this bill does not.

The Office of the State Courts Administrator (OSCA) expects no judicial or court workload impact from this bill as cases would be transferred and no net additional cases would be generated. Additional orders of transfer and completion of necessary paperwork resulting from the bill may have a minimal fiscal impact on expenditures.²⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 910.035, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

²⁶ Office of the State Courts Administrator, *2015 Judicial Impact Statement* (March 10, 2015); on file with the Senate Judiciary Committee.

By Senator Bradley

7-00661A-15

20151170__

A bill to be entitled

An act relating to problem-solving courts; amending s. 910.035, F.S.; defining the term "problem-solving court"; authorizing a person eligible for participation in a problem-solving court to transfer his or her case to another county's problem-solving court under certain circumstances; making technical changes; providing an effective date.

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

Section 1. Section 910.035, Florida Statutes, is amended to read:

910.035 Transfer from county for plea and sentence or participation in a problem-solving court.-

(1) INDICTMENT OR INFORMATION PENDING.—A defendant arrested or held in a county other than that in which an indictment or information is pending against him or her may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the indictment or information is pending, and to consent to disposition of the case in the county in which the defendant was arrested or is held, subject to the approval of the prosecuting attorney of the court in which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction for the county in which the

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defendant is held, and the prosecution shall continue in that county upon the information or indictment originally filed. In the event a fine is imposed upon the defendant in that county, two-thirds thereof shall be returned to the county in which the indictment or information was originally filed.

(2) INDICTMENT OR INFORMATION NOT PENDING.—A defendant arrested on a warrant issued upon a complaint in a county other than the county of arrest may state in writing that he or she wishes to plead guilty or nolo contendere, to waive trial in the county in which the warrant was issued, and to consent to disposition of the case in the county in which the defendant was arrested, subject to the approval of the prosecuting attorney of the court in which the indictment or information is pending. Upon receipt of the defendant's statement and the written approval of the prosecuting attorney, and upon the filing of an information or the return of an indictment, the clerk of the court from which the warrant was issued shall transmit the papers in the proceeding, or certified copies thereof, to the clerk of the court of competent jurisdiction in the county in which the defendant was arrested, and the prosecution shall continue in that county upon the information or indictment originally filed.

(3) EFFECT OF NOT GUILTY PLEA.—If, after the proceeding has been transferred pursuant to subsection (1) or subsection (2), the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court. The defendant's statement that he or she wishes to plead guilty or nolo contendere shall not be used against the defendant.

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59 (4) APPEARANCE IN RESPONSE TO A SUMMONS.—For the purpose of
60 initiating a transfer under this section, a person who appears
61 in response to a summons shall be treated as if he or she had
62 been arrested on a warrant in the county of such appearance.

63 (5) TRANSFERS FOR PARTICIPATION IN A PROBLEM-SOLVING
64 COURT.—For purposes of this subsection, the term “problem-
65 solving court” means a drug court pursuant to s. 948.01, s.
66 948.06, s. 948.08, s. 948.16, or s. 948.20; a veterans’ court
67 pursuant to s. 394.47891, s. 948.08, s. 948.16, or s. 948.21; or
68 a mental health court. ~~A~~ Any person eligible for participation
69 in a problem-solving drug court treatment program pursuant to s.
70 948.08(6) may be eligible to have the case transferred to a
71 county other than that in which the charge arose if the problem-
72 solving drug court program agrees and these procedures ~~if the~~
73 ~~following conditions~~ are met:

74 (a) The authorized representative of the problem-solving
75 drug court program of the county requesting to transfer the case
76 shall consult with the authorized representative of the problem-
77 solving drug court program in the county to which transfer is
78 desired.

79 (b) If approval for transfer is received from all parties,
80 the trial court ~~must shall~~ accept, in the case of a pretrial
81 problem-solving court, a plea of nolo contendere and enter a
82 transfer order directing the clerk to transfer the case to the
83 county ~~that~~ which has accepted the defendant into its problem-
84 solving drug court program.

85 (c) The transfer order ~~must shall~~ include a copy of the
86 probable cause affidavit, in the case of a pre-trial problem-
87 solving court; any charging or sentencing documents in the case;

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

7-00661A-15

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88 all reports, witness statements, test results, evidence lists,
89 and other documents in the case; the defendant’s mailing address
90 and phone number; and the defendant’s written consent to abide
91 by the rules and procedures of the receiving county’s problem-
92 solving drug court program.

93 (d) After the transfer takes place, the clerk shall set the
94 matter for a hearing before the problem-solving drug court
95 program judge, and the court shall ensure the defendant’s entry
96 into the problem-solving drug court program.

97 (e) Upon successful completion of the problem-solving drug
98 court program, the jurisdiction to which the case has been
99 transferred shall dispose of the case ~~pursuant to s. 948.08(6)~~.
100 If the defendant does not complete the problem-solving drug
101 court program successfully, the jurisdiction to which the case
102 has been transferred shall dispose of the case within the
103 guidelines of the Criminal Punishment Code.

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

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



The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 3, 2015

I respectfully request that **Senate Bill # 1170**, relating to Problem-solving Courts, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "Rob Bradley".

Senator Rob Bradley
Florida Senate, District 7

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 1312

INTRODUCER: Judiciary Committee and Senator Simmons

SUBJECT: Strategic Lawsuits Against Public Participation

DATE: March 11, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Cibula	JU	Fav/CS
2.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1312 does two things:

- It adds protection of “free speech in connection with public issues” to the statute prohibiting certain strategic lawsuits against public participation (SLAPP), defining the term “free speech in connection with public issues” as any written or oral statement that is protected under applicable law and is made:
 - Before a governmental entity in connection with an issue under consideration or review by a governmental entity, or
 - In connection with the publication of a play, movie broadcast, or other similar work of art.
- It includes a person¹ in the prohibition against bringing a SLAPP suit and in the provisions for expedited resolution of a lawsuit claimed to be a SLAPP suit.

II. Present Situation:

A strategic lawsuit against public participation (SLAPP) is one ostensibly brought to redress a wrong, such as an invasion of privacy, a business tort, or an interference with a contract or an economic advantage, but actually brought to silence one or more critics.² Because of the variety

¹ The word “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations. Section 1.01(3), F.S.

² See, e.g., The Florida Senate Committee on Judiciary, Issue Brief 2009-332, Strategic Lawsuits Against Public Participation, October 2008, http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-332ju.pdf; Cornell University Law School, SLAPP suit definition, https://www.law.cornell.edu/wex/slapp_suit; Public

of nominal bases for a SLAPP suit, laws to prevent them, known as anti-SLAPP laws, are phrased in terms of rights to be protected.

Florida's anti-SLAPP statute protects the right of Florida's citizens to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Article I of the State Constitution.^{3, 4} The SLAPP-suit prohibition applies only to suits brought by government entities.

Specifically, the statute prohibits a governmental entity in this state from filing or causing to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state.

The statute also provides a right to an expeditious resolution of a claim that a suit has been filed in violation of this section. The person or entity sued by a governmental entity may petition the court for an order dismissing the action or granting final judgment in favor of that person or entity. As soon as practicable, the court must set a hearing on the petitioner's motion, which must be held at the earliest possible time after the filing of the governmental entity's response. If the petitioner prevails, the court may award actual damages arising from the governmental entity's violation of this act. The court must award the prevailing party reasonable attorney's fees and costs incurred in connection with a claim that an action was filed in violation of this section.

III. Effect of Proposed Changes:

CS/SB 1312 does two things:

- It adds protection of “free speech in connection with public issues” to the anti-SLAPP suit statute, defining the term “free speech in connection with public issues” as any written or oral statement that is protected under applicable law and is made:
 - Before a governmental entity in connection with an issue under consideration or review by a governmental entity, or
 - In connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.
- It includes a person in the prohibition against bringing a SLAPP suit and in the provisions for expedited resolution of a lawsuit claimed to be a SLAPP suit.

Participation Project, FAQs about SLAPPs, <http://www.anti-slapp.org/slappdash-faqs-about-slapps/>; Strategic Lawsuits against Public Participation, <http://legal-dictionary.thefreedictionary.com/Strategic+Lawsuits+against+Public+Participation>; and Reporters Committee for Freedom of the Press, Anti-SLAPP laws, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anti-slapp-laws-0>.

³ Section 768.295, F.S., the Citizen Participation in Government Act.

⁴ There are also narrower statutes prohibiting SLAPP suits against a condominium unit owner or a parcel owner within a homeowners' association without merit and solely because such owner has exercised the right to instruct their representatives or the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Article I of the State Constitution. ss. 718.1224 and 720.304, F.S., respectively. These statutes also provide for expeditious resolution of a claim that the suit is in violation of these sections and prohibit condominium associations or homeowners' associations from expending association funds in prosecuting a SLAPP suit against a property owner.

The bill takes effect July 1, 2015.

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:

Persons and entities may be better protected against the expenses of defending a SLAPP suit.

C. Government Sector Impact:

To the extent that the bill results in quicker, more efficient resolution of SLAPP suits, it may reduce costs to the courts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Due to the disjunctive structure of the definition of “free speech in connection with public issues,” the bill appears to give additional protections to speech solely because the speech is made through designated forms of media. The bill does not appear to require that speech made through these forms of media relate to a “public issue.” If the Legislature intends to link the speech protections provided in the bill to the discussion of public issues or participation in government, it may wish to revise the bill accordingly.

VIII. Statutes Affected:

This bill substantially amends section 768.295 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 March 10, 2015:

- Expands the list of types of artistic works contained in the definition of the term “free speech in connection with a public interest”;
- Preserves current law that actual damages are available only in a SLAPP suit filed by a government entity; and
- Makes technical changes.

- B. **Amendments:**

None.



456956

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/11/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment

Delete lines 19 - 84
and insert:
right in Florida ~~of Florida's citizens~~ to exercise the ~~their~~
rights of free speech in connection with public issues, and the
rights to peacefully assemble, instruct ~~their~~ representatives,
and petition for redress of grievances before the various
governmental entities of this state as protected by the First
Amendment to the United States Constitution and s. 5, Art. I of
the State Constitution. ~~The Legislature recognizes that~~



456956

12 ~~"Strategic Lawsuits Against Public Participation" or "SLAPP"~~
13 ~~suits, as they are typically called, have increased over the~~
14 ~~last 30 years and are mostly filed by private industry and~~
15 ~~individuals. However, It is the public policy of this state that~~
16 ~~a person or governmental entity~~ government entities not engage
17 in SLAPP suits because such actions are inconsistent with the
18 right of persons ~~individuals~~ to exercise their constitutional
19 rights of free speech in connection with public issues
20 ~~participate in the state's institutions of government.~~

21 Therefore, the Legislature finds and declares that prohibiting
22 such lawsuits as herein described ~~by governmental entities~~ will
23 preserve this fundamental state policy, preserve the
24 constitutional rights of persons in Florida ~~citizens~~, and assure
25 the continuation of representative government in this state. It
26 is the intent of the Legislature that such lawsuits be
27 expeditiously disposed of by the courts.

28 ~~(2)(3)~~ As used in this section, the phrase or term:

29 (a) "Free speech in connection with public issues" means
30 any written or oral statement that is protected under applicable
31 law and is made before a governmental entity in connection with
32 an issue under consideration or review by a governmental entity,
33 or is made in or in connection with a play, movie, television
34 program, radio broadcast, audiovisual work, book, magazine
35 article, musical work, news report, or other similar work.

36 (b) "Governmental entity" or "government entity" means the
37 state, including the executive, legislative, and the judicial
38 branches of government and the independent establishments of the
39 state, counties, municipalities, corporations primarily acting
40 as instrumentalities of the state, counties, or municipalities,



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41 districts, authorities, boards, commissions, or any agencies
42 thereof.

43 ~~(3)~~~~(4)~~ A person or ~~No~~ governmental entity in this state may
44 not shall file or cause to be filed, through its employees or
45 agents, any lawsuit, cause of action, claim, cross-claim, or
46 counterclaim against another ~~a~~ person or entity without merit
47 and primarily ~~solely~~ because such person or entity has exercised
48 the constitutional right of free speech in connection with a
49 public issue, or right to peacefully assemble, the right to
50 instruct representatives of government, or and the right to
51 petition for redress of grievances before the various
52 governmental entities of this state, as protected by the First
53 Amendment to the United States Constitution and s. 5, Art. I of
54 the State Constitution.

55 ~~(4)~~~~(5)~~ A person or entity sued by a governmental entity or
56 another person in violation of this section has a right to an
57 expeditious resolution of a claim that the suit is in violation
58 of this section. A person or entity may move ~~petition~~ the court
59 for an order dismissing the action or granting final judgment in
60 favor of that person or entity. The person or entity ~~petitioner~~
61 may file a motion for summary judgment, together with
62 supplemental affidavits, seeking a determination that the
63 claimant's or governmental entity's lawsuit has been brought in
64 violation of this section. The claimant or governmental entity
65 shall thereafter file a ~~its~~ response and any supplemental
66 affidavits. As soon as practicable, the court shall set a
67 hearing on the ~~petitioner's~~ motion, which shall be held at the
68 earliest possible time after the filing of the claimant's or
69 governmental entity's response. The court may award, subject to



456956

70 the limitations in s. 768.28, the party sued by a governmental
71 entity actual damages arising from a ~~the~~ governmental entity's
72 violation of this section ~~act~~. The court shall award the
73 prevailing party reasonable attorney ~~attorney's~~ fees and

By Senator Simmons

10-00699B-15

20151312__

A bill to be entitled

An act relating to strategic lawsuits against public participation; amending s. 768.295, F.S.; removing a short title; providing that legislative intent includes the protection of specified forms of free speech; defining the phrase "free speech in connection with public issues"; 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 768.295, Florida Statutes, is amended to read:

768.295 Strategic Lawsuits Against Public Participation (SLAPP) suits by governmental entities prohibited.—

(1) ~~This section may be cited as the "Citizen Participation in Government Act."~~

(2) It is the intent of the Legislature to protect the right of Florida's citizens to exercise their rights of free speech in connection with public issues, and their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. ~~The Legislature recognizes that "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, as they are typically called, have increased over the last 30 years and are mostly filed by private industry and individuals. However,~~ It is the public policy of this state that

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a person or governmental entity ~~government entities~~ not engage in SLAPP suits because such actions are inconsistent with the right of individuals to exercise their constitutional rights of free speech in connection with public issues ~~participate in the state's institutions of government~~. Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described ~~by governmental entities~~ will preserve this fundamental state policy, preserve the constitutional rights of Florida citizens, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(2)(3) As used in this section, the phrase or term:

(a) "Free speech in connection with public issues" means any written or oral statement that is protected under applicable law and made before a governmental entity in connection with an issue under consideration or review by a governmental entity, or in connection with the publication of a play, movie broadcast, or other similar work of art.

(b) "Governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(3)(4) A person or ~~Ne~~ governmental entity in this state may not shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another a person or entity without merit

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59 and solely because such person or entity has exercised the
 60 constitutional right of free speech in connection with a public
 61 issue, or right to peacefully assemble, the right to instruct
 62 representatives of government, or and the right to petition for
 63 redress of grievances before the various governmental entities
 64 of this state, as protected by the First Amendment to the United
 65 States Constitution and s. 5, Art. I of the State Constitution.

66 ~~(4)(5)~~ A person or entity sued by a governmental entity or
 67 another person in violation of this section has a right to an
 68 expeditious resolution of a claim that the suit is in violation
 69 of this section. A person or entity may move ~~petition~~ the court
 70 for an order dismissing the action or granting final judgment in
 71 favor of that person or entity. The person or entity ~~petitioner~~
 72 may file a motion for summary judgment, together with
 73 supplemental affidavits, seeking a determination that the
 74 claimant's or governmental entity's lawsuit has been brought in
 75 violation of this section. The claimant or governmental entity
 76 shall thereafter file a ~~its~~ response and any supplemental
 77 affidavits. As soon as practicable, the court shall set a
 78 hearing on the ~~petitioner's~~ motion, which shall be held at the
 79 earliest possible time after the filing of the claimant's or
 80 governmental entity's response. The court may award, subject to
 81 the limitations in s. 768.28, the party sued by a governmental
 82 entity or person actual damages arising from the governmental
 83 entity's or person's violation of this section ~~act~~. The court
 84 shall award the prevailing party reasonable attorney's fees and
 85 costs incurred in connection with a claim that an action was
 86 filed in violation of this section.

87 ~~(5)(6)~~ In any case filed by a governmental entity which is

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88 found by a court to be in violation of this section, the
 89 governmental entity shall report such finding and provide a copy
 90 of the court's order to the Attorney General no later than 30
 91 days after such order is final. The Attorney General shall
 92 report any violation of this section by a governmental entity to
 93 the Cabinet, the President of the Senate, and the Speaker of the
 94 House of Representatives. A copy of such report shall be
 95 provided to the affected governmental entity.

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

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The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 3, 2015

I respectfully request that **Senate Bill 1312**, relating to Strategic Lawsuits Against Public Participation, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "David Simmons".

Senator David Simmons
Florida Senate, District 10

**The Florida Senate
COMMITTEE VOTE RECORD**

COMMITTEE: Judiciary
ITEM: SB 1312
FINAL ACTION: Favorable with Committee Substitute
MEETING DATE: Tuesday, March 10, 2015
TIME: 4:00 —6:00 p.m.
PLACE: 110 Senate Office Building

FINAL VOTE		SENATORS	3/10/2015 ¹ Amendment 456956					
			Yea	Nay	Yea	Nay	Yea	Nay
X		Bean						
X		Benacquisto						
X		Brandes						
X		Joyner						
X		Simmons						
X		Simpson						
X		Soto						
X		Stargel						
X		Ring, VICE CHAIR						
X		Díaz de la Portilla, CHAIR						
10	0	TOTALS	RCS	-				
Yea	Nay		Yea	Nay	Yea	Nay	Yea	Nay

CODES: FAV=Favorable RCS=Replaced by Committee Substitute TP=Temporarily Postponed WD=Withdrawn
 UNF=Unfavorable RE=Replaced by Engrossed Amendment VA=Vote After Roll Call OO=Out of Order
 -R=Reconsidered RS=Replaced by Substitute Amendment VC=Vote Change After Roll Call AV=Abstain from Voting

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 1362

INTRODUCER: Senator Simmons

SUBJECT: Department of Legal Affairs

DATE: March 9, 2015

REVISED: _____

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

I. Summary:

SB 1362 makes changes to laws enforced by or governing the Office of the Attorney General, also known as the Department of Legal Affairs and includes the Office of Statewide Prosecution.

The bill:

- Revises the list of offenses to include kidnapping, false imprisonment, luring or enticing a child, or custody offenses facilitated by or connected to the use of the Internet that may be investigated and prosecuted by the Office of Statewide Prosecution.
- Provides authority to purchase promotional materials and basic refreshments for public training and information sessions.
- Allows the Medicaid Fraud unit to use a percentage of the recovered funds, deposited into the Operating Trust Fund, to fund investigations and enforcement actions.
- Updates references of federal consumer protection laws that are incorporated into the statutes.
- Revises Victim Assistance awards criteria to:
 - provide for maximum lifetime amounts,
 - expand definitions to broaden coverage for elderly persons or disabled adults who suffer a property loss, and
 - provide for relocation assistance for human trafficking victims.
- Makes necessary conforming and technical changes.

This bill may have a fiscal impact.

II. Present Situation:

For discussion of the provisions of ss. 16.56, 409.9203, 501.203, 501.204, 960.03, 960.13, 960.195, 960.198, and 960.199, F.S., that are amended and ss. 16.62 and 960.196, F.S., that are created by the bill, see the “effect of Proposed Changes” section of this analysis.

III. Effect of Proposed Changes:

Attorney General

Section 16.56, F.S., creates within the Department of Legal Affairs (department) a separate entity of the Office of Statewide Prosecution and provides for its authority and duties that include investigating and prosecuting certain offenses.

Section 1 amends s. 16.56, F.S., to authorize the Office of Statewide Prosecution to investigate and prosecute kidnapping, false imprisonment, luring or enticing a child, or custody offenses facilitated by or connected to the use of the internet. Technical changes are also made in this section.

The department conducts public training and informational sessions from time to time. **Section 2** creates s. 16.62, F.S., to authorize the department to expend not more than \$20,000 annually to purchase and distribute promotional materials or items that serve to advance with dignity and integrity the goodwill of the state and the department and to provide basic refreshments at official functions, seminars, or meetings of the department in which dignitaries or representatives from the federal government, other states, or nations, or other agencies are in attendance.

A Medicaid Fraud Control Unit is created in the department to investigate all violations of Medicaid Provider Fraud.¹ The Department of Law Enforcement or the director of the Medicaid Provider Fraud unit are required to pay rewards for reporting Medicaid fraud if certain requirements are met. Section 68.082, F.S., provides for actions of false claims against the state. Section 68.085, F.S., provides for awards to certain plaintiffs from proceeds of an action or settlement of a claim. Section 409.9203, F.S., provides for rewards to a person who furnishes original information relating to and reports a violation of the state's Medicaid fraud laws. The award must be paid from the Operating Trust Fund moneys collected pursuant to s. 68.085, F.S. Section 68.085(3), F.S., provides for 10 percent of the remaining proceeds be deposited into the Operating Trust Fund for payment of rewards.

Section 3 amends s. 409.9203, F.S., to add a new subsection that requires 50 percent of the 10 percent of the remaining proceeds described in s. 68.085(3), F.S., be used to fund rewards for reporting Medicaid fraud and authorizes the Medicaid Fraud Control Unit to use the remaining 50 percent to fund its investigations of potential violations for false claims against the state² and any related civil actions.

Consumer Protection

Chapter 501, F.S., provides for the protection of Florida's consumers. In addition to the laws prescribed by the Legislature, rules of the Federal Trade Commission (FTC), standards of unfairness and deception set forth and interpreted by the FTC or the federal courts, and any law, statute, rule regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices as of July 1, 2013, are incorporated by reference in the definition of the term "violation of this part." In construing the unfair methods of

¹ Section 409.920, F.S.

² Section 68.082, F.S.

competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce that are unlawful, due consideration and weight must be given to the interpretations of the FTC and federal courts relating to certain provisions³ of the Federal Trade Commission Act as of July 1, 2013. **Sections 4 and 5** amend ss. 501.203 and 501.204, F.S., change the date of July 1, 2013, to July 1, 2015, thereby updating the federal law the department may use to protect Florida consumers.

Victim Assistance

The provisions of ss. 960.01 - 960.28, F.S., are known as the “Florida Crimes Compensation Act.” Section 960.03, F.S., provides for definitions, including the terms “crime” and “disabled adult.” Victims who suffer personal physical injury or death as a direct result of a crime are eligible for awards.

Section 6 amends s. 960.03, F.S., by adding the offense “a forcible felony committed by an adult or juvenile which directly results in psychiatric or psychological injury” to the definition of the term “crime.” A driver of a vehicle involved in a crash occurring on public or private property which results in injury to a person other than serious bodily injury, in serious bodily injury to a person, or in the death of a person,⁴ or fleeing or attempting to elude a law enforcement officer⁵ are also added to the elements of that definition. Finally, the element of a crime involving the operation of a motor vehicle, boat, or aircraft which results in another person’s injury or death, is clarified to require the act to be “intentionally inflicted through the use of the vehicle, boat, or aircraft.” The amendment adds that “no other act involving the operation of a motor vehicle, boat, or aircraft constitutes a crime for purposes of the chapter.”

The term “disabled adult” means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability or organic brain damage or mental limitation that restrict the person’s ability to perform the normal activities of daily living. The term is expanded to include “mental illness” or “who has one or more physical limitations.”

Section 960.13, F.S., provides for awards of compensation to victims. The department must find that a crime was committed, that the crime directly resulted in personal injury to, psychiatric or psychological injury to, or death of, the victim or intervenor, and the crime was promptly reported to the proper authorities to make an award. Any award made pursuant to the chapter must be reduced by the amount of any payments or services received or to be received as a result of the injury or death from certain sources that provide services. An exception is made for an award for loss of support in that it will not be reduced. **Section 7** adds to the reduction exception awards for catastrophic injury.

Section 960.195, F.S., provides awards to elderly persons or disabled adults for property loss that causes a substantial diminution of the quality of life. The department may award a maximum of \$500 when:

- There is proof that a criminal or delinquent act was committed,

³ Section 5(a)(1) of 15 U.S.C. s. 45(a)(1).

⁴ Section 316.027(2), F.S.

⁵ Section 316.1935, F.S.

- The criminal or delinquent act is reported to law enforcement authorities within 72 hours,
- The victim cooperates with law enforcement authorities in the investigation,
- There is proof that the tangible personal property in question belonged to the claimant,
- The claimant did not contribute to the criminal or delinquent act,
- There is no other source of reimbursement or indemnification available to the claimant, and
- The claimant would not be able to replace the tangible personal property in question without incurring a serious financial hardship.

Section 8 amends s. 960.195, F.S., to limit the amount of the claim to \$500 on any one claim and a lifetime maximum of \$1,000 for all claims. The department may waive the 72 hour requirement if it finds that the delay was justified by good cause shown. The department is authorized to deny, reduce, or withdraw any award if it finds that a claimant or award recipient has not cooperated with the state attorney, all law enforcement agencies, and the department.

Section 960.07, F.S., provides the general process and criteria for filing of claims for compensation by an eligible person and s. 960.13, F.S., provides generally for awards. In addition to this award and compensation, **section 9** creates s. 960.196, F.S., relating to relocation assistance for victims of human trafficking. This new section authorizes the department to award a one-time payment of up to \$1,500 for any one claim and a lifetime maximum of \$3,000 to a victim of human trafficking who needs urgent assistance to escape from an unsafe environment directly related to the human trafficking offense. For the victim to be awarded the compensation:

- There must be proof that a human trafficking offense⁶ was committed.
- The crime must be reported to the proper authorities and the claim must be filed within 1 year, or 2 years with good cause, after the date of the last human trafficking offense.⁷
 - A certified domestic violence or rape crisis center in the state must certify the victim's need to escape from an unsafe environment. The center must assert in its certification that the victim is cooperating with the proper authorities and must include documentation that the victim has developed a safety plan.
 - A state attorney, statewide prosecutor, or federal prosecutor may certify in writing that a human trafficking victim's need to relocate from an unsafe environment due to the threat of future violence which is directly related to the human trafficking offense in a case that exceeds the 2-year requirement.

The department must deny relocation payments for a human trafficking claim if it has previously approved or paid out a domestic violence or sexual battery relocation claim under s. 960.198, F.S., or s. 960.199, F.S.

Section 960.198, F.S., provides for relocation assistance for victims of domestic violence. Under this section, the department may award a one-time payment of up to \$1,500 on any one claim and a lifetime maximum of \$3,000 to a victim of domestic violence who needs immediate assistance to escape from a domestic violence environment. Certain criteria must be met to receive the reward and when the claim must be denied by the department. **Section 10** amends this section to add human trafficking to the list of claims that should not be paid out if a claim has already been paid by the department for the same incident.

⁶ See s. 787.06(3)(b), (d), (f), or (g), F.S.

⁷ *Id.*

Section 960.199, F.S., provides for relocation assistance for victims of sexual battery or human trafficking. **Section 11** amends this section to remove references to human trafficking that are now addressed in s. 960.196, F.S.

Section 12 provides that the act takes effect July 1, 2015.

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 award for victim assistance benefits are capped, citizens are limited in the amount of lifetime awards that they may receive.

C. Government Sector Impact:

Because awards for victim assistance are capped in certain instances, cost to the state will be less by an indeterminate amount.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 16.56, 409.9203, 501.203, 501.204, 960.03, 960.13, 960.195, 960.198, and 960.199.

This bill creates sections 16.62 and 960.196 of the Florida Statutes.

IX. Additional Information:

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

None.

- B. **Amendments:**

None.

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

By Senator Simmons

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1 A bill to be entitled
 2 An act relating to the Department of Legal Affairs;
 3 amending s. 16.56, F.S.; revising the list of offenses
 4 that may be investigated and prosecuted by the Office
 5 of Statewide Prosecution; creating s. 16.62, F.S.;
 6 prohibiting the Department of Legal Affairs from
 7 expending more than a specified amount annually to
 8 purchase and distribute promotional materials or items
 9 that serve to advance the goodwill of this state and
 10 the department and to provide basic refreshments at
 11 specified functions, seminars, or meetings; amending
 12 s. 409.9203, F.S.; specifying the distribution of
 13 certain funds recovered in Medicaid fraud actions;
 14 amending s. 501.203, F.S.; revising the term
 15 "violation of this part"; amending s. 501.204, F.S.;
 16 revising legislative intent; amending s. 960.03, F.S.;
 17 revising the definition of the term "crime" for
 18 purposes of obtaining crime victim compensation from
 19 the department to include certain forcible felonies;
 20 revising provisions concerning acts involving the
 21 operation of a motor vehicle, boat, or aircraft;
 22 revising the definition of the term "disabled adult";
 23 correcting a cross-reference; amending s. 960.13,
 24 F.S.; exempting crime victim compensation awards for
 25 catastrophic injury from certain deductions; amending
 26 s. 960.195, F.S.; revising the maximum victim
 27 compensation amounts that the department may award to
 28 elderly persons or disabled adults who suffer a
 29 property loss that causes a substantial diminution in

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30 their quality of life in certain circumstances;
 31 revising the conditions under which elderly persons or
 32 disabled adults who suffer a property loss are
 33 eligible for an award; authorizing the department to
 34 deny, reduce, or withdraw a specified award upon
 35 finding that any claimant or award recipient has not
 36 duly cooperated with certain persons and entities;
 37 creating s. 960.196, F.S.; providing for relocation
 38 assistance for human trafficking victims; amending s.
 39 960.198, F.S.; prohibiting relocation assistance for a
 40 domestic violence claim if the victim has received
 41 previous relocation assistance for a human trafficking
 42 claim; amending s. 960.199, F.S.; deleting provisions
 43 relating to relocation assistance for human
 44 trafficking victims; providing an effective date.

45
 46 Be It Enacted by the Legislature of the State of Florida:

47
 48 Section 1. Paragraphs (a) and (b) of subsection (1) of
 49 section 16.56, Florida Statutes, are amended to read:

50 16.56 Office of Statewide Prosecution.—

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

55 (a) Investigate and prosecute the offenses of:

56 1. Bribery, burglary, criminal usury, extortion, gambling,
 57 kidnapping, larceny, murder, prostitution, perjury, robbery,
 58 carjacking, and home-invasion robbery;

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- 59 2. Any crime involving narcotic or other dangerous drugs;
 60 3. Any violation of ~~the provisions of~~ the Florida RICO
 61 (Racketeer Influenced and Corrupt Organization) Act, including
 62 any offense listed in the definition of racketeering activity in
 63 s. 895.02(1)(a), providing such listed offense is investigated
 64 in connection with a violation of s. 895.03 and is charged in a
 65 separate count of an information or indictment containing a
 66 count charging a violation of s. 895.03, the prosecution of
 67 which listed offense may continue independently if the
 68 prosecution of the violation of s. 895.03 is terminated for any
 69 reason;
 70 4. Any violation of ~~the provisions of~~ the Florida Anti-
 71 Fencing Act;
 72 5. Any violation of ~~the provisions of~~ the Florida Antitrust
 73 Act of 1980, as amended;
 74 6. Any crime involving, or resulting in, fraud or deceit
 75 upon any person;
 76 7. Any violation of s. 847.0135, relating to computer
 77 pornography and child exploitation prevention, or any offense
 78 related to a violation of s. 847.0135 or any violation of
 79 chapter 827 where the crime is facilitated by or connected to
 80 the use of the Internet or any device capable of electronic data
 81 storage or transmission;
 82 8. Any violation of ~~the provisions of~~ chapter 815;
 83 9. Any criminal violation of part I of chapter 499;
 84 10. Any violation of ~~the provisions of~~ the Florida Motor
 85 Fuel Tax Relief Act of 2004;
 86 11. Any criminal violation of s. 409.920 or s. 409.9201;
 87 12. Any crime involving voter registration, voting, or

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- 88 candidate or issue petition activities;
 89 13. Any criminal violation of the Florida Money Laundering
 90 Act;
 91 14. Any criminal violation of the Florida Securities and
 92 Investor Protection Act; or
 93 15. Any violation of ~~the provisions of~~ chapter 787, as well
 94 as any and all offenses related to a violation of ~~the provisions~~
 95 ~~of~~ chapter 787;
 96
 97 or any attempt, solicitation, or conspiracy to commit any of the
 98 crimes specifically enumerated above. The office shall have such
 99 power only when any such offense is occurring, or has occurred,
 100 in two or more judicial circuits as part of a related
 101 transaction, or when any such offense is connected with an
 102 organized criminal conspiracy affecting two or more judicial
 103 circuits. Informations or indictments charging such offenses
 104 shall contain general allegations stating the judicial circuits
 105 and counties in which crimes are alleged to have occurred or the
 106 judicial circuits and counties in which crimes affecting such
 107 circuits or counties are alleged to have been connected with an
 108 organized criminal conspiracy.
 109 (b) Investigate and prosecute any crime enumerated in
 110 paragraph (a) subparagraphs (a)1.-14. facilitated by or
 111 connected to the use of the Internet. Any such crime is a crime
 112 occurring in every judicial circuit within the state.
 113 Section 2. Section 16.62, Florida Statutes, is created to
 114 read:
 115 16.62 Authority of the Department of Legal Affairs to
 116 expend funds on promotional materials and goodwill.-In addition

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 117 to expenditures separately authorized by law, the Department of
 118 Legal Affairs may not expend more than \$20,000 annually to
 119 purchase and distribute promotional materials or items that
 120 serve to advance with dignity and integrity the goodwill of this
 121 state and the department and to provide basic refreshments at
 122 official functions, seminars, or meetings of the department in
 123 which dignitaries or representatives from the Federal
 124 Government, other states, or nations, or other agencies are in
 125 attendance.

126 Section 3. Subsection (5) is added to section 409.9203,
 127 Florida Statutes, to read:

128 409.9203 Rewards for reporting Medicaid fraud.—

129 (5) Notwithstanding s. 68.085(3), 10 percent of any
 130 remaining proceeds deposited into the Operating Trust Fund from
 131 an action based on a claim of funds from the state Medicaid
 132 program shall be allocated in the following manner:

133 (a) Fifty percent of such moneys shall be used to fund
 134 rewards for reporting Medicaid fraud pursuant to this section.

135 (b) The remaining 50 percent of such moneys shall be used
 136 by the Medicaid Fraud Control Unit to fund its investigations of
 137 potential violations of s. 68.082 and any related civil actions.

138 Section 4. Subsection (3) of section 501.203, Florida
 139 Statutes, is amended to read:

140 501.203 Definitions.—As used in this chapter, unless the
 141 context otherwise requires, the term:

142 (3) "Violation of this part" means any violation of this
 143 act or the rules adopted under this act and may be based upon
 144 any of the following as of July 1, 2015 ~~2013~~:

145 (a) Any rules promulgated pursuant to the Federal Trade

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 146 Commission Act, 15 U.S.C. ss. 41 et seq.;

147 (b) The standards of unfairness and deception set forth and
 148 interpreted by the Federal Trade Commission or the federal
 149 courts;

150 (c) Any law, statute, rule, regulation, or ordinance which
 151 proscribes unfair methods of competition, or unfair, deceptive,
 152 or unconscionable acts or practices.

153 Section 5. Section 501.204, Florida Statutes, is amended to
 154 read:

155 501.204 Unlawful acts and practices.—

156 (1) Unfair methods of competition, unconscionable acts or
 157 practices, and unfair or deceptive acts or practices in the
 158 conduct of any trade or commerce are hereby declared unlawful.

159 (2) It is the intent of the Legislature that, in construing
 160 subsection (1), due consideration and great weight shall be
 161 given to the interpretations of the Federal Trade Commission and
 162 the federal courts relating to s. 5(a)(1) of the Federal Trade
 163 Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2015 ~~2013~~.

164 Section 6. Subsections (3) and (6) of section 960.03,
 165 Florida Statutes, are amended to read:

166 960.03 Definitions; ss. 960.01-960.28.—As used in ss.
 167 960.01-960.28, unless the context otherwise requires, the term:

168 (3) "Crime" means:

169 (a) A felony or misdemeanor offense committed by an adult
 170 or a juvenile which results in physical injury or death, a
 171 forcible felony committed by an adult or juvenile which directly
 172 results in psychiatric or psychological injury, or a felony or
 173 misdemeanor offense of child abuse committed by an adult or a
 174 juvenile which results in a mental injury, as defined in s.

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175 827.03, to a person younger than 18 years of age who was not
 176 physically injured by the criminal act. The mental injury to the
 177 minor must be verified by a psychologist licensed under chapter
 178 490, by a physician licensed in this state under chapter 458 or
 179 chapter 459 who has completed an accredited residency in
 180 psychiatry, or by a physician who has obtained certification as
 181 an expert witness pursuant to s. 458.3175. The term also
 182 includes a criminal act that is committed within this state but
 183 that falls exclusively within federal jurisdiction.

184 (b) A violation of s. 316.027(2), s. 316.193, s. 316.1935
 185 ~~s. 316.027(1)~~, s. 327.35(1), s. 782.071(1)(b), or s.
 186 860.13(1)(a) which results in physical injury or death.

187 (c) ~~however,~~ An act involving the operation of a motor
 188 vehicle, boat, or aircraft which results in another person's
 189 injury or death that is intentionally inflicted through the use
 190 of the vehicle, boat, or aircraft; however, no other act
 191 involving the operation of a motor vehicle, boat, or aircraft
 192 constitutes a crime for purposes of this chapter ~~does not~~
 193 constitute a crime for the purpose of this chapter unless the
 194 injury or death was intentionally inflicted through the use of
 195 the vehicle, boat, or aircraft.

196 (d) ~~(e)~~ A criminal act committed outside this state against
 197 a resident of this state which would have been compensable if it
 198 had occurred in this state and which occurred in a jurisdiction
 199 that does not have an eligible crime victim compensation program
 200 as the term is defined in the federal Victims of Crime Act of
 201 1984.

202 (e) ~~(d)~~ A violation of s. 827.071, s. 847.0135, s. 847.0137,
 203 or s. 847.0138, related to online sexual exploitation and child

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204 pornography.

205 (6) "Disabled adult" means a person 18 years of age or
 206 older who suffers from a condition of physical or mental
 207 incapacitation due to a developmental disability, ~~or~~ organic
 208 brain damage, or mental illness or who has one or more physical
 209 or mental limitations that restrict the person's ability to
 210 perform the normal activities of daily living.

211 Section 7. Subsection (6) of section 960.13, Florida
 212 Statutes, is amended to read:

213 960.13 Awards.—

214 (6) Any award made pursuant to this chapter, except an
 215 award for loss of support or catastrophic injury, shall be
 216 reduced by the amount of any payments or services received or to
 217 be received by the claimant as a result of the injury or death:

218 (a) From or on behalf of the person who committed the
 219 crime; provided, however, that a restitution award ordered by a
 220 court to be paid to the claimant by the person who committed the
 221 crime shall not reduce any award made pursuant to this chapter
 222 unless it appears to the department that the claimant will be
 223 unjustly enriched thereby.

224 (b) From any other public or private source or provider,
 225 including, but not limited to, an award of workers' compensation
 226 pursuant to chapter 440.

227 (c) From agencies mandated by other Florida statutes to
 228 provide or pay for services, except as provided in s. 960.28.

229 (d) From an emergency award under s. 960.12.

230 Section 8. Section 960.195, Florida Statutes, is amended to
 231 read:

232 960.195 Awards to elderly persons or disabled adults for

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233 property loss.-

234 (1) Notwithstanding the criteria in s. 960.13, for crime
235 victim compensation awards, the department may award a maximum
236 of \$500 on any one claim and a lifetime maximum of \$1,000 on all
237 claims to elderly persons or disabled adults who suffer a
238 property loss that causes a substantial diminution in their
239 quality of life when:

240 (a)(1) There is proof that a criminal or delinquent act was
241 committed;

242 (b)(2) The criminal or delinquent act is reported to law
243 enforcement authorities within 72 hours, unless the department,
244 for good cause shown, finds the delay to have been justified;

245 ~~(3) The victim cooperates with law enforcement authorities~~
246 ~~in the investigation of the criminal or delinquent act;~~

247 (c)(4) There is proof that the tangible personal property
248 in question belonged to the claimant;

249 (d)(5) The claimant did not contribute to the criminal or
250 delinquent act;

251 (e)(6) There is no other source of reimbursement or
252 indemnification available to the claimant; and

253 (f)(7) The claimant would not be able to replace the
254 tangible personal property in question without incurring a
255 serious financial hardship.

256 (2) The department may deny, reduce, or withdraw any award
257 under subsection (1) upon finding that any claimant or award
258 recipient has not duly cooperated with the state attorney, all
259 law enforcement agencies, and the department.

260 Section 9. Section 960.196, Florida Statutes, is created to
261 read:

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262 960.196 Relocation assistance for victims of human
263 trafficking.-

264 (1) Notwithstanding the criteria specified in ss. 960.07(2)
265 and 960.13 for crime victim compensation awards, the department
266 may award a one-time payment of up to \$1,500 for any one claim
267 and a lifetime maximum of \$3,000 to a victim of human
268 trafficking who needs urgent assistance to escape from an unsafe
269 environment directly related to the human trafficking offense.

270 (2) In order for an award to be granted to a victim for
271 relocation assistance:

272 (a) There must be proof that a human trafficking offense,
273 as described in s. 787.06(3)(b), (d), (f), or (g), was
274 committed.

275 (b) The crime must be reported to the proper authorities
276 and the claim must be filed within 1 year, or 2 years with good
277 cause, after the date of the last human trafficking offense, as
278 described in s. 787.06(3)(b), (d), (f), or (g). In a case that
279 exceeds the 2-year requirement due to an active and ongoing
280 investigation, a state attorney, statewide prosecutor, or
281 federal prosecutor may certify in writing a human trafficking
282 victim's need to relocate from an unsafe environment due to the
283 threat of future violence which is directly related to the human
284 trafficking offense.

285 (c) The victim's need must be certified by a certified
286 domestic violence or rape crisis center in this state, except as
287 provided in paragraph (b). The center's certification must
288 assert that the victim is cooperating with the proper
289 authorities and must include documentation that the victim has
290 developed a safety plan.

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291 (3) Relocation payments for a human trafficking claim shall
 292 be denied if the department has previously approved or paid out
 293 a domestic violence or sexual battery relocation claim under s.
 294 960.198 or s. 960.199 to the same victim regarding the same
 295 incident.

296 Section 10. Subsection (3) of section 960.198, Florida
 297 Statutes, is amended to read:

298 960.198 Relocation assistance for victims of domestic
 299 violence.—

300 (3) Relocation payments for a domestic violence claim shall
 301 be denied if the department has previously approved or paid out
 302 a human trafficking or sexual battery relocation claim under s.
 303 960.196 or s. 960.199 to the same victim regarding the same
 304 incident.

305 Section 11. Section 960.199, Florida Statutes, is amended
 306 to read:

307 960.199 Relocation assistance for victims of sexual battery
 308 ~~or human trafficking.~~—

309 (1) The department may award a one-time payment of up to
 310 \$1,500 on any one claim and a lifetime maximum of \$3,000 to a
 311 victim of sexual battery, as defined in s. 794.011, ~~or a victim~~
 312 ~~of human trafficking, as described in s. 787.06(3)(b), (d), (f),~~
 313 ~~or (g),~~ who needs relocation assistance.

314 (2) In order for an award to be granted to a victim for
 315 relocation assistance:

316 (a) There must be proof that a sexual battery offense ~~or~~
 317 ~~human trafficking offense, as described in s. 787.06(3)(b), (d),~~
 318 ~~(f), or (g),~~ was committed.

319 (b) The sexual battery offense ~~or human trafficking~~

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320 ~~offense, as defined in s. 787.06(3)(b), (d), (f), or (g),~~ must
 321 be reported to the proper authorities.

322 (c) The victim's need for assistance must be certified by a
 323 certified rape crisis center in this state ~~or by the state~~
 324 ~~attorney or statewide prosecutor having jurisdiction over the~~
 325 ~~offense. A victim of human trafficking's need for assistance may~~
 326 ~~also be certified by a certified domestic violence center in~~
 327 ~~this state.~~

328 (d) The center's certification must assert that the victim
 329 is cooperating with law enforcement officials, if applicable,
 330 and must include documentation that the victim has developed a
 331 safety plan. ~~If the victim seeking relocation assistance is a~~
 332 ~~victim of a human trafficking offense as described in s.~~
 333 ~~787.06(3)(b), (d), (f), or (g), the certified rape crisis~~
 334 ~~center's or certified domestic violence center's certification~~
 335 ~~must include, if applicable, approval of the state attorney or~~
 336 ~~statewide prosecutor attesting that the victim is cooperating~~
 337 ~~with law enforcement officials.~~

338 (e) The act of sexual battery ~~or human trafficking, as~~
 339 ~~described in s. 787.06(3)(b), (d), (f), or (g),~~ must be
 340 committed in the victim's place of residence or in a location
 341 that would lead the victim to reasonably fear for his or her
 342 continued safety in the place of residence.

343 (3) Relocation payments for a sexual battery ~~or human~~
 344 ~~trafficking~~ claim under this section shall be denied if the
 345 department has previously approved or paid out a human
 346 trafficking or domestic violence relocation claim under s.
 347 960.196 or s. 960.198 to the same victim regarding the same
 348 incident.

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349

Section 12. This act shall take effect July 1, 2015.



The Florida Senate

Committee Agenda Request

To: Senator Miguel Diaz de la Portilla, Chair
Committee on Judiciary

Subject: Committee Agenda Request

Date: March 3, 2015

I respectfully request that **Senate Bill 1362**, relating to Department of Legal Affairs, be placed on the:

- committee agenda at your earliest possible convenience.
- next committee agenda.

A handwritten signature in black ink, appearing to read "David Simmons".

Senator David Simmons
Florida Senate, District 10

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 318

INTRODUCER: Judiciary Committee and Senator Diaz de la Portilla

SUBJECT: Guardianship Proceedings

DATE: March 11, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Fav/CS
2.			ACJ	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 318 amends the power of attorney and guardianship statutes to:

- Permit the automatic suspension of a power of attorney during guardianship proceedings only if the petitioner specifically requests the suspension and states facts under oath supporting the suspension;
- Authorize mediation or alternative dispute resolution for guardianship conflicts;
- Authorize the appointment of the office of criminal conflict and civil regional counsel for indigent wards;
- Clarify that attorneys for a ward are entitled to compensation from the guardianship estate;
- Clarify that expert testimony is not necessary to establish compensation for a guardian or guardian's attorney;
- Provide that advance notice is not required before a hearing when appointing an emergency temporary guardian if the 24 hour advance notice could result in substantial harm to the alleged incapacitated person;
- Limit the appointment of an emergency temporary guardian to 60 days;
- Permit a nonprofit charitable corporation to serve as a guardian;
- Require a court, when modifying the authority of a health care surrogate in an advance directive, to specify in its orders to what extent a guardian's authority will supersede a health care surrogate and base that decision on findings of fact;
- Establish factors a court must consider in determining who to appoint as a guardian;

- Provide a code of conduct or ethical standards for a guardian and requires the reporting of abuse of a ward to the Department of Children and Families;
- Require guardianship plans to be filed in advance of the plan year;
- Authorize family members of wards to challenge a decision by a guardian which denies visitation to family members;
- Provide that the results of a court-ordered medical exam after a suggestion of capacity is filed is evidence that a court can use for determining capacity or restoring rights; and
- Require a court to give priority to scheduling restoration of capacity proceedings.

II. Present Situation:

Power of Attorney

A power of attorney is an instrument that grants someone authority to act as an agent for the grantor.¹ The “principal” is the individual who grants authority to the agent who then acts in place of the principal, whether the term “agent” is actually used in the writing or not.² Under existing law, an alleged incapacitated person’s power of attorney is automatically suspended upon the filing of a petition to determine incapacity of the principal. The result is that the agent then loses the ability to act on behalf of the principal.

Guardianship

Background

A guardianship is a relationship based upon trust in which one person, a guardian, has the legal duty and authority to care for the person or property of another person, who is referred to as a ward. A guardianship is established because a court has determined that the ward is not capable of managing his or her affairs, generally due to infancy, incapacity, or disability.³ A guardian may be appointed over the person, over the property, or both.

When a court determines that someone is incapacitated,⁴ it must consider whether there is an alternative to guardianship which will sufficiently meet the person’s needs. If no alternative can be found, then a guardian⁵ must be appointed.⁶ The Legislature has stated, however, that the form of assistance be chosen in each situation that least interferes with the legal capacity of someone to act on his or her behalf.⁷

¹ BLACK’S LAW DICTIONARY 1191 (7th ed. 1999).

² Sections 709.2102 (1), (9), and (11), F.S.

³ BLACK’S LAW DICTIONARY 712 (9th ed. 2009).

⁴ An “incapacitated person” is a person who has been judicially determined to lack the capacity to manage at least some of his or her property or to meet at least some of his or her essential health and safety requirements. Section 744.102(12), F.S.

⁵ Various provisions in ch. 744, F.S., provide for a guardian ad litem, limited guardian, plenary guardian, standby guardian, foreign guardian, corporate guardian, nonprofit corporate guardian, preneed guardian, professional guardian, surrogate, and public guardian.

⁶ Section 744.331(6)(b), F.S.

⁷ Section 744.1012, F.S.

Guardianship Proceedings

A guardianship proceeding is initiated in circuit court when an adult files a petition to determine incapacity and alleges specifically the factual information on which the petitioner believes the incapacity is based.⁸ Within 5 days after the petition is filed, the court must appoint a three member examining committee⁹ to examine the allegedly incapacitated person to determine his or her incapacity. The members have 15 days¹⁰ after their appointment to submit a written report to the court which sets an adjudicatory hearing to be held within 14 days¹¹ after the examining members' reports are filed. If the court finds on the basis of clear and convincing evidence that the person is incapacitated, the court must enter a written order determining the incapacity, but only with respect to those rights specified in the order.¹²

Powers and Duties of a Guardian

A guardian has a fiduciary relationship with a ward and is bound to act in good faith and trust on the ward's behalf. The guardian may not use that relationship for private gain except for the reimbursement of fees and expenses provided by law.¹³ The guardian of an incapacitated person may only exercise the rights that have been removed from the ward and delegated to the guardian. In addition to performing all duties required of him or her by law, a guardian is required to file an initial guardianship report and an annual guardianship report, implement the guardianship plan, and at the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to the property.¹⁴ If the guardian breaches the fiduciary duty owed to the ward, the court is obligated to take the steps necessary to protect the ward and the ward's assets.¹⁵

Responsibilities of the Clerk of Court and Judicial Review

The clerk of the circuit court, as custodian of the guardianship files, must review each initial and annual guardianship report, which is later reviewed by the circuit court. The court retains jurisdiction over all guardianships and must review the appropriateness and extent of a guardianship annually.¹⁶

Termination of a Guardianship

The relationship between a guardian and ward is terminated when a ward is restored to capacity, the guardian has been unable to find the ward after a diligent search, or for a guardian of the property, when the property subject to the guardianship has been exhausted.¹⁷ The relationship is

⁸ Section 744.3201, F.S.

⁹ One member must be a psychiatrist or other physician and the remaining members must be a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology, or other person who has special skill, training, or education to advise the court in the form of an expert opinion.

¹⁰ Section 744.331(3), F.S.

¹¹ Section 744.331(5), F.S.

¹² Section 744.331(6), F.S.

¹³ Section 744.446, F.S.

¹⁴ Section 744.361, F.S.

¹⁵ Section 744.446, F.S.

¹⁶ Sections 744.368 and 744.372, F.S.

¹⁷ Section 744.521, F.S.

also terminated upon the death of the guardian or ward, by resignation¹⁸ or removal of the guardian,¹⁹ or by a change of domicile to a foreign jurisdiction.²⁰

Resolution of Disputes Involving Guardianships

Disputes often arise in guardianship matters and involve issues such as visitation, care plans, the ward's range of choices, medical care, whether less restrictive options are available to the ward, property issues, and financial decisions. These issues are litigated, often at great expense to the ward, and burden court calendars.

Court Monitors and Emergency Court Monitors

A court is authorized under the guardianship chapter to appoint a court monitor over a matter under its jurisdiction, when an interested person inquires or upon its own motion. The order of appointment is served upon the guardian, the ward, and other interested persons as the court decides. The monitor serves to investigate, seek information, examine documents, or interview the ward and report his or her findings to the court in a report. The report is also served on the guardian, the ward, and any other person as the court decides. If the monitor's report indicates that the court needs to take action to protect the ward's interest, the court, after a hearing with notice, enters any necessary order to protect the ward or his or her estate. A court monitor may not be a family member or someone with a personal interest in the proceedings but may be allowed a reasonable fee for his or her services from the ward's property.²¹

Similarly, a court may appoint a court monitor on an emergency basis without notice. To do so, the court must find that there appears to be imminent danger that the physical or mental health or safety of the ward will be impaired, or the ward's property is in danger of being wasted or lost unless immediate action is taken. The emergency court monitor's authority expires 60 days after appointment or upon a finding of no probable cause, whichever occurs first, but may be extended for an additional 30 days upon a showing that the emergency condition still exists. The monitor has 15 days to file a report of findings and recommendation to the court after his or her appointment. As with a court monitor, the emergency monitor may be allowed a reasonable fee that is paid from the ward's property.²²

Guardian and Attorney Fees and Expenses in Guardianship Proceedings

Section 744.108, F.S., establishes that a guardian or attorney who has rendered services to the ward or the guardian on the ward's behalf is entitled to reasonable fees for those services and reimbursement for those costs. The court is given a list of factors to consider in awarding those fees. It is not clear whether s. 744.108(8), F.S., covers all requests for attorney fees or is limited to only fees for the guardian's attorney. It is also unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney.

¹⁸ Section 744.467, F.S.

¹⁹ Section 744.474, F.S.

²⁰ Section 744.524, F.S.

²¹ Section 744.107, F.S.

²² Section 744.1075, F.S.

Claims of Minors

Section 744.3025(1)(a), F.S., provides that a court may appoint a guardian ad litem before approving a settlement of a claim for a minor when the gross settlement exceeds \$15,000. The statute does not specify criteria for the court to rely upon in determining whether there is a need for the appointment of a guardian ad litem.

Emergency Temporary Guardianship

The process of appointing a guardian may take up to 34 days or longer, upon a showing of good cause. The statutes, however, provide a more timely remedy through an additional type of guardianship in an emergency situation. A court may appoint an emergency temporary guardian²³ for an allegedly incapacitated person upon a finding that there appears to be an imminent danger that:

- The physical or mental health or safety of the person will be seriously impaired; or
- The person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

Under those circumstances, a court may appoint an emergency temporary guardian after the filing of a petition for determination of incapacity and before the appointment of a guardian. The court must appoint counsel to represent the alleged incapacitated person during the proceedings. Further, the court may appoint an emergency temporary guardian on its own motion if no petition for appointment of guardian has been filed when the order determining incapacity is entered.²⁴

The emergency temporary guardian's authority expires 90 days after the appointment or when a guardian is appointed, whichever occurs first. The authority may be extended for 90 additional days upon a showing that the emergency conditions continue to exist.²⁵ The emergency temporary guardian's authority and responsibility begin when the letters of emergency temporary guardian are issued. He or she must file a final report no later than 30 days after the emergency temporary guardianship expires²⁶ and the final report must be served on the successor guardian and the ward.²⁷

Advance Directives

An "advance directive" is a written document or oral statement that is witnessed in which a person states his or her desires regarding health care and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.²⁸ An advance directive permits a competent adult to express his or her wishes regarding decisions relating to his or her own health, particularly the right to choose or refuse medical treatment.

²³ Section 744.3031(1), F.S.

²⁴ Section 744.3031(2), F.S.

²⁵ Section 744.3031(3), F.S.

²⁶ Section 744.3031(7) and (8)(a), F.S.

²⁷ Section 744.3031(8)(d), F.S.

²⁸ Section 765.101, F.S.

Considerations When Appointing a Guardian

The statutes provide a list of factors that a court must consider when appointing a guardian.²⁹

The court must give preference to a person who:

- Is related by blood or marriage;
- Has educational, professional, or business experience that is relevant to the services needed for the ward;
- Has the capacity to manage the ward's financial resources; or
- Has the ability to meet the law's requirements and unique needs of the case at hand.

The court must also consider:

- The wishes expressed by the incapacitated person as to who the guardian should be;
- The preferences of a minor who is over the age of 14 years as to who the guardian should be;
- Any person designated as a guardian in a will under which the ward is a beneficiary.

The court shall appoint the standby guardian or preneed guardian, unless that is contrary to the best interests of the ward.³⁰

Guardianship Plans and Reports

For a court to monitor and supervise a guardian's compliance, the guardian must file reports and plans for review. A guardian of the person must file an annual plan which updates information about the ward's condition, specifying the ward's needs and how those needs should be met in the upcoming year.³¹ If the court requires calendar year planning, the plan must be filed by April 1 of that plan year. If not, the plan must be filed within 90 days after the anniversary month that the letters of guardianship were filed.³² The approved report authorizes the guardian the necessary power to act within the terms of the plan and limits the powers of the guardian to those terms.³³

Restoration to Capacity

An incapacitated person retains the right to be restored to capacity at the earliest possible time.³⁴ The procedure for restoration is described in s. 744.464, F.S. Any interested person or the ward may file a suggestion of capacity stating that the ward is currently capable of exercising some or all or the rights which were removed. The statute is silent on what the evidentiary standard is that is used to determine restoration of capacity. Clear guidance is needed in the statute to remove this uncertainty.

²⁹ Section 744.312, F.S.

³⁰ Section 744.312(4), F.S.

³¹ Section 744.3675, F.S.

³² Section 744.367(1), F.S.

³³ Section 744.369(8), F.S.

³⁴ Section 744.3215(1)(c), F.S.

Effect of Proposed Changes:

Suspension of a Power of Attorney (Sections 1, 2, and 12)

This bill creates s. 744.3203, F.S., to address the suspension of a power of attorney when the incapacity of the principal is alleged. When someone files a petition to determine incapacity but before the order is entered, the alleged incapacitated person's power of attorney is suspended when the petitioner files a motion stating that a power of attorney should be suspended or modified for any of the following reasons:

- The agent's decision are not consistent with the alleged incapacitated person's known desires;
- The power of attorney is invalid;
- The agent has not discharged his or her duties or incapacity or illness renders him or her incapable of discharging those duties; or
- The agent has abused powers.

It is not grounds to suspend a power of attorney if a dispute exists between the agent and the petitioner and the matter is appropriately resolved in a different forum or a legal proceeding other than a guardianship proceeding.

The petitioner's motion must identify one of the four grounds listed above and allege specific statements of fact demonstrating that there are grounds to justify the suspension of the power of attorney. The petitioner must sign the petition and declare that he or she has read the motion and that the facts stated in it are true.

The court must schedule an expediting hearing for the motion when the agent files a response. The court order must set forth what powers the agent is permitted to exercise, if any, pending the outcome of the petition to determine the principal's incapacity. The intent appears to be that, in an emergency situation, a specific power can be reinstated without a hearing and without notice to all interested persons.

Sections 709.2109(3) and 709.2119(2), F.S., are amended to conform to the changes created by s. 744.3203, F.S.

Resolution of Disputes Involving Guardianships (Section 3)

This bill creates a new section of law which permits a court, upon its own motion or that of an interested party, to refer a guardianship matter to mediation or alternative dispute resolution. The court must find that mediation or alternative dispute resolution is in the best interests of an alleged incapacitated person, ward, or minor to order the proceeding.

Alternative dispute resolution is defined as a procedure for settling disputes by processes other than litigation. This often involves arbitration or mediation.³⁵ Mediation is defined as a process

³⁵ BLACK'S LAW DICTIONARY 78 (7th ed. 1999).

in which a neutral third person or panel considers the parties' facts and arguments and renders a decision which may or may not be binding.³⁶

Court Monitors and Emergency Court Monitors (Sections 4 and 5)

The bill provides that a court may appoint the office of criminal conflict and civil regional counsel to serve as a court monitor or emergency court monitor if a ward is indigent.

Guardian and Attorney Fees and Expenses in Guardianship Proceedings (Section 6)

This bill amends s. 744.108, F.S., to clarify that attorneys for the ward, whether court appointed or otherwise, are entitled to compensation from the guardianship estate. Language is created to clarify that expert testimony is not necessary to establish compensation for the guardian or the guardian's attorney. This change will benefit wards in many instances by eliminating charges for expert witness fees.

Claims of Minors (Section 7)

The bill amends s. 744.3025(1)(a), F.S., to provide that a court may appoint a guardian ad litem only if the court believes a guardian ad litem is necessary to protect the minor's interest in a claim that exceeds \$15,000. A new subsection (3) is created and states that the settlement of a claim under this section is subject to the confidentiality provisions of the guardianship chapter.³⁷

Emergency Temporary Guardian (Section 8)

Notice Provisions

The bill amends s. 744.3031, F.S., to provide that a court may appoint an emergency temporary guardian after a petition for determination of incapacity has been held, but only after that hearing is duly noticed. The notice of filing of a petition for appointment of an emergency temporary guardian and notice of any hearing on that petition must be served on the alleged incapacitated person and his or her attorney at least 24 hours before a hearing is held unless the petitioner demonstrates that substantial harm will occur if the 24-hour notice is given.

Length of Time a Guardian May Serve

The current statute limits an emergency temporary guardian's authority to 90 days, but this bill limits the authority to 60 days. Current law provides that the emergency temporary guardian's authority may be extended for 90 days, but this bill limits an extension to 60 days and requires that a hearing be held first to demonstrate that the emergency conditions still exist.

Filing of a Final Report

Currently, an emergency temporary guardian must file a final report within 30 days after the emergency temporary guardianship expires.³⁸ Under this bill, a court may not authorize final

³⁶ Section 44.1011(2), F.S.

³⁷ This language links this bill to SB 360 which creates a public records exemption to protect the confidentiality of records relating to the settlement of a claim on behalf of a minor or ward.

³⁸ Section 744.3031(8), F.S.

payment for the emergency temporary guardian's fee or the fees of his or her attorney until the final report is filed. This bill provides that, if the final report is not timely filed, the court shall issue an order to show cause to the emergency temporary guardian to appear and explain why no further action should be taken against him or her by the court. The court's order must specify the time and place of the hearing within a reasonable time after service of the order to allow the guardian to prepare a defense. Prior to the hearing, the court may:

- Suspend the emergency temporary guardian if he or she has become a successor guardian;
- Appoint a guardian ad litem; or
- Issue any other appropriate order to protect the physical or mental health or safety or the property of the ward.

A copy of the order must be transmitted to all parties when it is issued.

After the hearing on the order to show cause, the court may impose sanctions on the emergency temporary guardian or take any other action authorized by law including:

- Entering a judgment of contempt;
- Ordering an accounting;
- Freezing assets;
- Referring the case to local law enforcement agencies or the state attorney;
- Filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; and
- Initiating proceedings to remove the emergency temporary guardian.

Not For Profit Corporation as Guardian (Section 9)

This bill amends s. 744.309, F.S., to resolve an inconsistency in the statutes which allows a nonprofit entity to register as a professional guardian, but also requires a guardian to be a human. Under this amended language, a nonprofit charitable corporation is expressly authorized to serve as a guardian.

Advance Directives (Section 10)

This bill amends s. 744.3115, F.S., to provide that, in circumstances in which the ward executed any advance directive before his or her incapacity, the court must specify in the order and letters of guardianship what authority the guardian may exercise over the ward regarding health care decisions and what authority, if any, the surrogate shall continue to exercise over the ward regarding health care decisions. Any order revoking or modifying the authority of the surrogate must be supported by specific written findings of fact. If the court determines that the guardian will be responsible for making health care decisions for the ward, the guardian will assume the surrogate's responsibilities. These changes are designed to strengthen a person's choice regarding who should make medical decisions on his or her behalf.

Considerations When Appointing a Guardian (Section 11)

This bill amends the existing group of factors a court must consider when determining who to appoint as a guardian for an incapacitated person. The court must now also consider the wishes of close relatives if the person cannot express a preference.

Unless a standby or preneed guardian is appointed, a court:

- Must use a rotation system to appoint a guardian or support its order with written findings of fact;
- May not give preference to a person based solely on the fact that he or she was appointed to serve as an emergency temporary guardian; and
- May not appoint as the permanent guardian a professional guardian who served as an emergency temporary guardian.

The final two objections above only apply if an interested person objects to the appointment of the guardian. The court may waive these restrictions if special requirements of the guardianship require that the court appoint a guardian with special talents or specific prior experience but the court must note those findings.

Letters of Guardianship (Section 13)

This section provides that letters of guardianship for all guardianships, not just limited guardianships, must specify the authority of a guardian with respect to a ward's advance directive. In a sense, this is a conforming change to reflect the amendment made to s. 744.3115, F.S., relating to advance directives.

Abuse, Neglect, or Exploitation by a Guardian (Section 14)

The bill creates a code of conduct or ethical standards for guardians and requires a person to report abuse, neglect, or exploitation of a ward by a guardian to the Department of Children and Families.

Powers and Duties of a Guardian (Section 15)

The bill amends s. 744.361(1), F.S., to confirm that a guardian of an incapacitated person is a fiduciary who may exercise only those rights removed from the ward and delegated to the guardian. That section is further amended to provide that a guardian:

- Shall act within the scope of the authority granted and as provided by law;
- Shall act in good faith;
- May not act in a manner contrary to the ward's best interests; and
- Shall use certain special skills or expertise, if any, when acting on the ward's behalf.

The bill also requires that a guardian over the property keep clear, distinct, and accurate records of the property.

Additional responsibilities of a guardian of a ward's person are enumerated. A professional guardian must also assess the nature and extent of visitation and communication with the ward's family and friends during a personal visit.

Annual Guardianship Reports (Section 16)

Existing law allows annual guardianship plans to be filed well after the plan year has begun. The changes under this bill require guardianship plans to be filed in advance.

Judicial Review of Guardianship Reports (Section 17)

The bill amends this section to provide that a guardian may continue to act under the authority of the last approved guardianship report until the next year's report is approved.

Petition for Interim Judicial Review (Section 18)

The bill amends this section to provide that at any time, an interested person may petition the court for review that the guardian is acting in a manner contrary to the power and duties of a guardian or is denying visitation between the ward and his or her relatives.

Restoration to Capacity (Section 19)

The bill amends s. 744.464(3), F.S., to establish a "preponderance of the evidence" burden of proof for the restoration of all or some of the ward's rights and requires the court to make specific findings of fact. The bill also provides that the ward has the burden of proving that the restoration of capacity is warranted. A new provision is added stating that a court must give priority to any suggestion of capacity and must advance the cause on the calendar.³⁹

Effective Date (Section 20 and 21)

The bill takes effect upon becoming law and the amendments made in the bill apply to all proceedings pending when the bill becomes effective.

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

This bill does not appear to affect the spending, revenues, or tax authority of cities or counties. As such, the bill does not appear to be a mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁹ Section 744.464(4), F.S.

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

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

None

V. Technical Deficiencies:

Section 744.3203(3), F.S., suspension of a power of attorney before an incapacity determination, could be drafted more precisely for clarity. The intent appears to be that, in an emergency situation, a specific power can be reinstated without a hearing and notice being served on all interested persons. Perhaps an amendment could be developed to clarify the meaning of this subsection.

VI. Related Issues:

None.

VII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 709.2109, 709.2119, 744.107, 744.1075, 744.108, 744.3025, 744.3031, 744.309, 744.3115, 744.312, 744.345, 744.361, 744.367, 744.369, 744.3715, and 744.464.

This bill creates the following sections of the Florida Statutes: 744.1065, 744.3203, and 744.359.

VIII. 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 March 10, 2015:

The committee substitute differs from the original bill in the following ways:

- A power of attorney may be suspended automatically during guardianship proceedings but only if the petitioner specifically requests the suspension and states facts under oath supporting the suspension.
- Courts may refer guardianship matters to mediation or alternative dispute resolution.

- Courts may appoint the office of criminal conflict counsel as court monitors and emergency court monitors for indigent wards.
- Attorneys for the ward, whether court appointed or otherwise, are entitled to compensation from the guardianship estate.
- Expert testimony is not necessary to establish compensation for the guardian or the guardian's attorney.
- If a court has already appointed a guardian to represent a minor, an additional appointment of a guardian ad litem is not necessary to represent a minor's interest in the settlement of a claim.
- Advance notice is not necessary to the alleged incapacitated person and his or her attorney before appointing an emergency temporary guardian if a petitioner demonstrates that substantial harm will occur if notice is given.
- A nonprofit charitable corporation is expressly authorized to serve as a guardian.
- If a court modifies the authority of a health care surrogate in an advance directive, the modification must be based on findings of fact.
- The factors a court must consider in determining who to appoint as guardian are revised. A court is discouraged from appointing as a permanent guardian a professional guardian who has served as an emergency temporary guardian.
- A code of conduct or ethical standards for guardians is established. A person is required to report abuse, neglect, or exploitation of a ward by a guardian to the Department of Children and Families.
- Guardianship plans are required to be filed in advance of the plan year.
- Family members of wards are authorized to challenge a decision by a guardian which denies visitation to family members.
- The results of a court-ordered medical exam after a suggestion of capacity is filed is evidence that may be used for determining capacity or restoring rights. Courts must give priority to scheduling restoration of capacity proceedings.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/12/2015	.	
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The Committee on Judiciary (Diaz de la Portilla) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsection (3) of section 709.2109, Florida
Statutes, is amended to read:

709.2109 Termination or suspension of power of attorney or
agent's authority.—

(3) (a) If a power of attorney is suspended during any
~~person initiates~~ judicial proceedings to determine the



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11 principal's incapacity or for the appointment of a guardian
12 advocate, the authority granted under the power of attorney is
13 suspended until the petition is dismissed or withdrawn or the
14 court enters an order authorizing the agent to exercise one or
15 more powers granted under the power of attorney.

16 ~~(a) If an emergency arises after initiation of proceedings~~
17 ~~to determine incapacity and before adjudication regarding the~~
18 ~~principal's capacity, the agent may petition the court in which~~
19 ~~the proceeding is pending for authorization to exercise a power~~
20 ~~granted under the power of attorney. The petition must set forth~~
21 ~~the nature of the emergency, the property or matter involved,~~
22 ~~and the power to be exercised by the agent.~~

23 (b) Notwithstanding the provisions of this section, unless
24 otherwise ordered by the court, a proceeding to determine
25 incapacity does not affect the authority of the agent to make
26 health care decisions for the principal, including, but not
27 limited to, those provided in chapter 765. If the principal has
28 executed a health care advance directive designating a health
29 care surrogate, the terms of the directive control if the
30 directive and the power of attorney are in conflict unless the
31 power of attorney is later executed and expressly states
32 otherwise.

33 Section 2. Paragraphs (a) and (c) of subsection (2) of
34 section 709.2119, Florida Statutes, are amended, and subsection
35 (3) of that section is republished, to read:

36 709.2119 Acceptance of and reliance upon power of
37 attorney.—

38 (2) A third person may require:

39 (a) An agent to execute an affidavit stating where the



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40 principal is domiciled; that the principal is not deceased; that
41 there has been no revocation, or partial or complete termination
42 by adjudication of incapacity or by the occurrence of an event
43 referenced in the power of attorney; that the power of attorney
44 is not under a suspension as the result ~~there has been no~~
45 ~~suspension by initiation~~ of proceedings to determine incapacity,
46 or to appoint a guardian, of the principal; that the agent's
47 authority has not been terminated by the filing of an action for
48 dissolution or annulment of marriage or legal separation of the
49 agent and principal; and, if the affiant is a successor agent,
50 the reasons for the unavailability of the predecessor agents, if
51 any, at the time the authority is exercised.

52 (c) A written affidavit executed by the agent under this
53 subsection may, but need not, be in the following form:

54
55 STATE OF.....
56 COUNTY OF.....

57
58 Before me, the undersigned authority, personally appeared
59 ...(agent)... ("Affiant"), who swore or affirmed that:

60 1. Affiant is the agent named in the Power of Attorney
61 executed by ...(principal)... ("Principal") on ...(date)....

62 2. This Power of Attorney is currently exercisable by
63 Affiant. The principal is domiciled in ...(insert name of state,
64 territory, or foreign country)....

65 3. To the best of Affiant's knowledge after diligent search
66 and inquiry:

67 a. The Principal is not deceased;

68 b. Affiant's authority for the specific transaction has not



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69 been suspended during ~~by initiation of~~ proceedings to determine
70 incapacity or to appoint a guardian or a guardian advocate;

71 c. Affiant's authority has not been terminated by the
72 filing of an action for dissolution or annulment of Affiant's
73 marriage to the principal, or their legal separation; and

74 d. There has been no revocation, or partial or complete
75 termination, of the power of attorney or of Affiant's authority.

76 4. Affiant is acting within the scope of authority granted
77 in the power of attorney.

78 5. Affiant is the successor to ...(insert name of
79 predecessor agent)..., who has resigned, died, become
80 incapacitated, is no longer qualified to serve, has declined to
81 serve as agent, or is otherwise unable to act, if applicable.

82 6. Affiant agrees not to exercise any powers granted by the
83 Power of Attorney if Affiant attains knowledge that the power of
84 attorney has been revoked, has been partially or completely
85 terminated or suspended, or is no longer valid because of the
86 death or adjudication of incapacity of the Principal.

87
88
89 ... (Affiant) ...
90

91 Sworn to (or affirmed) and subscribed before me this
92 day of ...(month)..., ...(year)..., by ...(name of person making
93 statement)...

94
95 ...(Signature of Notary Public-State of Florida)...

96
97 ...(Print, Type, or Stamp Commissioned Name of Notary Public)...



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Personally Known OR Produced Identification
...(Type of Identification Produced)...

(3) A third person who is asked to accept a power of attorney that appears to be executed in accordance with s. 709.2105 may in good faith request, and rely upon, without further investigation:

(a) A certified English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English;

(b) An opinion of counsel as to any matter of law concerning the power of attorney if the third person making the request provides in a writing or other record the reason for the request; or

(c) The affidavit described in subsection (2).

Section 3. Section 744.1065, Florida Statutes, is created to read:

744.1065 Mediation; alternative dispute resolution.—At any time, the court may, upon its own motion or the motion of an interested person, refer a matter under the jurisdiction of this chapter to mediation or alternative dispute resolution if the court finds that mediation or alternative dispute resolution is in the best interests of the alleged incapacitated person, ward, or minor.

Section 4. Subsection (5) is added to section 744.107, Florida Statutes, to read:

744.107 Court monitors.—

(5) The court may appoint the office of criminal conflict and civil regional counsel as monitor if the ward is indigent.



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127 Section 5. Subsection (6) is added to section 744.1075,
128 Florida Statutes, to read:

129 744.1075 Emergency court monitor.—

130 (6) The court may appoint the office of criminal conflict
131 and civil regional counsel as monitor if the ward is indigent.

132 Section 6. Subsections (5) and (8) of section 744.108,
133 Florida Statutes, are amended, and subsection (9) is added to
134 that section, to read:

135 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
136 and expenses.—

137 (5) All petitions for guardian ~~guardian's~~ and attorney
138 ~~attorney's~~ fees and expenses must be accompanied by an itemized
139 description of the services performed for the fees and expenses
140 sought to be recovered.

141 (8) When court proceedings are instituted to review or
142 determine guardian ~~a guardian's~~ or attorney ~~an attorney's~~ fees
143 under subsection (2), such proceedings are part of the
144 guardianship administration process and the costs, including
145 costs and attorney fees for the guardian's attorney, an attorney
146 appointed under s. 744.331(2), or an attorney who has rendered
147 services to the ward, shall be determined by the court and paid
148 from the assets of the guardianship estate unless the court
149 finds the requested compensation under subsection (2) to be
150 substantially unreasonable.

151 (9) With respect to a request for compensation by the
152 guardian, the guardian's attorney, a person employed by the
153 guardian, an attorney appointed under s. 744.331(2), or an
154 attorney who has rendered services to the ward, the court may
155 determine the compensation to be reasonable without receiving



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156 expert testimony. A person or party may offer expert testimony
157 for or against a request for compensation after giving notice to
158 interested persons. If expert testimony is offered, the court
159 shall award reasonable expert witness fees to the prevailing
160 interested person, which must be paid from the assets of the
161 guardianship estate.

162 Section 7. Section 744.3025, Florida Statutes, is amended
163 to read:

164 744.3025 Claims of minors.—

165 (1) (a) The court may appoint a guardian ad litem to
166 represent the minor's interest before approving a settlement of
167 the minor's portion of the claim in a ~~any~~ case in which a minor
168 has a claim for personal injury, property damage, wrongful
169 death, or other cause of action in which the gross settlement of
170 the claim exceeds \$15,000 if the court believes a guardian ad
171 litem is necessary to protect the minor's interest.

172 (b) Except as provided in paragraph (e), the court shall
173 appoint a guardian ad litem to represent the minor's interest
174 before approving a settlement of the minor's claim in a ~~any~~ case
175 in which the gross settlement involving a minor equals or
176 exceeds \$50,000.

177 (c) The appointment of the guardian ad litem must be
178 without the necessity of bond or notice.

179 (d) The duty of the guardian ad litem is to protect the
180 minor's interests as described in the Florida Probate Rules.

181 (e) A court need not appoint a guardian ad litem for the
182 minor if a guardian of the minor has previously been appointed
183 and that guardian has no potential adverse interest to the
184 minor. ~~A court may appoint a guardian ad litem if the court~~



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185 ~~believes a guardian ad litem is necessary to protect the~~
186 ~~interests of the minor.~~

187 (2) Unless waived, the court shall award reasonable fees
188 and costs to the guardian ad litem to be paid out of the gross
189 proceeds of the settlement.

190 (3) A settlement of a claim pursuant to this section is
191 subject to the confidentiality provisions of this chapter.

192 Section 8. Section 744.3031, Florida Statutes, is amended
193 to read:

194 744.3031 Emergency temporary guardianship.—

195 (1) A court, prior to appointment of a guardian but after a
196 petition for determination of incapacity has been filed pursuant
197 to this chapter, and after a duly noticed hearing has been held,
198 may appoint an emergency temporary guardian for the person or
199 property, or both, of an alleged incapacitated person. The court
200 must specifically find that there appears to be imminent danger
201 that the physical or mental health or safety of the person will
202 be seriously impaired or that the person's property is in danger
203 of being wasted, misappropriated, or lost unless immediate
204 action is taken. The subject of the proceeding or any adult
205 interested in the welfare of that person may apply to the court
206 in which the proceeding is pending for the emergency appointment
207 of a temporary guardian. The powers and duties of the emergency
208 temporary guardian must be specifically enumerated by court
209 order. The court shall appoint counsel to represent the alleged
210 incapacitated person during any such summary proceedings, and
211 such appointed counsel may request that the proceeding be
212 recorded and transcribed.

213 (2) The court may appoint an emergency temporary guardian



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214 on its own motion if no petition for appointment of guardian has
215 been filed at the time of entry of an order determining
216 incapacity.

217 (3) Notice of filing of a petition for appointment of an
218 emergency temporary guardian and notice of any hearing on the
219 petition must be served on the alleged incapacitated person and
220 on the alleged incapacitated person's attorney at least 24 hours
221 before a hearing is held on the petition unless the petitioner
222 demonstrates that substantial harm to the alleged incapacitated
223 person will occur if the 24-hour notice is given.

224 (4)~~(3)~~ The authority of an emergency temporary guardian
225 expires 60 ~~90~~ days after the date of appointment or when a
226 guardian is appointed, whichever occurs first. The authority of
227 the emergency temporary guardian may be extended for an
228 additional 60 ~~90~~ days after a hearing is held and upon a showing
229 that the emergency conditions still exist.

230 (5)~~(4)~~ The court may issue an injunction, restraining
231 order, or other appropriate writ to protect the physical or
232 mental health or safety of the person who is the ward of the
233 emergency temporary guardianship.

234 (6)~~(5)~~ The emergency temporary guardian shall take an oath
235 to faithfully perform the duties of a guardian before letters of
236 emergency temporary guardianship are issued.

237 (7)~~(6)~~ The court may require that, before exercising
238 authority as guardian, the emergency temporary guardian of the
239 property ~~may be required to~~ file a bond in accordance with s.
240 744.351.

241 (8)~~(7)~~ An emergency temporary guardian's authority and
242 responsibility begins upon issuance of letters of emergency



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243 temporary guardianship in accordance with s. 744.345.

244 (9)~~(8)~~(a) An emergency temporary guardian shall file a
245 final report no later than 30 days after the expiration of the
246 emergency temporary guardianship.

247 (b) A court may not authorize any final payment of the
248 emergency temporary guardian fees or the fees of his or her
249 attorney until the final report is filed.

250 (c)1. If the final report is not timely filed, the court
251 shall issue to the emergency temporary guardian an order to show
252 cause which requires the emergency temporary guardian to appear
253 before the court and explain why the court should not take
254 further action. The order must specify the time and place of the
255 hearing within a reasonable time after service of the order to
256 allow for the preparation of a defense.

257 2. At any time before the hearing on the order to show
258 cause, the court may suspend the emergency temporary guardian if
259 he or she has become a successor guardian, appoint a guardian ad
260 litem, or issue any other appropriate order to protect the
261 physical or mental health, safety, or property of the ward. A
262 copy of any such order shall be transmitted by the court or
263 under its direction to all parties at the time of entry of the
264 order or injunction.

265 3. After the hearing on the order to show cause, the court
266 may impose sanctions on the emergency temporary guardian or take
267 any other action authorized by law, including, but not limited
268 to, entering a judgment of contempt; ordering an accounting;
269 freezing assets; referring the case to local law enforcement
270 agencies or the state attorney; filing an abuse, neglect, or
271 exploitation complaint with the Department of Children and



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272 Families; and initiating proceedings to remove the emergency
273 temporary guardian if he or she has become a successor guardian.

274 (d)~~(b)~~ If an emergency temporary guardian is a guardian for
275 the property, the final report must consist of a verified
276 inventory of the property, as provided in s. 744.365, as of the
277 date the letters of emergency temporary guardianship were
278 issued, a final accounting that gives a full and correct account
279 of the receipts and disbursements of all the property of the
280 ward over which the guardian had control, and a statement of the
281 property of the ward on hand at the end of the emergency
282 temporary guardianship. If the emergency temporary guardian
283 becomes the successor guardian of the property, the final report
284 must satisfy the requirements of the initial guardianship report
285 for the guardian of the property as provided in s. 744.362.

286 (e)~~(c)~~ If the emergency temporary guardian is a guardian of
287 the person, the final report must summarize the activities of
288 the temporary guardian with regard to residential placement,
289 medical condition, mental health and rehabilitative services,
290 and the social condition of the ward to the extent of the
291 authority granted to the temporary guardian in the letters of
292 guardianship. If the emergency temporary guardian becomes the
293 successor guardian of the person, the report must satisfy the
294 requirements of the initial report for a guardian of the person
295 as stated in s. 744.362.

296 (f)~~(d)~~ A copy of the final report of the emergency
297 temporary guardianship shall be served on the successor guardian
298 and the ward.

299 Section 9. Subsection (1) of section 744.309, Florida
300 Statutes, is amended to read:



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301 744.309 Who may be appointed guardian of a resident ward.-

302 (1) RESIDENT.-

303 (a) Any resident of this state who is sui juris and is 18
304 years of age or older is qualified to act as guardian of a ward.

305 (b) A corporation not for profit incorporated pursuant to
306 chapter 617 is qualified to act as guardian of a ward if the
307 corporation is a charitable organization that is exempt from
308 taxation under s. 501(c) (3) of the Internal Revenue Code and the
309 corporation is registered as a professional guardian pursuant to
310 s. 744.1083.

311 (c) A justice or ~~No judge may not shall~~ act as guardian
312 unless after this law becomes effective, except when he or she
313 is related to the ward by blood, marriage, or adoption, or has
314 maintained a close relationship with the ward or the ward's
315 family, and serves without compensation.

316 Section 10. Section 744.3115, Florida Statutes, is amended
317 to read:

318 744.3115 Advance directives for health care.-In each
319 proceeding in which a guardian is appointed under this chapter,
320 the court shall determine whether the ward, prior to incapacity,
321 has executed any valid advance directive under chapter 765. If
322 any advance directive exists, the court shall specify in its
323 order and letters of guardianship what authority, if any, the
324 guardian shall exercise over the ward with regard to health care
325 decisions and what authority, if any, the surrogate shall
326 continue to exercise over the ward with regard to health care
327 decisions ~~surrogate~~. Pursuant to the grounds listed in s.
328 765.105, the court, upon its own motion, may, with notice to the
329 surrogate and any other appropriate parties, modify or revoke



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330 the authority of the surrogate to make health care decisions for
331 the ward. Any order revoking or modifying the authority of the
332 surrogate must be supported by specific written findings of
333 fact. If the court order provides that the guardian is
334 responsible for making health care decisions for the ward, the
335 guardian shall assume the responsibilities of the surrogate
336 which are provided in s. 765.205. For purposes of this section,
337 the term "health care decision" has the same meaning as in s.
338 765.101.

339 Section 11. Section 744.312, Florida Statutes, is reordered
340 and amended to read:

341 744.312 Considerations in appointment of guardian.—

342 (2) ~~(1)~~ If a guardian cannot be appointed pursuant to
343 subsection (1) ~~Subject to the provisions of subsection (4)~~, the
344 court may appoint any person who is fit and proper and qualified
345 to act as guardian, whether related to the ward or not.

346 ~~(2)~~ The court shall give preference to the appointment of a
347 person who:

348 (a) Is related by blood or marriage to the ward;

349 (b) Has educational, professional, or business experience
350 relevant to the nature of the services sought to be provided;

351 (c) Has the capacity to manage the financial resources
352 involved; or

353 (d) Has the ability to meet the requirements of the law and
354 the unique needs of the individual case.

355 (3) The court shall also consider all of the following:

356 (a) ~~Consider~~ The wishes expressed by an incapacitated
357 person as to who shall be appointed guardian. ~~†~~

358 (b) ~~Consider~~ The preference of a minor who is at least age



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359 14 years of age ~~or over~~ as to who should be appointed guardian.†

360 (c) ~~Consider~~ Any person designated as guardian in any will
361 in which the ward is a beneficiary.

362 (d) The wishes of close relatives of the incapacitated
363 person if the person cannot express a preference.

364 (4) Unless a court appoints a standby or preneed guardian,
365 the court:

366 (a) Must use a rotation system for the appointment of the
367 guardian or support its order appointing a guardian with written
368 findings of fact for each factor in subsections (2) and (3).

369 (b) May not give preference to the appointment of a person
370 under subsection (2) solely based on the fact that the person
371 was appointed by the court to serve as an emergency temporary
372 guardian.

373 (c) May not appoint as the permanent guardian a
374 professional guardian who served as an emergency temporary
375 guardian for the incapacitated person.

376 (5) The limitations in paragraphs (4) (b) and (c) apply only
377 if an interested person objects to the appointment of the
378 guardian. However, the court may waive the limitations if the
379 special requirements of the guardianship demand that the court
380 appoint a guardian who has a special talent or specific prior
381 experience. The court must make specific findings of fact which
382 justify such special requirements, which require an appointment
383 without reference to the limitations in paragraphs (4) (b) and
384 (c).

385 (1)-(4) If the person designated is qualified to serve
386 pursuant to s. 744.309, The court shall appoint as guardian any
387 standby guardian or preneed guardian who is qualified as



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388 guardian under s. 744.309, unless the court determines that
389 appointing the ~~such~~ person is contrary to the best interests of
390 the ward.

391 Section 12. Section 744.3203, Florida Statutes, is created
392 to read:

393 744.3203 Suspension of power of attorney before incapacity
394 determination.-

395 (1) At any time during proceedings to determine incapacity
396 but before the entry of an order determining incapacity, an
397 alleged incapacitated person's power of attorney is suspended
398 when the petitioner files a motion stating that a specific power
399 of attorney should be suspended or modified for any of the
400 following grounds:

401 (a) The agent's decisions are not in accord with the
402 alleged incapacitated person's known desires.

403 (b) The power of attorney is invalid.

404 (c) The agent has failed to discharge duties, or incapacity
405 or illness renders the agent incapable of discharging duties.

406 (d) The agent has abused powers.

407
408 Grounds for suspending a power of attorney do not include the
409 existence of a dispute between the agent and the petitioner
410 which is more appropriate for resolution in some other forum or
411 a legal proceeding other than a guardianship proceeding.

412 (2) The motion must:

413 (a) Identify one or more of the grounds in subsection (1);

414 (b) Include specific statements of fact showing that
415 grounds exist to justify the relief sought; and

416 (c) Include the following statement: "Under penalties of



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417 perjury, I declare that I have read the foregoing motion and
418 that the facts stated in it are true," followed by the signature
419 of the petitioner.

420 (3) Upon the filing of a response to the motion by the
421 agent under the power of attorney, the court shall schedule the
422 motion for an expedited hearing. Unless an emergency has arisen
423 and the agent's response sets forth the nature of the emergency,
424 the property or matter involved, and the power to be exercised
425 by the agent, notice must be given to all interested persons,
426 the alleged incapacitated person, and the alleged incapacitated
427 person's attorney. The court order following the hearing must
428 set forth what powers the agent is permitted to exercise, if
429 any, pending the outcome of the petition to determine
430 incapacity.

431 (4) In addition to any other remedy authorized by law, a
432 court may award reasonable attorney fees and costs to an agent
433 who successfully challenges the suspension of the power of
434 attorney if the petitioner's motion contains false or incomplete
435 statements, was made in bad faith, or fails to contain
436 sufficient factual allegations.

437 Section 13. Section 744.345, Florida Statutes, is amended
438 to read:

439 744.345 Letters of guardianship.—Letters of guardianship
440 shall be issued to the guardian and shall specify whether the
441 guardianship pertains to the person, or the property, or both,
442 of the ward. The letters must state whether the guardianship is
443 plenary or limited, and, if limited, the letters must state the
444 powers and duties of the guardian. ~~If the guardianship is~~
445 ~~limited,~~ The letters shall state whether or not and to what



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446 extent the guardian is authorized to act on behalf of the ward
447 with regard to any advance directive previously executed by the
448 ward.

449 Section 14. Section 744.359, Florida Statutes, is created
450 to read:

451 744.359 Abuse, neglect, or exploitation by a guardian.—

452 (1) A guardian may not abuse, neglect, or exploit a ward.

453 (2) A guardian commits exploitation when the guardian:

454 (a) Commits fraud in obtaining appointment as a guardian.

455 (b) Abuses his or her powers.

456 (c) Wastes, embezzles, or intentionally mismanages the
457 assets of the ward.

458 (3) A person who believes that a guardian is abusing,
459 neglecting, or exploiting a ward, including criminal
460 exploitation of a ward as prohibited in s. 825.103, shall report
461 the conduct to the central abuse hotline of the Department of
462 Children and Families.

463 Section 15. Section 744.361, Florida Statutes, is amended
464 to read:

465 744.361 Powers and duties of guardian.—

466 (1) The guardian of an incapacitated person is a fiduciary
467 and may exercise only those rights that have been removed from
468 the ward and delegated to the guardian. The guardian of a minor
469 shall exercise the powers of a plenary guardian.

470 (2) The guardian shall act within the scope of the
471 authority granted by the court and as provided by law.

472 (3) The guardian shall act in good faith.

473 (4) The guardian may not act in a manner that is contrary
474 to the ward's best interests under the circumstances.



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475 (5) A guardian who has special skills or expertise, or is
476 appointed in reliance upon the guardian's representation that
477 the guardian has special skills or expertise, shall use those
478 special skills or expertise when acting on behalf of the ward.

479 ~~(6)(2)~~ The guardian shall file an initial guardianship
480 report in accordance with s. 744.362.

481 ~~(7)(3)~~ The guardian shall file a guardianship report
482 annually in accordance with s. 744.367.

483 ~~(8)(4)~~ The guardian of the person shall implement the
484 guardianship plan.

485 ~~(9)(5)~~ When two or more guardians have been appointed, the
486 guardians shall consult with each other.

487 ~~(10)(6)~~ A guardian who is given authority over any property
488 of the ward shall:

489 (a) Protect and preserve the property and invest it
490 prudently as provided in chapter 518, apply it as provided in s.
491 744.397, and keep clear, distinct, and accurate records of the
492 administration of the ward's property ~~account for it faithfully.~~

493 (b) Perform all other duties required of him or her by law.

494 (c) At the termination of the guardianship, deliver the
495 property of the ward to the person lawfully entitled to it.

496 ~~(11)(7)~~ The guardian shall observe the standards in dealing
497 with the guardianship property that would be observed by a
498 prudent person dealing with the property of another, ~~and, if the~~
499 ~~guardian has special skills or is named guardian on the basis of~~
500 ~~representations of special skills or expertise, he or she is~~
501 ~~under a duty to use those skills.~~

502 ~~(12)(8)~~ The guardian, if authorized by the court, shall
503 take possession of all of the ward's property and of the rents,



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504 income, issues, and profits from it, whether accruing before or
505 after the guardian's appointment, and of the proceeds arising
506 from the sale, lease, or mortgage of the property or of any
507 part. All of the property and the rents, income, issues, and
508 profits from it are assets in the hands of the guardian for the
509 payment of debts, taxes, claims, charges, and expenses of the
510 guardianship and for the care, support, maintenance, and
511 education of the ward or the ward's dependents, as provided for
512 under the terms of the guardianship plan or by law.

513 (13) Recognizing that every individual has unique needs and
514 abilities, a guardian who is given authority over a ward's
515 person shall, as appropriate under the circumstances:

516 (a) Consider the expressed desires of the ward as known by
517 the guardian when making decisions that affect the ward.

518 (b) Allow the ward to maintain contact with family and
519 friends unless the guardian believes that such contact may cause
520 harm to the ward.

521 (c) Not restrict the physical liberty of the ward more than
522 reasonably necessary to protect the ward or another person from
523 serious physical injury, illness, or disease.

524 (d) Assist the ward in developing or regaining his or her
525 own capacity, if medically possible.

526 (e) Notify the court if the guardian believes that the ward
527 has regained capacity and that one or more of the rights that
528 have been removed should be restored to the ward.

529 (f) To the extent applicable, make provision for the
530 medical, mental, rehabilitative, or personal care services for
531 the welfare of the ward.

532 (g) To the extent applicable, acquire a clear understanding



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533 of the risks and benefits of a recommended course of health care
534 treatment before making a health care decision.

535 (h) Evaluate the ward's medical and health care options,
536 financial resources, and desires when making residential
537 decisions that are best suited for the current needs of the
538 ward.

539 (i) Advocate on behalf of the ward in institutional and
540 other residential settings and regarding access to home and
541 community-based services.

542 (j) Acquire an understanding of the available residential
543 options and give priority to home and other community-based
544 services and settings when not inconsistent with the person's
545 goals, needs, and preferences.

546 (14)-(9) A professional guardian must ensure that each of
547 the guardian's wards is personally visited by the guardian or
548 one of the guardian's professional staff at least once each
549 calendar quarter. During the personal visit, the guardian or the
550 guardian's professional staff person shall assess:

551 (a) The ward's physical appearance and condition.

552 (b) The appropriateness of the ward's current living
553 situation.

554 (c) The need for any additional services and the necessity
555 for continuation of existing services, taking into consideration
556 all aspects of social, psychological, educational, direct
557 service, health, and personal care needs.

558 (d) The nature and extent of visitation and communication
559 with the ward's family and friends.

560
561 This subsection does not apply to a professional guardian who



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562 has been appointed only as guardian of the property.

563 Section 16. Subsection (1) of section 744.367, Florida
564 Statutes, is amended to read:

565 744.367 Duty to file annual guardianship report.-

566 (1) Unless the court requires filing on a calendar-year
567 basis, each guardian of the person shall file with the court an
568 annual guardianship plan at least 60 days, but no more than
569 within 90 days, before ~~after~~ the last day of the anniversary
570 month that the letters of guardianship were signed, and the plan
571 must cover the coming fiscal year, ending on the last day in
572 such anniversary month. If the court requires calendar-year
573 filing, the guardianship plan for the forthcoming calendar year
574 must be filed on or after September 1, but no later than
575 December 1, of the current year ~~before April 1 of each year.~~

576 Section 17. Subsection (8) of section 744.369, Florida
577 Statutes, is amended to read:

578 744.369 Judicial review of guardianship reports.-

579 (8) The approved report constitutes the authority for the
580 guardian to act in the forthcoming year. The powers of the
581 guardian are limited by the terms of the report. The annual
582 report may not grant additional authority to the guardian
583 without a hearing, as provided for in s. 744.331, to determine
584 that the ward is incapacitated to act in that matter. Unless the
585 court orders otherwise, the guardian may continue to act under
586 authority of the last approved report until the forthcoming
587 year's report is approved.

588 Section 18. Subsection (1) of section 744.3715, Florida
589 Statutes, is amended to read:

590 744.3715 Petition for interim judicial review.-



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591 (1) At any time, any interested person, including the ward,
592 may petition the court for review alleging that the guardian is
593 not complying with the guardianship plan, ~~or~~ is exceeding his or
594 her authority under the guardianship plan, is acting in manner
595 contrary to s. 744.361, is denying visitation between the ward
596 and his or her relatives in violation of s. 744.361(13), or ~~and~~
597 the guardian is not acting in the best interest of the ward. The
598 petition for review must state the nature of the objection to
599 the guardian's action or proposed action. Upon the filing of any
600 such petition, the court shall review the petition and act upon
601 it expeditiously.

602 Section 19. Paragraphs (a) and (b) of subsection (3) of
603 section 744.464, Florida Statutes, are amended, and subsection
604 (4) is added to that section, to read:

605 744.464 Restoration to capacity.—

606 (3) ORDER OF RESTORATION.—

607 (a) If no objections are filed, ~~and~~ and the court is satisfied
608 that with the medical examination establishes by a preponderance
609 of the evidence that restoration of all or some of the ward's
610 rights is appropriate, the court shall enter an order of
611 restoration of capacity, restoring all or some of the rights
612 that which were removed from the ward in accordance with those
613 findings. ~~The order must be issued within 30 days after the~~
614 ~~medical report is filed.~~

615 (b) At the conclusion of a hearing, conducted pursuant to
616 s. 744.1095, the court shall make specific findings of fact and,
617 based on a preponderance of the evidence, enter an order either
618 denying the suggestion of capacity or restoring all or some of
619 the rights that which were removed from the ward. The ward has



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620 the burden of proving by a preponderance of the evidence that
621 the restoration of capacity is warranted.

622 (4) TIMELINESS OF HEARING.—The court shall give priority to
623 any suggestion of capacity and shall advance the cause on the
624 calendar.

625 Section 20. The amendments made by this act apply to all
626 proceedings pending on the effective date of this act.

627 Section 21. This act shall take effect upon becoming a law.

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

629 And the title is amended as follows:

630 Delete everything before the enacting clause
631 and insert:

632 A bill to be entitled
633 An act relating to guardianship proceedings; amending
634 s. 709.2109, F.S.; revising the conditions under which
635 an agent's power of attorney is terminated or
636 suspended or continues; amending s. 709.2119, F.S.;
637 revising the contents of an affidavit by an agent to a
638 third person; creating s. 744.1065, F.S.; authorizing
639 a court to refer guardianship matters to mediation or
640 alternative dispute resolution under certain
641 circumstances; amending ss. 744.107 and 744.1075,
642 F.S.; authorizing a court to appoint the office of
643 criminal conflict and civil regional counsel as a
644 court monitor in guardianship proceedings under
645 certain circumstances; amending s. 744.108, F.S.;
646 providing that fees and costs incurred by specified
647 attorneys in compensation proceedings are payable from
648 the assets of the guardianship estate; providing that



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649 expert testimony is not required in proceedings to
650 determine compensation for an attorney or guardian;
651 providing that expert witness fees are payable from
652 the assets of the guardianship estate under certain
653 circumstances; amending s. 744.3025, F.S.; clarifying
654 the circumstances under which a court may appoint a
655 guardian ad litem to represent a minor; clarifying the
656 circumstances under which a court must appoint a
657 guardian ad litem; providing that a settlement of a
658 minor's claim is subject to certain confidentiality
659 provisions; amending s. 744.3031, F.S.; requiring that
660 a duly noticed hearing be held before the appointment
661 of an emergency temporary guardian; requiring a notice
662 of filing of a petition for appointment of an
663 emergency temporary guardian and a notice for any
664 hearing on the petition to be served on certain
665 persons before a hearing on the petition commences;
666 revising the period for which an emergency temporary
667 guardian may be appointed; prohibiting the final
668 payment of the emergency temporary guardian fees and
669 his or her attorney fees until the final report is
670 filed; requiring a court to issue an order to show
671 cause to an emergency temporary guardian who fails to
672 timely file his or her final report; authorizing a
673 court to take certain actions to protect the ward
674 before a hearing on an order to show cause; requiring
675 a copy of such order to be transmitted to certain
676 parties; authorizing the court to impose sanctions on
677 the emergency temporary guardian or take certain other



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678 actions after a show cause hearing; amending s.
679 744.309, F.S.; providing that certain corporations not
680 for profit may act as guardians of a ward; amending s.
681 744.3115, F.S.; requiring the court to specify
682 authority for health care decisions with respect to a
683 ward's advance directive; requiring a court order
684 revoking or modifying the authority of a health care
685 surrogate to be supported by written findings of fact;
686 amending s. 744.312, F.S.; requiring a court, in
687 determining whom to appoint as a guardian, to consider
688 the wishes of the close relatives of the incapacitated
689 person under certain circumstances; limiting the
690 authority of a court to appoint guardians under
691 certain circumstances; authorizing the court to waive
692 the limitations under certain circumstances;
693 prohibiting the court from appointing a professional
694 guardian as a permanent guardian under certain
695 circumstances; creating s. 744.3203, F.S.; providing
696 for the suspension of a power of attorney during
697 guardianship proceedings under certain circumstances;
698 requiring an expedited hearing on the motion to
699 suspend a power of attorney under certain
700 circumstances; authorizing a court to award reasonable
701 attorney fees and costs to an agent who challenges the
702 suspension of the power of attorney under certain
703 circumstances; amending s. 744.345, F.S.; revising the
704 circumstances under which letters of guardianship must
705 describe the extent to which a guardian is authorized
706 to act on behalf of the ward with regard to an advance



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707 directive; creating s. 744.359, F.S.; prohibiting
708 abuse, neglect, or exploitation of a ward by a
709 guardian; requiring the report of abuse, neglect, or
710 exploitation to the Department of Children and
711 Families central abuse hotline; amending s. 744.361,
712 F.S.; revising the powers and duties of a guardian;
713 amending s. 744.367, F.S.; revising the period during
714 which a guardian must file an annual guardianship plan
715 with the court; amending s. 744.369, F.S.; providing
716 for the continuance of a guardian's authority to act
717 under a last approved annual report under certain
718 circumstances; amending s. 744.3715, F.S.; providing
719 an additional circumstance under which an interested
720 person may petition the court regarding a guardian's
721 failure to comply with the duties of a guardian;
722 amending s. 744.464, F.S.; establishing the burden of
723 proof for determining restoration of capacity of a
724 ward in pending guardianship cases; requiring the
725 court to make findings of fact in its determination to
726 restore or deny capacity; providing that the ward has
727 the burden of proving by a preponderance of the
728 evidence; requiring a court to advance such cases on
729 the calendar; providing applicability; providing an
730 effective date.

By Senator Diaz de la Portilla

40-00508-15

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1 A bill to be entitled
 2 An act relating to guardianship proceedings; amending
 3 s. 744.3031, F.S.; requiring that a duly noticed
 4 hearing be held before the appointment of an emergency
 5 temporary guardian; requiring a notice of filing of a
 6 petition for appointment of an emergency temporary
 7 guardian and any hearing on the petition to be served
 8 on certain persons before a hearing on the petition
 9 commences; revising the time period for which the
 10 emergency temporary guardian may be appointed;
 11 revising the time period for which the authority of
 12 the emergency temporary guardian may be extended after
 13 a hearing is held; requiring the emergency temporary
 14 guardian to file a bond under certain circumstances;
 15 authorizing a court to issue an order to show cause
 16 directed at the emergency temporary guardian under
 17 certain circumstances; requiring the order to include
 18 specific information; authorizing a court, before such
 19 hearing, to issue an order to protect the ward;
 20 requiring a copy of such order to be transmitted to
 21 all parties; authorizing a court, after such hearing,
 22 to impose sanctions on specified persons or to take
 23 any other action authorized by law; creating s.
 24 744.3032, F.S.; providing that an emergency temporary
 25 guardian of an incapacitated person is a fiduciary and
 26 may exercise only delegated rights; providing the
 27 duties and responsibilities of the emergency temporary
 28 guardian; amending s. 744.3115, F.S.; requiring the
 29 court to specify authority for health care decisions

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

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30 with respect to a ward's advance directive; amending
 31 s. 744.312, F.S.; prohibiting the court from giving
 32 certain preferences when appointing a guardian;
 33 reenacting s. 744.344(4), F.S., relating to a court
 34 appointing an emergency temporary guardian, to
 35 incorporate the amendment made to s. 744.3031, F.S.,
 36 in a reference thereto; reenacting s. 765.205(3),
 37 F.S., relating to making health care decisions for the
 38 principal, to incorporate the amendment made to s.
 39 744.3115, F.S., in a reference thereto; reenacting ss.
 40 744.304(4), 744.3045(7), and 744.308(6), F.S.,
 41 relating to confirming the appointment of the guardian
 42 if the court finds the standby guardian to be
 43 qualified to serve as guardian, confirming the
 44 appointment of the guardian if the court finds the
 45 preneed guardian to be qualified to serve as guardian,
 46 and directing how the court will be governed when
 47 appointing a guardian, respectively, to incorporate
 48 the amendment made to s. 744.312, F.S., in references
 49 thereto; providing an effective date.

50
 51 Be It Enacted by the Legislature of the State of Florida:

52
 53 Section 1. Section 744.3031, Florida Statutes, is amended
 54 to read:

55 744.3031 Emergency temporary guardianship.—

56 (1) A court, prior to appointment of a guardian but after a
 57 petition for determination of incapacity has been filed pursuant
 58 to this chapter, and after a duly noticed hearing has been held,

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59 may appoint an emergency temporary guardian for the person or
 60 property, or both, of an alleged incapacitated person. The court
 61 must specifically find that there appears to be imminent danger
 62 that the physical or mental health or safety of the person will
 63 be seriously impaired or that the person's property is in danger
 64 of being wasted, misappropriated, or lost unless immediate
 65 action is taken. The subject of the proceeding or any adult
 66 interested in the welfare of that person may apply to the court
 67 in which the proceeding is pending for the emergency appointment
 68 of a temporary guardian. The powers and duties of the emergency
 69 temporary guardian must be specifically enumerated by court
 70 order. The court shall appoint counsel to represent the alleged
 71 incapacitated person during any such summary proceedings, and
 72 such appointed counsel may request that the proceeding be
 73 recorded and transcribed.

74 (2) The court may appoint an emergency temporary guardian
 75 on its own motion if no petition for appointment of guardian has
 76 been filed at the time of entry of an order determining
 77 incapacity.

78 (3) Notice of filing of a petition for appointment of an
 79 emergency temporary guardian and notice of any hearing on the
 80 petition must be served on the alleged incapacitated person and
 81 on the alleged incapacitated person's attorney before a hearing
 82 on the petition is commenced.

83 (4)(3) The authority of an emergency temporary guardian
 84 expires 60 90 days after the date of appointment or when a
 85 guardian is appointed, whichever occurs first. The authority of
 86 the emergency temporary guardian may be extended for an
 87 additional 60 90 days after a hearing is held and upon a showing

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88 that the emergency conditions still exist.

89 (5)(4) The court may issue an injunction, restraining
 90 order, or other appropriate writ to protect the physical or
 91 mental health or safety of the person who is the ward of the
 92 emergency temporary guardianship.

93 (6)(5) The emergency temporary guardian shall take an oath
 94 to faithfully perform the duties of a guardian before letters of
 95 emergency temporary guardianship are issued.

96 (7)(6) The court may require that, before exercising
 97 authority as guardian, the emergency temporary guardian of the
 98 property ~~may be required to~~ file a bond in accordance with s.
 99 744.351.

100 (8)(7) An emergency temporary guardian's authority and
 101 responsibility begins upon issuance of letters of emergency
 102 temporary guardianship in accordance with s. 744.345.

103 (9)(8)(a) An emergency temporary guardian shall file a
 104 final report no later than 30 days after the expiration of the
 105 emergency temporary guardianship.

106 (b) If the final report is not timely filed, the court may
 107 issue to the emergency temporary guardian an order to show cause
 108 that requires the emergency temporary guardian to appear before
 109 the court to explain why the court should not take further
 110 action. The order must specify the time and place of the hearing
 111 within a reasonable time after service of the order to allow for
 112 the preparation of a defense.

113 (c) At any time before the hearing on the order to show
 114 cause, the court may issue a temporary injunction, a restraining
 115 order, or an order freezing the assets of the emergency
 116 temporary guardian; suspend the emergency temporary guardian or

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117 appoint a guardian ad litem; or issue any other appropriate
 118 order to protect the physical or mental health or safety or the
 119 property of the ward. A copy of any such order or injunction
 120 shall be transmitted by the court or under its direction to all
 121 parties at the time of entry of the order or injunction.

122 (d) After a hearing on the order to show cause, the court
 123 may impose sanctions on the emergency temporary guardian or his
 124 or her attorney or other respondent or take any other action
 125 authorized by law, including, but not limited to, entering a
 126 judgment of contempt; ordering an accounting; freezing assets;
 127 referring the case to local law enforcement agencies or the
 128 state attorney; filing an abuse, neglect, or exploitation
 129 complaint with the Department of Children and Families; and
 130 initiating proceedings to remove the emergency temporary
 131 guardian.

132 (e)(b) If an emergency temporary guardian is a guardian for
 133 the property, the final report must consist of a verified
 134 inventory of the property, as provided in s. 744.365, as of the
 135 date the letters of emergency temporary guardianship were
 136 issued, a final accounting that gives a full and correct account
 137 of the receipts and disbursements of all the property of the
 138 ward over which the guardian had control, and a statement of the
 139 property of the ward on hand at the end of the emergency
 140 temporary guardianship. If the emergency temporary guardian
 141 becomes the successor guardian of the property, the final report
 142 must satisfy the requirements of the initial guardianship report
 143 for the guardian of the property as provided in s. 744.362.

144 (f)(e) If the emergency temporary guardian is a guardian of
 145 the person, the final report must summarize the activities of

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146 the temporary guardian with regard to residential placement,
 147 medical condition, mental health and rehabilitative services,
 148 and the social condition of the ward to the extent of the
 149 authority granted to the temporary guardian in the letters of
 150 guardianship. If the emergency temporary guardian becomes the
 151 successor guardian of the person, the report must satisfy the
 152 requirements of the initial report for a guardian of the person
 153 as stated in s. 744.362.

154 (g)(d) A copy of the final report of the emergency
 155 temporary guardianship shall be served on the successor guardian
 156 and the ward.

157 Section 2. Section 744.3032, Florida Statutes, is created
 158 to read:

159 744.3032 Powers and duties of an emergency temporary
 160 guardian.—An emergency temporary guardian of an incapacitated
 161 person is a fiduciary and may exercise only those rights that
 162 the court has removed from the ward and delegated to the
 163 guardian. The emergency temporary guardian:

164 (1) Shall act within the scope of the authority granted by
 165 the court and as provided by law;

166 (2) Shall act in good faith;

167 (3) May not act in a manner that is contrary to the ward's
 168 best interests under the circumstances;

169 (4) Shall use special skills or expertise if the emergency
 170 temporary guardian has special skills or expertise or is
 171 appointed in reliance upon the emergency temporary guardian's
 172 representation that he or she has special skills or expertise;
 173 and

174 (5) Recognizing that every individual has unique needs and

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175 abilities, shall, if the emergency temporary guardian is given
 176 authority over the ward's person and if the following actions
 177 are appropriate under the circumstances:

178 (a) Consider the expressed desires of the ward as known by
 179 the emergency temporary guardian when making decisions that
 180 affect the ward.

181 (b) Allow the ward to maintain contact with family and
 182 friends unless the emergency temporary guardian believes that
 183 such contact may cause harm to the ward.

184 (c) Not restrict the physical liberty of the ward more than
 185 reasonably necessary to protect the ward or another person from
 186 serious physical injury, illness, or disease.

187 (d) Assist the ward in developing or regaining his or her
 188 own capacity, if medically possible.

189 (e) Notify the court if the emergency temporary guardian
 190 believes that the ward has regained capacity and that one or
 191 more of the rights that have been removed should be restored.

192 (f) To the extent applicable, make provision for the
 193 medical, mental, rehabilitative, or personal care services for
 194 the welfare of the ward.

195 (g) To the extent applicable, acquire a clear understanding
 196 of the risks and benefits of a recommended course of health care
 197 treatment before making health care decisions for the ward.

198 (h) Evaluate the ward's medical and health care options,
 199 financial resources, and desires when making residential
 200 decisions that are best suited for the current needs of the
 201 ward.

202 (i) Advocate on behalf of the ward in institutional and
 203 other residential settings.

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204 Section 3. Section 744.3115, Florida Statutes, is amended
 205 to read:

206 744.3115 Advance directives for health care.—In each
 207 proceeding in which a guardian is appointed under this chapter,
 208 the court shall determine whether the ward, prior to incapacity,
 209 has executed any valid advance directive under chapter 765. If
 210 any advance directive exists, the court shall specify in its
 211 order and letters of guardianship what authority, if any, the
 212 guardian shall exercise over the ward with regard to health care
 213 decisions and what authority, if any, the surrogate shall
 214 continue to exercise over the ward with regard to health care
 215 decisions ~~surrogate~~. Pursuant to the grounds listed in s.
 216 765.105, the court, upon its own motion, may, with notice to the
 217 surrogate and any other appropriate parties, modify or revoke
 218 the authority of the surrogate to make health care decisions for
 219 the ward. If the court order provides that the guardian is
 220 responsible for making health care decisions for the ward, the
 221 guardian shall assume the responsibilities of the surrogate
 222 which are provided in s. 765.205. For purposes of this section,
 223 the term "health care decision" has the same meaning as in s.
 224 765.101.

225 Section 4. Subsection (1) of section 744.312, Florida
 226 Statutes, is amended, present subsections (3) and (4) of that
 227 section are redesignated as subsections (4) and (5),
 228 respectively, and a new subsection (3) is added to that section,
 229 to read:

230 744.312 Considerations in appointment of guardian.—

231 (1) Subject to the provisions of subsection (5) ~~(4)~~, the
 232 court may appoint any person who is fit and proper and qualified

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233 to act as guardian, whether related to the ward or not.

234 (3) The court may not give preference to the appointment of
 235 a person solely based on the fact that the person was appointed
 236 as an emergency temporary guardian.

237 Section 5. For the purpose of incorporating the amendment
 238 made by this act to section 744.3031, Florida Statutes, in a
 239 reference thereto, subsection (4) of section 744.344, Florida
 240 Statutes, is reenacted to read:

241 744.344 Order of appointment.—

242 (4) If a petition for the appointment of a guardian has not
 243 been filed at the time of the hearing on the petition to
 244 determine capacity, the court may appoint an emergency temporary
 245 guardian in the manner and for the purposes specified in s.
 246 744.3031.

247 Section 6. For the purpose of incorporating the amendment
 248 made by this act to section 744.3115, Florida Statutes, in a
 249 reference thereto, subsection (3) of section 765.205, Florida
 250 Statutes, is reenacted to read:

251 765.205 Responsibility of the surrogate.—

252 (3) If, after the appointment of a surrogate, a court
 253 appoints a guardian, the surrogate shall continue to make health
 254 care decisions for the principal, unless the court has modified
 255 or revoked the authority of the surrogate pursuant to s.
 256 744.3115. The surrogate may be directed by the court to report
 257 the principal's health care status to the guardian.

258 Section 7. For the purpose of incorporating the amendment
 259 made by this act to section 744.312, Florida Statutes, in a
 260 reference thereto, subsection (4) of section 744.304, Florida
 261 Statutes, is reenacted to read:

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262 744.304 Standby guardianship.—

263 (4) Within 20 days after assumption of duties as guardian,
 264 a standby guardian shall petition for confirmation of
 265 appointment. If the court finds the standby guardian to be
 266 qualified to serve as guardian under ss. 744.309 and 744.312,
 267 appointment of the guardian must be confirmed. Each guardian so
 268 confirmed shall file an oath in accordance with s. 744.347,
 269 shall file a bond, and shall submit to a credit and a criminal
 270 history record check as set forth in s. 744.3135, if required.
 271 Letters of guardianship must then be issued in the manner
 272 provided in s. 744.345.

273 Section 8. For the purpose of incorporating the amendment
 274 made by this act to section 744.312, Florida Statutes, in a
 275 reference thereto, subsection (7) of section 744.3045, Florida
 276 Statutes, is reenacted to read:

277 744.3045 Preneed guardian.—

278 (7) Within 20 days after assumption of duties as guardian,
 279 a preneed guardian shall petition for confirmation of
 280 appointment. If the court finds the preneed guardian to be
 281 qualified to serve as guardian pursuant to ss. 744.309 and
 282 744.312, appointment of the guardian must be confirmed. Each
 283 guardian so confirmed shall file an oath in accordance with s.
 284 744.347 and shall file a bond, if required. Letters of
 285 guardianship must then be issued in the manner provided in s.
 286 744.345.

287 Section 9. For the purpose of incorporating the amendment
 288 made by this act to section 744.312, Florida Statutes, in a
 289 reference thereto, subsection (6) of section 744.308, Florida
 290 Statutes, is reenacted to read:

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291 744.308 Resident guardian of the property of nonresident
292 ward.-

293 (6) In the appointment of the guardian, the court shall be
294 governed by s. 744.312.

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



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Fav/1 amendment
3/10/15	JU	Fav/CS
	CA	
	FP	

December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **CS/SB 36** – Judiciary Committee and Senator Miguel Diaz de la Portilla
Relief of Estate of Victor Guerrero

SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR \$6,873,838.19 BASED ON A JURY AWARD AGAINST PASCO COUNTY TO COMPENSATE THE ESTATE OF VICTOR GUERRERO FOR HIS DEATH IN A COLLISION WITH A COUNTY VEHICLE.

FINDINGS OF FACT:

On May 1, 2008, Victor Guerrero, a 48-year old, off-duty Tampa police officer, was traveling southbound on U.S. Highway 41 on his motorcycle. Highway 41 is a north-south thoroughfare in Pasco County and is a two-lane, undivided highway with a 55 mph speed limit in the area where Mr. Guerrero was driving. At the same time, Daniel Whipple, a Pasco County employee, was driving a Pasco County truck northbound on Highway 41 on his way to inspect a subdivision off of that road. The weather was clear and the view was not obstructed. As Mr. Guerrero approached Mr. Whipple, Mr. Whipple made a left hand turn into the southbound lane.

As Mr. Whipple turned, the Pasco County truck he was driving and Mr. Guerrero's motorcycle collided in the southbound lane. Mr. Whipple stated that he simply did not see the motorcycle. Mr. Guerrero's motorcycle struck the side of the Pasco County pickup truck, and Mr. Guerrero was ejected from the motorcycle. Mr. Guerrero was not wearing a helmet

at the time of the accident and died as a result of a brainstem laceration which occurred as a result of the incident.

A witness to the accident testified that Mr. Whipple's vehicle turned in front of Mr. Guerrero's motorcycle. The witness testified that Mr. Guerrero did not have an opportunity to avoid the collision. The witness did not believe that the motorcycle driver, Mr. Guerrero, did anything wrong. In addition, the Tampa Police Department investigator believed that Mr. Whipple violated section 316.122, Florida Statutes, by making an improper left turn.

Following the accident, Pasco County's Driver Safety Review Board conducted an internal investigation relating to the accident, and found that Daniel Whipple was negligent in causing the accident, citing mistakes due to carelessness. The Board recommended that Daniel Whipple's driving privileges, as extended to County vehicles and equipment, be suspended. The jury was informed of the Board's finding but not that Daniel Whipple's driving privileges were suspended.

Mr. Guerrero is survived by his wife of 2 years, Lara Guerrero, with whom he had lived since 2000 with her three children. Mr. Guerrero is also survived by three sons from a prior marriage, Michael, David, and Kevin, aged 21, 19, and 15 at the time of their father's death, respectively. At the time of Mr. Guerrero's death, his sons lived in South Carolina with their mother and had lived there for less than one year. Mr. Guerrero had seen his sons three times after their move. Mr. Guerrero traveled to South Carolina once and his sons returned to Florida twice. Prior to moving to South Carolina in 2007, Mr. Guerrero's sons and their mother resided in the Tampa area.

The Guerrero estate (the "estate" or "claimant") filed a lawsuit against Pasco County and, on February 10, 2012, the jury returned a verdict for \$7,845,127.30. The parties stipulated to economic damages of \$1,095,127.30. The jury awarded Lara Guerrero \$1,500,000 and award \$1,750,000 to each of the three children. The jury verdict for noneconomic damages was less than sought for Mrs. Guerrero (counsel suggested \$2,500,000 in noneconomic damages for Mrs. Guerrero) and more than sought each of the children (counsel suggested \$500,000 in noneconomic damages for each of the children). The verdict amount was reduced by ten percent for comparative negligence due to Mr. Guerrero's failure to wear

a helmet. The verdict form gave the jury the option to apportion liability to Mr. Guerrero for speeding but the jury did not do so. The Second District Court of Appeal affirmed the final judgment.

Following the trial, Michael and Kevin Guerrero have remained in South Carolina with their mother. Michael is currently employed at an auto body shop, and Kevin graduated from Northeastern Technical College in May of 2013 after obtaining an Associate in Arts Degree. Kevin currently works at the Food Lion. David was discharged from the United States Marine Corps in January 2013 and is currently in the Reserves. David currently resides in Florida and will begin the Hillsborough Community College Law Enforcement Academy in January 2015. Lara Guerrero moved out of the Tampa area after the home she, Victor, and her three children lived in was foreclosed following Victor's death. She currently resides in Fleming Island, Florida with her boyfriend, daughter, and boyfriend's son. Lara Guerrero has been employed sporadically since Victor Guerrero's death but is not currently employed. Prior to Victor's death, Lara Guerrero was employed by the Home Depot for over fifteen years.

In December, 2014, the House and Senate special masters held a joint hearing on this contested claim. The Guerreros and Pasco County submitted documents from pretrial discovery, from the trial, from the appellate record, and supplemented the record after the hearing with other documents. The Guerreros testified at the hearing. At the hearing, Pasco County presented expert testimony that Mr. Guerrero would not have died if he had been wearing a motorcycle helmet. Pasco County also presented expert testimony that Mr. Guerrero was speeding and that the accident would not have occurred if Mr. Guerrero had been driving a safe speed.

The Guerreros presented expert testimony that Mr. Guerrero would have died even if he had been wearing a helmet and presented evidence that Mr. Guerrero was not speeding.

Pasco County opposes a claim bill in this case. The County argues that Mr. Guerrero was speeding and not wearing a helmet and that he would have avoided the accident had he not been speeding and would have survived the accident had he been wearing a helmet. The County further argues that jury

verdict was excessive and unduly influenced by emotional testimony in the case.

A medical examiner testified at the trial and his trial testimony, including testimony presented outside the presence of the jury, was provided for the hearing. The medical examiner stated that Mr. Guerrero would have died from the accident even if he was wearing a helmet. A second expert witness presented by the estate testified that Mr. Guerrero would have died whether or not he had been wearing a helmet. He testified that no helmet could have prevented Mr. Guerrero's death. Pasco County's expert testified that Mr. Guerrero would have survived if he had been wearing a helmet.

Both sides presented evidence relating to whether or not Mr. Guerrero was speeding at the time of the accident. The claimant's expert testified that Mr. Guerrero was travelling between 51 and 58 miles per hour. The Pasco County expert testified that Mr. Guerrero was traveling between 66 and 83 miles per hour.

Pasco County has paid \$200,000 of the final judgment. Of that \$200,000, \$186,776.38 was paid to the claimant and \$13,223.62 was paid to the claimant's automobile insurance carrier to satisfy its subrogated property damage claim. Pasco County was insured by a Public Entity Excess Liability Policy issued by Star Insurance Company which has liability limits of \$1,000,000 for each covered accident or occurrence. The Policy is subject to a self-retention limit of \$1,000,000 which is eroded by certain costs and expenses incurred by the County in the defense or payment of a covered claim. Approximately \$690,000 remains of Pasco County's self-insured retention limit which must be exhausted before Star Insurance Company's duty to indemnify the County is triggered. The self-insured retention and any amount above the \$1,000,000 insurance policy would be paid from the County's general fund.

The \$186,776.38 paid to the claimant was divided as follows:

Mrs. Guerrero: \$7,937.99

Kevin Guerrero: \$6,761.99

Michael Guerrero: \$6,467.99

David Guerrero: \$6,467.99

Estate: \$1,764.00

Attorneys (including \$5,000 in trust for future costs and probate fees): \$157,386.42.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding to determine whether Pasco County is liable in negligence for the death of Mr. Guerrero and, if so, whether the amount of the claim is reasonable.

Section 316.122, Florida Statutes, requires the driver of a vehicle turning left to yield to oncoming traffic. Mr. Whipple, a Pasco County employee, failed to do so. Pasco County is liable as Mr. Whipple's employer.

Each side presented evidence relating to whether Mr. Guerrero would have died if he had been wearing a helmet. Given the conflicting testimony, the jury's finding apportioning most of the damages to the County but some of the damages to Mr. Guerrero was reasonable.

Similarly, there was conflicting expert testimony regarding Mr. Guerrero's speed at the time of the accident. However, an eyewitness saw the accident and believed that the driver of the truck, Mr. Whipple, was at fault. Given the conflicting expert testimony, the jury's apparent reliance on an eyewitness and finding that speed was not a factor was reasonable.

Pasco County objects to various evidentiary rulings made by the trial judge at trial. Specifically, the County objects to the admission of the Driver Safety Review Board finding that Mr. Whipple was at fault. The jury's finding of fault was reasonable in this case. An eyewitness saw the accident and believed that Mr. Whipple was at fault. Given eyewitness testimony, it is reasonable for the jury to find Mr. Whipple at fault even if one assumes the trial court erred in admitting the finding of the Driver Safety Review Board.

The County also argues that the jury was unduly influenced by emotional testimony at trial and that the jury award was excessive. Those issues were raised, or could have been raised, by the County on appeal, reviewed by the court under

an abuse of discretion standard, and rejected. The jury appears to have exercised independent judgment from that of the lawyers in the case. It awarded less than was asked for to Mrs. Guerrero and more than was sought to each of the three children. It is difficult to place a monetary value on the loss of a husband or a father but it is reasonable for a jury to determine that surviving children should receive more than a surviving spouse.

ATTORNEYS FEES:

The claimant's attorneys have agreed to limit their fees and lobbyist fees to not more than 25 percent of any amount awarded by the Legislature.

RECOMMENDED
AMENDMENT:

This bill provides post-judgment interest at the rate of 4.75 percent. While paying post-judgment interest in claim bills is not unprecedented, the general practice is not to include post-judgment interest. This bill provides for a lump sum payment to the estate of Victor Guerrero but the jury made separate awards to the estate, to Lara Guerrero, and to each of the three children.

The recommended amendment removes references to post-judgment interest and apportions the claim to the estate, Mrs. Guerrero, and the three children as follows:

- Estate: \$962,337.34 (14%)
- Mrs. Guerrero: \$1,312,903.09 (19.1%)
- Kevin Guerrero: \$1,532,865.92 (22.3%)
- Michael Guerrero: \$1,532,865.92 (22.3%)
- David Guerrero: \$1,532,865.92 (22.3%)

I arrived at those amounts by calculating the percentage of the total award that the jury awarded to each claimant and multiplying those percentages by the total dollar amount of the bill.

RECOMMENDATIONS:

The undersigned recommends that the bill be reported favorably.

Respectfully submitted,

L. Michael Billmeier, Jr.
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

CS by Judiciary:

The committee substitute reduces the amount appropriated by the claim bill to \$1.5 million. The committee substitute also apportions the appropriation among the Estate of Victor Guerrero and his survivors.



906194

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
03/11/2015	.	
	.	
	.	
	.	

The Committee on Judiciary (Diaz de la Portilla) recommended the following:

Senate Amendment (with title amendment)

Delete lines 75 - 80

and insert:

and to draw a warrant payable to Lara Guerrero, as personal representative of the Estate of Victor Guerrero in the amount of \$1,500,000.00, which shall be apportioned as follows: to the Estate of Victor Guerrero in the amount of \$90,000.00, to Lara Guerrero in the amount of \$405,000.00, to Kevin Guerrero in the amount of \$345,000.00, to Michael Guerrero in the amount of



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11 \$330,000.00, and to David Guerrero in the amount of \$330,000.00,
12 as compensation for injuries and damages sustained as a result
13 of the death of Victor Guerrero.

14
15 ===== T I T L E A M E N D M E N T =====

16 And the title is amended as follows:

17 Delete lines 2 - 67

18 and insert:

19 An act for the relief of the Estate of Victor Guerrero
20 by Pasco County; providing for an appropriation to
21 compensate the Guerrero family for Officer Guerrero's
22 death, which was the result of negligence by an
23 employee of Pasco County; providing that the
24 appropriation settles all present and future claims
25 relating to the death of Officer Guerrero; providing a
26 limitation on fees and costs; providing an effective
27 date.

28
29 WHEREAS, on May 1, 2008, Victor Guerrero, a veteran of the
30 United States Marine Corps and a decorated, 20-year veteran of
31 the City of Tampa Police Department, was riding his motorcycle
32 to visit his mother on his day off from work, and

33 WHEREAS, Officer Guerrero was traveling southbound on U.S.
34 41, about 1 mile north of S.R. 52, which is a straightaway with
35 no obstructions, and

36 WHEREAS, at the same time, Pasco County employee Daniel
37 Whipple was driving a Pasco County vehicle northbound on U.S.
38 41, and

39 WHEREAS, as Officer Guerrero approached Mr. Whipple, Mr.



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40 Whipple made a left hand turn directly into the path of Officer
41 Guerrero, and

42 WHEREAS, an accident reconstruction expert estimated that
43 Officer Guerrero was about 100 feet away when Mr. Whipple, who
44 claimed that he never saw Officer Guerrero, made the turn, and

45 WHEREAS, Officer Guerrero had no time to brake or swerve
46 and struck the side of Mr. Whipple's truck and was ejected from
47 the motorcycle, and

48 WHEREAS, Officer Guerrero was airlifted to St. Joseph's
49 Hospital in Tampa, where he was pronounced dead, and

50 WHEREAS, the Pasco County Driver Safety Review Board
51 investigated the accident and determined that Mr. Whipple was at
52 fault, citing carelessness, and

53 WHEREAS, after the accident, Officer Guerrero's widow, Lara
54 Guerrero, was unable to return to her job at Home Depot due to
55 severe emotional distress, and was prescribed anti-depressant
56 medication to assist her in dealing with her loss, and

57 WHEREAS, Officer Guerrero left behind three sons, Michael,
58 David, and Kevin, who were 21, 19, and 15, respectively, at the
59 time of the accident, and

60 WHEREAS, Lara Guerrero, as personal representative of the
61 Estate of Victor Guerrero, filed a law suit against Pasco County
62 in the Circuit Court of the Sixth Judicial Circuit in Pasco
63 County, and

64 WHEREAS, on February 10, 2012, the jury in the case
65 returned a verdict for \$7,845,127.30 in favor of the Estate of
66 Victor Guerrero, which was reduced 10 percent for comparative
67 negligence for Officer Guerrero's failure to wear a helmet,
68 leaving a total verdict of \$7,060,614.57, plus interest at the



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69 statutory rate of 4.75 percent per annum, and

70 WHEREAS, the amount awarded by the jury includes economic
71 damages of \$1,095,127.30, which were stipulated to by the
72 parties and include damages for future loss of income and
73 funeral expenses, damages representing loss of support for Lara
74 Guerrero, and damages representing loss of support for Kevin
75 Guerrero, and

76 WHEREAS, the amount awarded by the jury also includes \$1.5
77 million for Lara Guerrero for loss of her husband's
78 companionship and protection and for her pain and suffering, and
79 \$1.75 million for each of Officer Guerrero's sons for loss of
80 parental companionship, instruction, and guidance and for their
81 pain and suffering, and

82 WHEREAS, Pasco County has paid \$186,776.38 of the final
83 judgment, and

84 WHEREAS, on March 6, 2015, Pasco County and the Guerrero
85 family reached a settlement in this matter for the payment of
86 1.5 million in addition to the amount previously paid, NOW,
87 THEREFORE,

By Senator Diaz de la Portilla

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1 A bill to be entitled
 2 An act for the relief of the Estate of Victor Guerrero
 3 by Pasco County; providing for an appropriation to
 4 compensate the Estate of Victor Guerrero for Officer
 5 Guerrero's death, which was the result of negligence
 6 by an employee of Pasco County; providing that the
 7 appropriation settles all present and future claims
 8 relating to the death of Officer Guerrero; providing a
 9 limitation on fees and costs; providing an effective
 10 date.
 11
 12 WHEREAS, on May 1, 2008, Victor Guerrero, a veteran of the
 13 United States Marine Corps and a decorated, 20-year veteran of
 14 the City of Tampa Police Department, was riding his motorcycle
 15 to visit his mother on his day off from work, and
 16 WHEREAS, Officer Guerrero was traveling southbound on U.S.
 17 41, about 1 mile north of S.R. 52, which is a straightaway with
 18 no obstructions, and
 19 WHEREAS, at the same time, Pasco County employee Daniel
 20 Whipple was driving a Pasco County vehicle northbound on U.S.
 21 41, and
 22 WHEREAS, as Officer Guerrero approached Mr. Whipple, Mr.
 23 Whipple made a left hand turn directly into the path of Officer
 24 Guerrero, and
 25 WHEREAS, an accident reconstruction expert estimated that
 26 Officer Guerrero was about 100 feet away when Mr. Whipple, who
 27 claimed that he never saw Officer Guerrero, made the turn, and
 28 WHEREAS, Officer Guerrero had no time to brake or swerve
 29 and struck the side of Mr. Whipple's truck and was ejected from

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30 the motorcycle, and
 31 WHEREAS, Officer Guerrero was airlifted to St. Joseph's
 32 Hospital in Tampa, where he was pronounced dead, and
 33 WHEREAS, the Pasco County Driver Safety Review Board
 34 investigated the accident and determined that Mr. Whipple was at
 35 fault, citing carelessness, and
 36 WHEREAS, after the accident, Officer Guerrero's widow, Lara
 37 Guerrero, was unable to return to her job at Home Depot due to
 38 severe emotional distress, and was prescribed anti-depressant
 39 medication to assist her in dealing with her loss, and
 40 WHEREAS, Officer Guerrero left behind three sons, Michael,
 41 David, and Kevin, who were 21, 19, and 15, respectively, at the
 42 time of the accident, and
 43 WHEREAS, Lara Guerrero, as personal representative of the
 44 Estate of Victor Guerrero, filed a law suit against Pasco County
 45 in the Circuit Court of the Sixth Judicial Circuit in Pasco
 46 County, and
 47 WHEREAS, on February 10, 2012, the jury in the case
 48 returned a verdict for \$7,845,127.30 in favor of the Estate of
 49 Victor Guerrero, which was reduced 10 percent for comparative
 50 negligence for Officer Guerrero's failure to wear a helmet,
 51 leaving a total verdict of \$7,060,614.57, plus interest at the
 52 statutory rate of 4.75 percent per annum, and
 53 WHEREAS, the amount awarded by the jury includes economic
 54 damages of \$1,095,127.30, which were stipulated to by the
 55 parties and include damages for future loss of income and
 56 funeral expenses, damages representing loss of support for Lara
 57 Guerrero, and damages representing loss of support for Kevin
 58 Guerrero, and

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59 WHEREAS, the amount awarded by the jury also includes \$1.5
60 million for Lara Guerrero for loss of her husband's
61 companionship and protection and for her pain and suffering, and
62 \$1.75 million for each of Officer Guerrero's sons for loss of
63 parental companionship, instruction, and guidance and for their
64 pain and suffering, and

65 WHEREAS, Pasco County has paid \$186,776.38 of the final
66 judgment and there is a balance owed of \$6,873,838.19, NOW,
67 THEREFORE,

68
69 Be It Enacted by the Legislature of the State of Florida:

70
71 Section 1. The facts stated in the preamble to this act are
72 found and declared to be true.

73 Section 2. Pasco County is authorized and directed to
74 appropriate from funds of the county not otherwise appropriated
75 and to draw a warrant in the sum of \$6,873,838.19 plus interest
76 at the statutory rate of 4.75 percent per annum owed from the
77 date of the final judgment payable to Lara Guerrero, as personal
78 representative of the Estate of Victor Guerrero, as compensation
79 for injuries and damages sustained as the result of the death of
80 Victor Guerrero.

81 Section 3. The amount paid previously by Pasco County and
82 the amount awarded under this act are intended to provide the
83 sole compensation for all present and future claims arising out
84 of the factual situation described in the preamble to this act
85 which resulted in the death of Victor Guerrero. The total amount
86 paid for attorney fees, lobbying fees, costs, and other similar
87 expenses relating to this claim may not exceed 25 percent of the

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88 amount awarded under this act.

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

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