

**Tab 1** **SB 80** by **Richter**; (Similar to H 0017) Family Trust Companies

**Tab 2** **SB 458** by **Richter**; (Similar to H 0379) Transfers of Structured Settlement Payment Rights

**Tab 3** **SB 352** by **Bradley**; (Similar to CS/H 0225) Self-authentication of Documents

512352 A S RCS JU, Stargel Delete L.31 - 75: 11/17 06:34 PM

**Tab 4** **SB 396** by **Bradley**; (Identical to H 4029) Nonresident Plaintiffs in Civil Actions

**Tab 5** **SB 372** by **Lee**; (Similar to CS/H 0183) Administrative Procedures

~~310222 A S WD JU, Brandes Before L.42: 11/16 02:53 PM~~  
~~138148 A S WD JU, Brandes Before L.42: 11/17 06:34 PM~~  
231816 A S RCS JU, Stargel Delete L.297 - 302: 11/17 06:34 PM

**Tab 6** **SB 494** by **Hukill**; Digital Assets

147100 A S RCS JU, Diaz de la Portilla Delete L.160 - 161: 11/17 06:34 PM

**Tab 7** **SB 540** by **Hukill**; (Identical to H 0393) Estates

454764 A S RCS JU, Bean Delete L.47 - 96: 11/17 06:34 PM

**Tab 8** **SB 7008** by **GO**; (Identical to H 0339) Housing Discrimination

**Tab 9** **SB 604** by **Diaz de la Portilla (CO-INTRODUCERS) Hutson**; (Similar to H 0439) Mental Health Services in the Criminal Justice System

542820 A S RCS JU, Diaz de la Portilla Delete L.86 - 558: 11/17 06:34 PM

**Tab 10** **SB 642** by **Diaz de la Portilla**; (Identical to H 0459) Drones

548218 D S RCS JU, Diaz de la Portilla Delete everything after 11/17 06:34 PM

**The Florida Senate**  
**COMMITTEE MEETING EXPANDED AGENDA**

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

**MEETING DATE:** Tuesday, November 17, 2015

**TIME:** 3:30—5:30 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	<b>SB 80</b> Richter (Similar H 17)	Family Trust Companies; Revising the purposes of the Family Trust Company Act; specifying the applicability of other chapters of the financial institutions codes to family trust companies; revising the requirements for investigations of license applicants by the Office of Financial Regulation; revising the authority of specified family trust companies while acting as fiduciaries to purchase certain bonds and securities, etc.  BI      10/06/2015 Favorable JU      11/17/2015 Favorable FP	Favorable Yeas 10 Nays 0
2	<b>SB 458</b> Richter (Similar H 379)	Transfers of Structured Settlement Payment Rights; Eliminating a required disclosure that must be made to the claimant or the claimant's legal representative in a structured settlement; authorizing the structured settlement obligor and annuity issuer to rely on the court order in redirecting future settlement payments to the transferee or assignee, etc.  JU      11/17/2015 Favorable BI RC	Favorable Yeas 10 Nays 0
3	<b>SB 352</b> Bradley (Similar CS/H 225)	Self-authentication of Documents; Allowing certified copies of official public documents to be filed electronically; providing a method for authenticating public documents other than by certified copies, etc.  JU      11/17/2015 Fav/CS GO RC	Fav/CS Yeas 10 Nays 0
4	<b>SB 396</b> Bradley (Identical H 4029)	Nonresident Plaintiffs in Civil Actions; Repealing specified provisions relating to requirements for a nonresident plaintiff in a civil action to post security for costs, etc.  JU      11/17/2015 Favorable RC	Favorable Yeas 10 Nays 0

**COMMITTEE MEETING EXPANDED AGENDA**

Judiciary

Tuesday, November 17, 2015, 3:30—5:30 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
5	<b>SB 372</b> Lee (Similar CS/H 183)	Administrative Procedures; Providing procedures for agencies to follow when initiating rulemaking after certain public hearings; providing for publication of notices of rule development and of rules filed for adoption; specifying legal authority to file a petition challenging an agency rule as an invalid exercise of delegated legislative authority, etc.  JU 11/17/2015 Fav/CS AGG AP	Fav/CS Yeas 10 Nays 0
6	<b>SB 494</b> Hukill	Digital Assets; Citing this act as the "Florida Fiduciary Access to Digital Assets Act"; authorizing a user to use an online tool to allow a custodian to disclose or to prohibit a custodian from disclosing digital assets under certain circumstances; providing procedures for the disclosure of digital assets; authorizing the court to grant a guardian the right to access a ward's digital assets under certain circumstances; imposing fiduciary duties, etc.  JU 11/17/2015 Fav/CS FP RC	Fav/CS Yeas 9 Nays 0
7	<b>SB 540</b> Hukill (Identical H 393)	Estates; Providing that the validity and the effect of a specified disposition of real property be determined by Florida law; authorizing a trustee to pay attorney fees and costs from the assets of the trust without specified approval or court authorization in certain circumstances; providing that specified qualified beneficiaries may be entitled to an order compelling the refund of a specified payment to the trust, etc.  JU 11/17/2015 Fav/CS BI RC	Fav/CS Yeas 9 Nays 0
8	<b>SB 7008</b> Governmental Oversight and Accountability (Identical H 339)	Housing Discrimination; Removing housing discrimination as a cause of action for certain relief and damages stemming from violations of the Florida Civil Rights Act of 1992; authorizing, rather than requiring, a civil action to commence within 2 years after an alleged discriminatory housing practice; authorizing an aggrieved person to commence a civil action regardless of whether a specified complaint has been filed and regardless of the status of any such complaint, etc.  JU 11/17/2015 Favorable AGG AP	Favorable Yeas 9 Nays 0

**COMMITTEE MEETING EXPANDED AGENDA**

Judiciary

Tuesday, November 17, 2015, 3:30—5:30 p.m.

---

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
9	<b>SB 604</b> Diaz de la Portilla (Similar H 439)	Mental Health Services in the Criminal Justice System; Expanding eligibility for military veterans and servicemembers court programs; authorizing the creation of treatment-based mental health court programs; creating the Forensic Hospital Diversion Pilot Program; expanding eligibility requirements for certain pretrial intervention programs; authorizing pretrial mental health court programs for certain juvenile offenders, etc.  JU 11/17/2015 Fav/CS AHS AP	Fav/CS Yeas 9 Nays 0
10	<b>SB 642</b> Diaz de la Portilla (Identical H 459)	Drones; Providing for liability for damage to person or property in this state for which operation of a drone was a substantial contributing factor, etc.  JU 11/17/2015 Fav/CS CM RC	Fav/CS Yeas 5 Nays 4

---

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 80

INTRODUCER: Senator Richter

SUBJECT: Family Trust Companies

DATE: November 16, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<b>Favorable</b>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	_____	_____	<u>FP</u>	_____

---

**I. Summary:**

SB 80 amends the Florida Family Trust Company Act codified in ch. 662, F.S. The act was created in 2014 to allow families to form and operate private or family trust companies that provide trust services similar to those that can be provided by an individual trustee or a financial institution. Family trust companies are owned exclusively by family members and may not provide fiduciary services to the public. These private, family trust companies are generally formed to manage the wealth of high net-worth families in lieu of traditional individual or institutional trustee arrangements for a variety of personal, investment, regulatory, and tax reasons.

Chapter 662, F.S., authorizes the creation of three types of family trust companies: licensed family trust companies, foreign family trust companies, and unlicensed family trust companies. This bill amends ch. 662, F.S., to:

- Require all family trust companies in operation on October 1, 2016, to either apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state by December 30, 2016;
- Increase application requirements such that a family trust company must acknowledge in its registration application that its trust operations comply with the statutory provisions for organizational documents and minimum capital account amounts;
- Require a foreign licensed family trust company that applies for registration to provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction;
- Require that amendments to certificates of formation or certificates of organization be submitted to the Office of Financial Regulation (OFR or office) at least 30 days before they are filed or effective;
- Increase the time period to 45 days from 30 days after the end of each calendar year for companies to timely file an annual renewal application;

- Create a mechanism for the automatic reinstatement of lapsed licenses and registrations by payment of appropriate fees and any fines imposed by the OFR;
- Provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months.
- Delete a provision that allows the office to accept an audit prepared by a certified public accountant in lieu of an examination conducted by the office.
- Remove the requirement that the office conduct examinations of registered family trust companies;
- Require that a court determine there has been a breach of fiduciary duty or trust before the OFR enters a cease and desist order;
- Require that the management of a licensed family trust company have at least three directors or managers and require that at least one of those directors or managers be a Florida resident;
- Limit who may serve as a designated relative for a family trust company by providing that the designated relatives in a licensed family trust company may not have a common ancestor within three generations instead of the current five generations; and
- Clarify that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies but that for unlicensed or foreign family trust companies the role of the OFR is limited to ensuring that services provided by unlicensed or foreign family trust companies are provided only to family members and not to the general public.

## II. Present Situation:

### The Family Trust Company

A family trust company provides trust services to a related group of people but is prohibited from providing services to the general public. This includes serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family. A family might wish to form a family trust company in order to keep family matters more private than they would be if turned over to an independent trustee, to gain liability protection, to establish its own trust fee structure, or to obtain tax advantages. Traditional trust companies require regulatory oversight, licensing of investment personnel, public disclosure and capitalization requirements considered by practitioners to be overbroad and intrusive for the family trust.

In 2014, the Legislature authorized the creation of family trust companies in Florida.<sup>1</sup> The legislation took effect on October 1, 2015.<sup>2</sup> At least 14 other states have statutes governing the organization and operation of family trust companies.

### Types of Family Trust Companies

Chapter 662, F.S., authorizes three types of family trust companies: family trust companies, licensed family trust companies, and foreign licensed family trust companies.<sup>3</sup>

---

<sup>1</sup> Chapter 2014-97, Laws of Fla.

<sup>2</sup> *Id.*

<sup>3</sup> Chapter 662, F.S., was created by ch. 2014-97, Laws of Fla.

A “family trust company” is a corporation or limited liability company (LLC) that is exclusively owned by one or more family members, is organized or qualified to do business in Florida, acts or proposes to act as a fiduciary to serve one or more family members, and does not serve as a fiduciary for a person, entity, trust, or estate that is not a family member, except that it may serve as a fiduciary for up to 35 individuals who are not family members if the individuals are current or former employees of the family trust company or one or more trusts, companies, or other entities that are family members.<sup>4</sup>

A “licensed family trust company” means a family trust company that operates in accordance with this chapter and has been issued a license that has not been revoked or suspended by the Office of Financial Regulation.<sup>5</sup>

A “foreign licensed family trust company” means a family trust company that is licensed by a state other than Florida, has its principal place of business in a jurisdiction in the United States other than Florida, is operated in accordance with family or private trust company laws of a jurisdiction other than Florida, and is subject to statutory or regulatory mandated supervision by the jurisdiction in which the principal place of business is located.<sup>6</sup>

### **Powers of a Family Trust Company**

Section 662.130, F.S., authorizes a family trust company and a licensed family trust company to:

- Act as a sole or co-personal representative, executor, or curator for probate estates being administered in a state or jurisdiction other than Florida.
- Act as an attorney-in-fact or agent under a power of attorney, other than a power of attorney governed by ch. 709, F.S.
- Act within or outside of Florida as sole fiduciary or co-fiduciary and possess, purchase, sell, invest, reinvest, safe-keep, or otherwise manage or administer the real or personal property of eligible individuals and members.
- Exercise the powers of a corporation or LLC incorporated or organized under Florida law, or qualified to transact business as a foreign corporation or LLC under Florida law, which are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted customs and usages, a power conferred by the Florida Family Trust Company Act.
- Delegate duties and powers, including investment functions under s. 518.112, F.S., in accordance with the powers granted to a trustee under ch. 736, F.S., or other applicable law, and retain agents, attorneys, accountants, investment advisers, or other individuals or entities to advise or assist the family trust company, licensed family trust company, or foreign licensed family trust company in the exercise of its powers and duties.
- Perform all acts necessary for exercising these powers.

---

<sup>4</sup> See s. 662.111(12), F.S.

<sup>5</sup> See s. 662.111(16), F.S.

<sup>6</sup> See s. 662.111(15), F.S.

### **Capital Requirements**

Section 662.124, F.S., provides minimum capital account requirements. A family trust company or a licensed family trust company that has one designated relative may not be organized with an owners' capital account of less than \$250,000.

### **Licensed Family Trust Companies**

Section 662.121, F.S., requires a company wishing to be licensed as a licensed family trust company to file an application with the OFR. When a company files an application for licensure as a licensed family trust company, s. 662.1215, F.S., requires the OFR to conduct an investigation to confirm that persons who will serve as directors or officers of the corporation or, if the applicant is an LLC, managers or members acting in a managerial capacity, have not:

- Been convicted of, or entered a plea of nolo contendere to, a crime involving fraud, misrepresentation, or moral turpitude;
- Been convicted of, or pled nolo contendere to, a violation of the financial institutions codes or similar state or federal laws;
- Been directors or executive officers of a financial institution licensed or chartered under the financial institutions codes or by the Federal Government or any other state, the District of Columbia, a territory of the United States, or a foreign country, whose license or charter was suspended or revoked within the 10 years preceding the date of the application;
- Had a professional license suspended or revoked within 10 years preceding the application; or
- Made a false statement of material fact on the application.

The OFR must also confirm that the name of the proposed company complies with naming requirements, that capital accounts of the proposed company conform to relevant law, that the fidelity bonds and errors and omissions insurance coverage required are issued and effective, and that the articles of incorporation or articles of organization conform to applicable law. If the OFR determines the application does not meet statutory criteria, it must issue a notice of intent to deny the application and offer the applicant an opportunity for an administrative hearing.<sup>7</sup>

### **Management of Family Trust Companies**

Section 662.125, F.S., provides that the exclusive authority to manage a licensed family trust company is vested in a board of directors, if a corporation, or in a board of directors or managers, if a limited liability company. A licensed family trust company must have at least three directors or managers and at least one director or manager of the company must be a resident of this state.

### **Renewal of Licensure or Registration**

Section 662.128, F.S., requires family trust companies, licensed family trust companies, and foreign licensed family trust companies to file renewal applications with the OFR within 30 days after the end of each calendar year.

---

<sup>7</sup> See s. 662.1215(4), F.S.



### **Examinations and Investigations by the OFR**

Section 662.141, F.S., provides that the office may conduct an examination or investigation of a family trust company, licensed family trust company, or foreign licensed family trust company at any time it deems necessary to determine whether a family trust company, licensed family trust company, or foreign licensed family trust company has violated or is about to violate any provision of ch. 662, F.S., any relevant administrative rules, or any applicable provision of the financial institution codes. Section 662.141(1), F.S., requires the office to conduct an examination of a licensed family trust company, family trust company, and foreign licensed family trust company at least once every 18 months. The office may accept an audit in lieu of conducting an entire examination in certain circumstances.<sup>8</sup>

There is concern among practitioners that the current regulatory scheme in ch. 662, F.S., does not allow licensed family trust companies to qualify for the “bank exemption” with the federal Securities and Exchange Commission because the existing state licensure and examination requirements may be insufficient.<sup>9</sup> If these companies do not qualify for the “bank exemption,” they will be required to register as investment advisers with the United States Securities and Exchange Commission.<sup>10</sup>

### **Cease and Desist Authority**

Section 662.143, F.S., gives the OFR the power to order a family trust company, licensed family trust company, or foreign licensed family trust company to cease and desist from engaging in specified activities or practices. If the OFR believes there could be a violation, it must give the entity notice of the violation and an opportunity for an administrative hearing.<sup>11</sup> One of the specific practices that the OFR can take action against is if it has reason to believe that a family trust company, licensed family trust company, or foreign licensed family trust company is engaging in or has engaged in an act of commission or omission or a practice that is a breach of trust or of fiduciary duty.

## **III. Effect of Proposed Changes:**

### **General Responsibility and Authority of the Office of Financial Regulation**

**Section 1** clarifies that the OFR is responsible for the regulation, supervision, and examinations of licensed family trust companies but that the office’s role is limited to ensuring that services provided by unlicensed or foreign family trust companies are provided to family members and not to the general public.

### **Changes to Regulation of Licensed Family Trust Companies**

**Section 5** amends s. 662.1215, F.S., to add one additional piece of information that the office must verify when investigating a licensed family trust company’s initial application. The office

<sup>8</sup> See s. 662.141(2), F.S.

<sup>9</sup> See Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act* (on file with the Senate Committee on Judiciary).

<sup>10</sup> *Id.*

<sup>11</sup> See s. 662.143(2), F.S.

must investigate and confirm that the company's management structure complies with the provisions of s. 662.125, F.S., which requires a family trust company or licensed family trust company to have at least three directors or managers and requires that at least one of those directors or managers be a Florida resident.

**Section 11** amends s. 662.141, F.S., to provide that the office must conduct an examination of a licensed family trust company every 36 months instead of the current 18 months. The bill amends existing law and no longer allows an audit by a certified public accountant to substitute for an examination conducted by the office. This change to require examinations instead of audits may constitute sufficient state regulatory oversight to ensure that family trust companies qualify for the bank exemption from regulation from the Securities and Exchange Commission.<sup>12</sup>

**Section 12** amends s. 662.142, F.S., to clarify that a licensed family trust company is entitled to an administrative hearing pursuant to ch. 120, F.S., to contest a license revocation.

### **Changes to Unlicensed Family Trust Companies**

**Section 6** provides that a family trust company application for registration must state that its operations will comply with s. 662.123(1), F.S., relating to requirements in organizational documents, and s. 662.124, F.S., relating to minimum capital account requirements.

**Section 11** removes the requirement that the office conduct examinations of registered family trust companies. However, the OFR may conduct examinations of those entities at any time it deems necessary to verify compliance with s. 662.131, F.S., prohibited actions, or s. 662.134, F.S., unlawful advertising.

### **Other Provisions of the Bill**

**Section 2** makes a technical change to the definition of "officer."

**Section 3** provides that the financial institutions codes do not apply to family trust companies, licensed family trust companies, or foreign family trust companies unless specifically made applicable by ch. 662, F.S., in order to make ch. 662, F.S., a stand-alone statute for family trust companies. It further provides that this does not limit the OFR's power to investigate any entity to determine compliance with ch. 662, F.S., or applicable provisions of the financial institutions codes.

**Section 4** provides that the designated relatives in a licensed family trust company may not have a common ancestor within three generations instead of the current five generations.<sup>13</sup> The purpose in reducing the scope of the definition from five to three generations is to aid families in identifying relatives.<sup>14</sup> Most families are able to identify relatives over a three generation span, but it is more difficult to trace family members over a span of five generations.

---

<sup>12</sup> See Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 9.

<sup>13</sup> "Designated relative" means a common ancestor of a family, who may be a living or deceased person, and who is so designated in the application for a license.

<sup>14</sup> Email from Stephen Vogelsang, Esq., Member of the Real Property, Probate, and Trust Law Section of The Florida Bar, (Nov. 10, 2015) (on file with the Senate Committee on Judiciary).

**Section 6** requires that an application for registration by a foreign licensed family trust company provide proof that the company is in compliance with the family trust company laws and regulations of its principal jurisdiction.

**Section 7** requires a foreign licensed family trust company to be in compliance with the laws of its principal jurisdiction in order to operate in Florida. The bill requires all family trust companies in operation on October 1, 2016, to either apply for licensure as a licensed family trust company, register as a family trust company, register as a foreign licensed family trust company, or cease doing business in this state. The application or registration must be filed by December 30, 2016. This language, in substantially similar form, currently appears in existing s. 662.151, F.S. Section 17 of the bill removes the language from existing s. 662.151, F.S., and it is reinserted here, as part of s. 662.1225, F.S.

**Section 8** requires amendments to certificates of formation or certificates of organization of a family trust company to be submitted to the OFR at least 30 days before they are filed or effective. It removes the requirement that proposed amendments to bylaws or articles of organization be submitted to the OFR.

**Section 9** allows family trust companies, licensed family trust companies, and foreign licensed family trust companies to file annual renewal applications within 45 days of the end of each calendar year. Current law allows 30 days. This bill also requires the application for the renewal of a family trust company's registration to certify compliance with capital requirements and statutes relating to organizational documents.

**Section 10** removes references to the term "affiliate" and replaces it with "parent" or "subsidiary company" in s. 662.132, F.S., to prevent confusion with the term "family affiliate" defined in s. 662.111, F.S. It also provides that a family trust company or licensed family trust company may purchase bonds and securities directly from broker-dealers when acting as a fiduciary.

**Section 11** grants rulemaking authority to the Financial Services Commission to establish the requirements necessary to demonstrate conformity with ch. 662, F.S.

**Section 13** allows the OFR to serve a complaint against a family trust company, licensed family trust company, or foreign licensed family trust company if a court has determined that there has been a breach of trust or fiduciary duty.

**Section 14** provides a mechanism to reinstate the license or registration of a family trust company, licensed family trust company, or foreign licensed family trust company that was terminated for failure to timely file an annual renewal. The bill provides that a family trust company may have its license or registration automatically reinstated by submitting the renewal application, renewal fee, a \$500 late fee, and any fine imposed by the OFR. Fees and fines collected pursuant to this section will be deposited into the Financial Institutions' Regulatory Trust Fund to administer the chapter.

**Sections 15 and 16** of this bill make technical changes.

**Section 17** repeals s. 662.151(3), F.S., relating to licensure and registration. The bill transfers this provision of law to s. 662.1225, F.S.

**Section 18** provides that the bill takes effect upon becoming law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill's proponents expect that, as a result of this legislation, high net worth families who are not located in Florida may select Florida as the jurisdiction to establish family trust companies.<sup>15</sup>

C. Government Sector Impact:

The OFR anticipates that the revenues from the late fees created by the bill will be \$1,500 to \$3,000 annually after the first year.<sup>16</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

<sup>15</sup> See Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper on Proposed Changes to the Florida Family Trust Company Act* (on file with the Committee on Judiciary).

<sup>16</sup> See SB 80 2016 Legislative Bill Analysis, Office of Financial Regulation.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 662.102, 662.111, 662.120, 662.1215, 662.122, 662.1225, 662.123, 662.128, 662.132, 662.141, 662.142, 662.143, 662.144, 662.145, 662.150, and 662.151.

This bill creates section 662.113 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 Richter

23-00058-16

201680\_\_

1 A bill to be entitled  
 2 An act relating to family trust companies; amending s.  
 3 662.102, F.S.; revising the purposes of the Family  
 4 Trust Company Act; providing legislative findings;  
 5 amending s. 662.111, F.S.; redefining the term  
 6 "officer"; creating s. 662.113, F.S.; specifying the  
 7 applicability of other chapters of the financial  
 8 institutions codes to family trust companies;  
 9 providing that the section does not limit the  
 10 authority of the Office of Financial Regulation to  
 11 investigate any entity to ensure that it is not in  
 12 violation of ch. 662, F.S., or applicable provisions  
 13 of the financial institutions codes; amending s.  
 14 662.120, F.S.; revising the ancestry requirements for  
 15 designated relatives of a licensed family trust  
 16 company; amending s. 662.1215, F.S.; revising the  
 17 requirements for investigations of license applicants  
 18 by the Office of Financial Regulation; amending s.  
 19 662.122, F.S.; revising the requirements for  
 20 registration of a family trust company and a foreign  
 21 licensed family trust company; amending s. 662.1225,  
 22 F.S.; requiring a foreign licensed family trust  
 23 company to be in compliance with the family trust laws  
 24 and regulations in its principal jurisdiction;  
 25 specifying the date upon which family trust companies  
 26 must be registered or licensed or, if not registered  
 27 or licensed, cease doing business in this state;  
 28 amending s. 662.123, F.S.; revising the types of  
 29 amendments to organizational documents which must have

Page 1 of 21

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

23-00058-16

201680\_\_

30 prior approval by the office; amending s. 662.128,  
 31 F.S.; extending the deadline for the filing of, and  
 32 revising the requirements for, specified license and  
 33 registration renewal applications; amending s.  
 34 662.132, F.S.; revising the authority of specified  
 35 family trust companies while acting as fiduciaries to  
 36 purchase certain bonds and securities; revising the  
 37 prohibition against the purchase of certain bonds or  
 38 securities by specified family trust companies;  
 39 amending s. 662.141, F.S.; revising the purposes for  
 40 which the office may examine or investigate a family  
 41 trust company that is not licensed and a foreign  
 42 licensed family trust company; providing that the  
 43 office may rely upon specified documentation that  
 44 identifies the qualifications of beneficiaries as  
 45 permissible recipients of family trust company  
 46 services; deleting the requirement that the office  
 47 examine a family trust company that is not licensed  
 48 and a foreign licensed family trust company; deleting  
 49 a provision that authorizes the office to accept an  
 50 audit by a certified public accountant in lieu of an  
 51 examination by the office; authorizing the Financial  
 52 Services Commission to adopt rules establishing  
 53 specified requirements for family trust companies;  
 54 amending s. 662.142, F.S.; revising the circumstances  
 55 under which the office may enter an order revoking the  
 56 license of a licensed family trust company; deleting a  
 57 provision that authorizes the office to immediately  
 58 revoke the license of a licensed family trust company

Page 2 of 21

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

23-00058-16

201680\_\_

59 under certain circumstances; amending s. 662.143,  
 60 F.S.; revising the acts that may result in the entry  
 61 of a cease and desist order against specified family  
 62 trust companies and affiliated parties; amending s.  
 63 662.144, F.S.; authorizing a family trust company to  
 64 have its terminated registration or revoked license  
 65 reinstated under certain circumstances; revising the  
 66 timeframe for a family trust company to wind up its  
 67 affairs under certain circumstances; requiring the  
 68 deposit of certain fees and fines in the Financial  
 69 Institutions' Regulatory Trust Fund; amending s.  
 70 662.145, F.S.; revising the office's authority to  
 71 suspend a family trust company-affiliated party who is  
 72 charged with a specified felony or to restrict or  
 73 prohibit the participation of such party in certain  
 74 financial institutions; amending s. 662.150, F.S.;  
 75 making a technical change; amending s. 662.151, F.S.;  
 76 conforming a provision to changes made by the act;  
 77 providing an effective date.

78  
 79 Be It Enacted by the Legislature of the State of Florida:

80  
 81 Section 1. Section 662.102, Florida Statutes, is amended to  
 82 read:

83 662.102 ~~Purposes; findings Purpose.~~ Purpose.—The ~~purposes purpose~~ of  
 84 the Family Trust Company Act ~~are is~~ are to establish requirements  
 85 for licensing family trust companies, to ~~regulate provide~~  
 86 ~~regulation of those~~ persons who provide fiduciary services to  
 87 family members of no more than two families and their related

Page 3 of 21

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

23-00058-16

201680\_\_

88 interests as a family trust company, and to establish the degree  
 89 of regulatory oversight required of the Office of Financial  
 90 Regulation over such companies. ~~The Unlike trust companies~~  
 91 ~~formed under chapter 658, there is no public interest to be~~  
 92 ~~served by this chapter is to ensure outside of ensuring~~ that  
 93 fiduciary activities performed by a family trust company are  
 94 restricted to family members and their related interests and as  
 95 otherwise provided ~~for~~ in this chapter. Therefore, the  
 96 Legislature finds that:

97 (1) A family trust company is ~~companies are not a financial~~  
 98 institution ~~institutions~~ within the meaning of the financial  
 99 institutions codes, ~~and~~ Licensure of such a company these  
 100 ~~companies~~ pursuant to chapters 658 and 660 is should not be  
 101 required as it would not promote the purposes of the codes  
 102 specified as set forth in s. 655.001.

103 (2) A family trust company may elect to be a licensed  
 104 family trust company under this chapter if the company desires  
 105 to be subject to the regulatory oversight of the office, as  
 106 provided in this chapter, notwithstanding that the company  
 107 restricts its services to family members.

108 (3) With respect to:

109 (a) A licensed ~~Consequently, the office of Financial~~  
 110 ~~Regulation is not responsible for regulating~~ family trust  
 111 company, the office is responsible for regulating, supervising,  
 112 and examining the company as provided under this chapter.

113 (b) A family trust company that does not elect to be  
 114 licensed and a foreign licensed family trust company, companies  
 115 ~~to ensure their safety and soundness, and the responsibility of~~  
 116 the office's role ~~office~~ is limited to ensuring that fiduciary

Page 4 of 21

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

23-00058-16

201680\_\_

117 services provided by the company ~~such companies~~ are restricted  
 118 to family members and authorized related interests and not to  
 119 the general public. The office is not responsible for examining  
 120 a family trust company or a foreign licensed family trust  
 121 company regarding the safety or soundness of its operations.

122 Section 2. Subsection (19) of section 662.111, Florida  
 123 Statutes, is amended to read:

124 662.111 Definitions.—As used in this chapter, the term:

125 (19) "Officer" of a family trust company means an  
 126 individual, regardless of whether the individual has an official  
 127 title or receives a salary or other compensation, who may  
 128 participate in the major policymaking functions of a family  
 129 trust company, other than as a director. The term does not  
 130 include an individual who may have an official title and  
 131 exercise discretion in the performance of duties and functions,  
 132 but who does not participate in determining the major policies  
 133 of the family trust company and whose decisions are limited by  
 134 policy standards established by other officers, regardless of  
 135 whether the policy standards have been adopted by the board of  
 136 directors. The chair of the board of directors, the president,  
 137 the chief officer, the chief financial officer, the senior trust  
 138 officer, and all executive vice presidents of a family trust  
 139 company, and all managers if organized as a limited liability  
 140 company, are presumed to be ~~executive~~ officers unless such  
 141 officer is excluded, by resolution of the board of directors or  
 142 members or by the bylaws or operating agreement of the family  
 143 trust company, other than in the capacity of a director, from  
 144 participating in major policymaking functions of the family  
 145 trust company, and such excluded officer does not actually

Page 5 of 21

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

23-00058-16

201680\_\_

146 participate therein.

147 Section 3. Section 662.113, Florida Statutes, is created to  
 148 read:

149 662.113 Applicability of other chapters of the financial  
 150 institutions codes.—If a family trust company, licensed family  
 151 trust company, or foreign licensed family trust company limits  
 152 its activities to the activities authorized under this chapter,  
 153 the provisions of other chapters of the financial institutions  
 154 codes do not apply to the trust company unless otherwise  
 155 expressly provided in this chapter. This section does not limit  
 156 the office's authority to investigate any entity to ensure that  
 157 it is not in violation of this chapter or applicable provisions  
 158 of the financial institutions codes.

159 Section 4. Subsection (2) of section 662.120, Florida  
 160 Statutes, is amended to read:

161 662.120 Maximum number of designated relatives.—

162 (2) A licensed family trust company may ~~not~~ have up to more  
 163 ~~than~~ two designated relatives, ~~and~~ The designated relatives may  
 164 not have a common ancestor within three ~~five~~ generations.

165 Section 5. Paragraph (e) is added to subsection (2) of  
 166 section 662.1215, Florida Statutes, to read:

167 662.1215 Investigation of license applicants.—

168 (2) Upon filing an application for a license to operate as  
 169 a licensed family trust company, the office shall conduct an  
 170 investigation to confirm:

171 (e) That the management structure of the proposed company  
 172 complies with s. 662.125.

173 Section 6. Paragraph (b) of subsection (1) and paragraphs  
 174 (a) and (c) of subsection (2) of section 662.122, Florida

Page 6 of 21

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



23-00058-16

201680\_\_

175 Statutes, are amended to read:

176 662.122 Registration of a family trust company or a foreign  
177 licensed family trust company.-

178 (1) A family trust company that is not applying under s.  
179 662.121 to become a licensed family trust company must register  
180 with the office before beginning operations in this state. The  
181 registration application must:

182 (b) State that the family trust company is a family trust  
183 company as defined under this chapter and that its operations  
184 will comply with ss. 662.1225, 662.123(1), 662.124, 662.125,  
185 662.127, 662.131, and 662.134.

186 (2) A foreign licensed family trust company must register  
187 with the office before beginning operations in this state.

188 (a) The registration application must state that its  
189 operations will comply with ss. 662.1225, 662.125, 662.127,  
190 662.131, and 662.134 and that it is currently in compliance with  
191 the family trust company laws and regulations of its principal  
192 jurisdiction.

193 (c) The registration must include a certified copy of a  
194 certificate of good standing, or an equivalent document,  
195 authenticated by the official having custody of records in the  
196 jurisdiction where the foreign licensed family trust company is  
197 organized, along with satisfactory proof, as determined by the  
198 office, that the company is organized in a manner similar to a  
199 family trust company as defined under this chapter and is in  
200 compliance with the family trust company laws and regulations of  
201 its principal jurisdiction.

202 Section 7. Subsection (2) of section 662.1225, Florida  
203 Statutes, is amended, and subsection (3) is added to that

Page 7 of 21

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

23-00058-16

201680\_\_

204 section, to read:

205 662.1225 Requirements for a family trust company, licensed  
206 family trust company, or foreign licensed family trust company.-

207 (2) In order to operate in this state, a foreign licensed  
208 family trust company must be in good standing in its principal  
209 jurisdiction, must be in compliance with the family trust  
210 company laws and regulations of its principal jurisdiction, and  
211 must maintain:

212 (a) An office physically located in this state where  
213 original or true copies of all records and accounts of the  
214 foreign licensed family trust company pertaining to its  
215 operations in this state may be accessed and made readily  
216 available for examination by the office in accordance with this  
217 chapter.

218 (b) A registered agent who has an office in this state at  
219 the street address of the registered agent.

220 (c) All applicable state and local business licenses,  
221 charters, and permits.

222 (d) A deposit account with a state-chartered or national  
223 financial institution that has a principal or branch office in  
224 this state.

225 (3) A company in operation as of October 1, 2016, which  
226 meets the definition of a family trust company, must, on or  
227 before December 30, 2016, apply for licensure as a licensed  
228 family trust company, register as a family trust company or  
229 foreign licensed family trust company, or cease doing business  
230 in this state.

231 Section 8. Subsection (2) of section 662.123, Florida  
232 Statutes, is amended to read:

Page 8 of 21

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

23-00058-16

201680\_\_

233 662.123 Organizational documents; use of term "family  
234 trust" in name.—

235 (2) A proposed amendment to the articles of incorporation,  
236 articles of organization, certificate of formation, or  
237 certificate of organization, bylaws, or articles of organization  
238 of a ~~limited liability company~~, family trust company, or  
239 licensed family trust company must be submitted to the office  
240 for review at least 30 days before it is filed or effective. An  
241 amendment is not considered filed or effective if the office  
242 issues a notice of disapproval with respect to the proposed  
243 amendment.

244 Section 9. Subsections (1) through (4) of section 662.128,  
245 Florida Statutes, are amended to read:

246 662.128 Annual renewal.—

247 (1) Within 45 ~~30~~ days after the end of each calendar year,  
248 a family trust company companies, licensed family trust company  
249 companies, or ~~and~~ foreign licensed family trust company  
250 companies shall file its ~~their~~ annual renewal application with  
251 the office.

252 (2) The license renewal application filed by a licensed  
253 family trust company must include a verified statement by an  
254 authorized representative of the trust company that:

255 (a) The licensed family trust company operated in full  
256 compliance with this chapter, chapter 896, or similar state or  
257 federal law, or any related rule or regulation. The application  
258 must include proof acceptable to the office that the company is  
259 a family trust company as defined under this chapter.

260 (b) Describes any material changes to its operations,  
261 principal place of business, directors, officers, managers,

Page 9 of 21

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

23-00058-16

201680\_\_

262 members acting in a managerial capacity, and designated  
263 relatives since the end of the preceding calendar year.

264 (3) The registration renewal application filed by a family  
265 trust company must include:

266 (a) A verified statement by an authorized representative  
267 officer of the trust company that it is a family trust company  
268 as defined under this chapter and that its operations are in  
269 compliance with ss. 662.1225, 662.123(1), 662.124, 662.125,  
270 662.127, 662.131, and 662.134, ~~+~~ chapter 896, ~~+~~ or similar state  
271 or federal law, or any related rule or regulation.

272 (b) ~~and include~~ The name of the company's ~~its~~ designated  
273 relative or relatives, if applicable, and the street address for  
274 its principal place of business.

275 (4) The registration renewal application filed by a foreign  
276 licensed family trust company must include a verified statement  
277 by an authorized representative of the trust company that its  
278 operations are in compliance with ss. 662.1225, 662.125,  
279 662.131, and 662.134 and in compliance with the family trust  
280 company laws and regulations of its principal jurisdiction. It  
281 must also provide:

282 (a) The current telephone number and street address of the  
283 physical location of its principal place of business in its  
284 principal jurisdiction.

285 (b) The current telephone number and street address of the  
286 physical location in this state of its principal place of  
287 operations where its books and records pertaining to its  
288 operations in this state are maintained.

289 (c) The current telephone number and address of the  
290 physical location of any other offices located in this state.

Page 10 of 21

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

23-00058-16

201680\_\_

291 (d) The name and current street address in this state of  
292 its registered agent.

293 (e) Documentation satisfactory to the office that the  
294 foreign licensed family trust company is in compliance with the  
295 family trust company laws and regulations of its principal  
296 jurisdiction.

297 Section 10. Subsections (4) and (7) of section 662.132,  
298 Florida Statutes, are amended to read:

299 662.132 Investments.—

300 (4) Notwithstanding any other law, a family trust company  
301 or licensed family trust company may, while acting as a  
302 fiduciary, purchase directly from underwriters or broker-dealers  
303 ~~distributors~~ or in the secondary market:

304 (a) Bonds or other securities underwritten or brokered  
305 ~~distributed~~ by:

306 1. The family trust company or licensed family trust  
307 company;

308 2. A family affiliate; or

309 3. A syndicate, including the family trust company,  
310 licensed family trust company, or family affiliate.

311 (b) Securities of an investment company, including a mutual  
312 fund, closed-end fund, or unit investment trust, as defined  
313 under the federal Investment Company Act of 1940, for which the  
314 family trust company or licensed family trust company acts as an  
315 advisor, custodian, distributor, manager, registrar, shareholder  
316 servicing agent, sponsor, or transfer agent.

317 (7) Notwithstanding subsections (1)-(6), a family trust  
318 company or licensed family trust company may not, while acting  
319 as a fiduciary, purchase a bond or security issued by the

Page 11 of 21

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

23-00058-16

201680\_\_

320 company or its parent, or a subsidiary company ~~an affiliate~~  
321 thereof or its parent, unless:

322 (a) The family trust company or licensed family trust  
323 company is expressly authorized to do so by:

324 1. The terms of the instrument creating the trust;

325 2. A court order;

326 3. The written consent of the settlor of the trust for  
327 which the family trust company or licensed family trust company  
328 is serving as trustee; or

329 4. The written consent of every adult qualified beneficiary  
330 of the trust who, at the time of such purchase, is entitled to  
331 receive income under the trust or who would be entitled to  
332 receive a distribution of principal if the trust were  
333 terminated; and

334 (b) The purchase of the security is at a fair price and  
335 complies with:

336 1. The prudent investor rule in s. 518.11, or other prudent  
337 investor or similar rule under other applicable law, unless ~~such~~  
338 compliance is waived in accordance with s. 518.11 or other  
339 applicable law.

340 2. The terms of the instrument, judgment, decree, or order  
341 establishing the fiduciary relationship.

342 Section 11. Section 662.141, Florida Statutes, is amended  
343 to read:

344 662.141 Examination, investigations, and fees.—The office  
345 may conduct an examination or investigation of a ~~family trust~~  
346 ~~company~~, licensed family trust company, ~~or foreign licensed~~  
347 ~~family trust company~~ at any time it deems necessary to determine  
348 whether the a family trust company, licensed family trust

Page 12 of 21

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

23-00058-16

201680\_\_

349 company, ~~foreign licensed family trust company,~~ or licensed  
 350 family trust company-affiliated party thereof ~~person~~ has  
 351 violated or is about to violate any provision of this chapter,  
 352 ~~or rules adopted by the commission pursuant to this chapter, or~~  
 353 any applicable provision of the financial institutions  
 354 ~~institution~~ codes, or any rule ~~rules~~ adopted by the commission  
 355 pursuant to this chapter or the such codes. The office may  
 356 conduct an examination or investigation of a family trust  
 357 company or foreign licensed family trust company at any time it  
 358 deems necessary to determine whether the family trust company or  
 359 foreign licensed family trust company has engaged in any act  
 360 prohibited under s. 662.131 or s. 662.134 and, if a family trust  
 361 company or a foreign licensed family trust company has engaged  
 362 in such act, to determine whether any applicable provision of  
 363 the financial institutions codes has been violated.

364 (1) The office may rely upon a certificate of trust, trust  
 365 summary, or written statement from the trust company which  
 366 identifies the qualified beneficiaries of any trust or estate  
 367 for which a family trust company, licensed family trust company,  
 368 or foreign licensed family trust company serves as a fiduciary  
 369 and the qualifications of such beneficiaries as permissible  
 370 recipients of company services.

371 (2) The office shall conduct an examination of a licensed  
 372 family trust company, ~~family trust company, or foreign licensed~~  
 373 family trust company at least once every 36 ~~18~~ months.

374 ~~(2) In lieu of an examination by the office, the office may~~  
 375 ~~accept an audit of a family trust company, licensed family trust~~  
 376 ~~company, or foreign licensed family trust company by a certified~~  
 377 ~~public accountant licensed to practice in this state who is~~

Page 13 of 21

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

23-00058-16

201680\_\_

378 ~~independent of the company, or other person or entity acceptable~~  
 379 ~~to the office. If the office accepts an audit pursuant to this~~  
 380 ~~subsection, the office shall conduct the next required~~  
 381 ~~examination.~~

382 ~~(3)~~ The office shall examine the books and records of a  
 383 ~~family trust company or~~ licensed family trust company as  
 384 necessary to determine whether it is a ~~family trust company or~~  
 385 licensed family trust company as defined in this chapter, and is  
 386 operating in compliance with this chapter ss. ~~662.1225, 662.125,~~  
 387 662.126, 662.131, and 662.134, as applicable. ~~The office may~~  
 388 ~~rely upon a certificate of trust, trust summary, or written~~  
 389 ~~statement from the trust company identifying the qualified~~  
 390 ~~beneficiaries of any trust or estate for which the family trust~~  
 391 ~~company serves as a fiduciary and the qualification of the~~  
 392 ~~qualified beneficiaries as permissible recipients of company~~  
 393 ~~services. The commission may establish by rule the records to be~~  
 394 ~~maintained or requirements necessary to demonstrate conformity~~  
 395 ~~with this chapter as a family trust company or licensed family~~  
 396 ~~trust company.~~

397 (3)(4) The office shall examine the books and records of a  
 398 foreign licensed family trust company as necessary to determine  
 399 if it is a foreign licensed trust company as defined in this  
 400 chapter and is in compliance with ss. 662.1225, 662.125,  
 401 662.130(2), 662.131, and 662.134. In connection with an  
 402 examination of the books and records of the company, the office  
 403 may rely upon the most recent examination report or review or  
 404 certification letters or similar documentation issued by the  
 405 regulatory agency to which the foreign licensed family trust  
 406 company is subject to supervision. ~~The commission may establish~~

Page 14 of 21

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

23-00058-16

201680\_\_

407 ~~by rule the records to be maintained or requirements necessary~~  
 408 ~~to demonstrate conformity with this chapter as a foreign~~  
 409 ~~licensed family trust company.~~ The office's examination of the  
 410 books and records of a foreign licensed family trust company is,  
 411 to the extent practicable, limited to books and records of the  
 412 operations in this state.

413 ~~(4)(5)~~ For each examination of the books and records of a  
 414 family trust company, licensed family trust company, or foreign  
 415 licensed family trust company as authorized under this chapter,  
 416 the trust company shall pay a fee for the costs of the  
 417 examination by the office. As used in this section, the term  
 418 "costs" means the salary and travel expenses of field staff  
 419 which are directly attributable to the examination of the trust  
 420 company and the travel expenses of any supervisory ~~and~~ ~~or~~  
 421 support staff required as a result of examination findings. The  
 422 mailing of payment for costs incurred must be postmarked within  
 423 30 days after the receipt of a notice stating that ~~the such~~  
 424 costs are due. The office may levy a late payment of up to \$100  
 425 per day or part thereof that a payment is overdue, unless waived  
 426 for good cause. However, if the late payment of costs is  
 427 intentional, the office may levy an administrative fine of up to  
 428 \$1,000 per day for each day the payment is overdue.

429 ~~(5)(6)~~ All fees collected under this section must be  
 430 deposited into the Financial Institutions' Regulatory Trust Fund  
 431 pursuant to s. 655.049 for the purpose of administering this  
 432 chapter.

433 (6) The commission may establish by rule the records to be  
 434 maintained or requirements necessary to demonstrate conformity  
 435 with this chapter as a family trust company, licensed family

23-00058-16

201680\_\_

436 trust company, or foreign licensed family trust company.

437 Section 12. Section 662.142, Florida Statutes, is amended  
 438 to read:

439 662.142 Revocation of license.—

440 (1) Any of the following acts constitute ~~or conduct~~  
 441 ~~constitutes~~ grounds for the revocation by the office of the  
 442 license of a licensed family trust company:

443 (a) The company is not a family trust company as defined in  
 444 this chapter. ~~+~~

445 (b) A violation of s. 662.1225, s. 662.123(1)(a), s.  
 446 662.125(2), s. 662.126, s. 662.127, s. 662.128, s. 662.130, s.  
 447 662.131, s. 662.134, or s. 662.144. ~~+~~

448 (c) A violation of chapter 896, relating to financial  
 449 transactions offenses, or a any similar state or federal law or  
 450 ~~any~~ related rule or regulation. ~~+~~

451 (d) A violation of any rule of the commission. ~~+~~

452 (e) A violation of any order of the office. ~~+~~

453 (f) A breach of any written agreement with the office. ~~+~~

454 (g) A prohibited act or practice under s. 662.131. ~~+~~

455 (h) A failure to provide information or documents to the  
 456 office upon written request. ~~+~~ ~~or~~

457 (i) An act of commission or omission that is judicially  
 458 determined to be a breach of trust or ~~of~~ fiduciary duty ~~pursuant~~  
 459 ~~to a court of competent jurisdiction.~~

460 (2) If the office finds ~~Upon a finding~~ that a licensed  
 461 family trust company has committed any of the acts specified ~~set~~  
 462 ~~forth in subsection (1) paragraphs (1)(a)–(h),~~ the office may  
 463 enter an order suspending the company's license and provide  
 464 notice of its intention to revoke the license and of the

23-00058-16

201680\_\_

465 opportunity for a hearing pursuant to ss. 120.569 and 120.57.

466 (3) If a hearing is not timely requested pursuant to ss.  
 467 120.569 and 120.57 or if a hearing is held and it has been  
 468 determined that the licensed family trust company has committed  
 469 any of the acts specified in subsection (1) there has been a  
 470 commission or omission under paragraph (1)(i), the office may  
 471 immediately enter an order revoking the company's license. A The  
 472 licensed family trust company has ~~shall have~~ 90 days to wind up  
 473 its affairs after license revocation. If after 90 days the  
 474 company is still in operation, the office may seek an order from  
 475 the circuit court for the annulment or dissolution of the  
 476 company.

477 Section 13. Subsection (1) of section 662.143, Florida  
 478 Statutes, is amended to read:

479 662.143 Cease and desist authority.—

480 (1) The office may issue and serve upon a family trust  
 481 company, licensed family trust company, ~~or~~ foreign licensed  
 482 family trust company, or ~~upon a~~ family trust company-affiliated  
 483 party, a complaint stating charges if the office has reason to  
 484 believe that such company, family trust company-affiliated  
 485 party, or individual named therein is engaging in or has engaged  
 486 in any of the following acts ~~conduct that~~:

487 (a) ~~Indicates that~~ The company is not a family trust  
 488 company or foreign licensed family trust company as defined in  
 489 this chapter.†

490 (b) ~~Is~~ A violation of s. 662.1225, s. 662.123(1)(a), s.  
 491 662.125(2), s. 662.126, s. 662.127, s. 662.128, s. 662.130, or  
 492 s. 662.134.†

493 (c) ~~Is~~ A violation of any rule of the commission.†

23-00058-16

201680\_\_

494 (d) ~~Is~~ A violation of any order of the office.†

495 (e) ~~Is~~ A breach of any written agreement with the office.†

496 (f) ~~Is~~ A prohibited act or practice pursuant to s.

497 662.131.†

498 (g) ~~Is~~ A willful failure to provide information or  
 499 documents to the office upon written request.†

500 (h) ~~Is~~ An act of commission or omission that is judicially  
 501 determined by ~~or~~ a court of competent jurisdiction ~~practice that~~  
 502 ~~the office has reason to be believe is~~ a breach of trust or ~~of~~  
 503 fiduciary duty.† ~~or~~

504 (i) ~~Is~~ A violation of chapter 896 or similar state or  
 505 federal law or any related rule or regulation.

506 Section 14. Section 662.144, Florida Statutes, is amended  
 507 to read:

508 662.144 Failure to submit required report; fines.—If a  
 509 family trust company, licensed family trust company, or foreign  
 510 licensed family trust company fails to submit within the  
 511 prescribed period its annual renewal or any other report  
 512 required by this chapter or any rule, the office may impose a  
 513 fine of up to \$100 for each day that the annual renewal or  
 514 report is overdue. Failure to provide the annual renewal within  
 515 60 days after the end of the calendar year shall automatically  
 516 result in termination of the registration of a family trust  
 517 company or foreign licensed family trust company or revocation  
 518 of the license of a licensed family trust company. A family  
 519 trust company may have its registration or license automatically  
 520 reinstated by submitting to the office, on or before August 31  
 521 of the calendar year in which the renewal application is due,  
 522 the company's annual renewal application and fee required under

23-00058-16

201680\_\_

523 s. 662.128, a \$500 late fee, and the amount of any fine imposed  
 524 by the office under this section. A family ~~The~~ trust company  
 525 that fails to renew or reinstate its registration or license  
 526 must ~~shall thereafter have 90 days to~~ wind up its affairs on or  
 527 before November 30 of the calendar year in which such failure  
 528 occurs. Fees and fines collected under this section shall be  
 529 deposited into the Financial Institutions' Regulatory Trust Fund  
 530 pursuant to s. 655.049 for the purpose of administering this  
 531 chapter.

532 Section 15. Paragraph (a) of subsection (6) of section  
 533 662.145, Florida Statutes, is amended to read:

534 662.145 Grounds for removal.—

535 (6) The chief executive officer, or the person holding the  
 536 equivalent office, of a family trust company or licensed family  
 537 trust company shall promptly notify the office if he or she has  
 538 actual knowledge that a family trust company-affiliated party is  
 539 charged with a felony in a state or federal court.

540 (a) If a family trust company-affiliated party is charged  
 541 with a felony in a state or federal court, or is charged with an  
 542 offense in a court ~~the courts~~ of a foreign country with which  
 543 the United States maintains diplomatic relations which involves  
 544 a violation of law relating to fraud, currency transaction  
 545 reporting, money laundering, theft, or moral turpitude and the  
 546 charge is equivalent to a felony charge under state or federal  
 547 law, the office may enter an emergency order suspending the  
 548 family trust company-affiliated party or restricting or  
 549 prohibiting participation by such ~~company-affiliated~~ party in  
 550 the affairs of that particular family trust company or licensed  
 551 family trust company or any state financial institution,

Page 19 of 21

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

23-00058-16

201680\_\_

552 subsidiary, or service corporation, upon service of the order  
 553 upon the company and ~~the~~ family trust company-affiliated party  
 554 ~~is~~ charged.

555 Section 16. Paragraph (b) of subsection (1) of section  
 556 662.150, Florida Statutes, is amended to read:

557 662.150 Domestication of a foreign family trust company.—

558 (1) A foreign family trust company lawfully organized and  
 559 currently in good standing with the state regulatory agency in  
 560 the jurisdiction where it is organized may become domesticated  
 561 in this state by:

562 (b) Filing an application for a license to begin operations  
 563 as a licensed family trust company in accordance with s.

564 662.121, which must first be approved by the office, or by  
 565 filing the prescribed form with the office to register as a  
 566 family trust company to begin operations in accordance with s.  
 567 662.122.

568 Section 17. Subsection (3) of section 662.151, Florida  
 569 Statutes, is amended to read:

570 662.151 Registration of a foreign licensed family trust  
 571 company to operate in this state.—A foreign licensed family  
 572 trust company lawfully organized and currently in good standing  
 573 with the state regulatory agency in the jurisdiction under the  
 574 law of which it is organized may qualify to begin operations in  
 575 this state by:

576 ~~(3) A company in operation as of the effective date of this~~  
 577 ~~act that meets the definition of a family trust company shall~~  
 578 ~~have 90 days from the effective date of this act to apply for~~  
 579 ~~licensure as a licensed family trust company, register as a~~  
 580 ~~family trust company or foreign licensed family trust company,~~

Page 20 of 21

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

23-00058-16

201680\_\_

581 ~~or cease doing business in this state.~~

582 Section 18. This act shall take effect upon becoming law.





The Florida Senate

## Committee Agenda Request

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

**Subject:** Committee Agenda Request

**Date:** October 7, 2015

---

I respectfully request that **Senate Bill #80**, relating to Family Trusts, be placed on the:

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

A handwritten signature in cursive script, appearing to read "Garrett Richter".

---

Senator Garrett Richter  
Florida Senate, District 23

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 80  
Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name Pete Dunbar

Job Title \_\_\_\_\_

Address 215 S. Monroe #815  
Street

Phone 999-4100

Tallahassee FL 32301  
City State Zip

Email pdunbar@deanmeach.com

Speaking:  For  Against  Information

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

Representing Real Property, Probate & Trust Law Section - Fla Bar

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15

Meeting Date

SB 0080

Bill Number (if applicable)

Topic Family Trust Companies

Amendment Barcode (if applicable)

Name Kenneth Pratt

Job Title Senior VP of Governmental Affairs

Address 1001 Thomasville Rd, Ste 201

Phone 850-224-2265

Street

Tallahassee

FL

32303

Email kpratt@floridabankers.com

City

State

Zip

Speaking:  For  Against  Information

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

Representing Florida Bankers Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE

APPEARANCE RECORD

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

11/17/2015

Meeting Date

SB 0080

Bill Number (if applicable)

Topic SB 0080 Family Trust Companies - Waive in Support

Amendment Barcode (if applicable)

Name Ms. Jamie Mongiovi (Mon-Gi-oh-vi)

Job Title Director of Communications & Government Affairs

Address Office of Financial Regulation, 101 East Gaines Street

Phone 850-410-9601

Street

Tallahassee

Florida

32399

Email jamie.mongiovi@flofr.com

City

State

Zip

Speaking:  For  Against  Information

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

Representing Florida Office of Financial Regulation

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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



# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**  
Ethics and Elections, *Chair*  
Banking and Insurance, *Vice Chair*  
Appropriations  
Appropriations Subcommittee on Health  
and Human Services  
Commerce and Tourism  
Regulated Industries  
Rules

## SENATOR GARRETT RICHTER

*President Pro Tempore*  
23rd District

November 16, 2015

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

Dear Chair Diaz de la Portilla:

Senate bill 80 relating to family trust companies and senate bill 458 relating to transfers of structured settlement payment rights are scheduled to be heard in the Judiciary Committee this upcoming Tuesday, November 17th. Due to conflicts in my committee schedule, I will be sending my Legislative Assistant, Michael Nachev, as a representative to present the bill for your committee's consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Richter".

Garrett Richter

cc: Tom Cibula, Staff Director

REPLY TO:

- 3299 E. Tamiami Trail, Suite 203, Naples, Florida 34112-4961 (239) 417-6205
- 404 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5023
- 25 Homestead Road North, Suite 42 B, Lehigh Acres, Florida 33936 (239) 338-2777

Senate's Website: [www.flsenate.gov](http://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 458

INTRODUCER: Senator Richter

SUBJECT: Transfers of Structured Settlement Payment Rights

DATE: November 16, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maida	Cibula	JU	<b>Favorable</b>
2.			BI	
3.			RC	

---

**I. Summary:**

SB 458 revises the law governing the sale or transfer of the right to receive payments under a structured settlement agreement. A structured settlement agreement is an arrangement for the periodic payment of damages for personal injuries in connection with a tort claim or personal injury law suit. The purpose of existing law is to protect the recipients of structured settlements, and the law provides procedures for courts to approve the transfer of the right to receive payments under a structured settlement agreement.

The changes made by the bill:

- Specify that the court having jurisdiction over an application to transfer structured settlement payment rights is the court where the payee resides or, if the payee does not reside in this state, the court that approved the structured settlement agreement or the court in which a claim was pending which led to the structured settlement agreement.
- Require an applicant seeking to receive the payments under a structured settlement agreement to provide additional information about the payee in its application to the court.
- Require the payee to appear in court for the hearing on the application unless good cause exists to excuse the payee's attendance.
- Grant immunity to structured settlement obligors and annuity issuers that act in reliance on court orders approving the transfer of a structured settlement agreement.
- Make structured settlement obligors and annuity issuers immune from liability for a transferee's failure to provide required disclosures to the payee or to provide all the required information in its application to the court.
- Allow the transfer of structured settlement payments notwithstanding the terms of a structured settlement agreement prohibiting those transfers.

## II. Present Situation:

A structured settlement is an agreement for the periodic payment of damages for personal injuries, the payments of which are established by a settlement or judgment in resolution of a tort claim.<sup>1</sup> This arrangement typically involves one party paying a lump-sum premium to an insurance company to purchase an annuity in the name of the injured victim (the payee). Once the annuity is purchased, the insurance company begins to make periodic payments to the payee for a negotiated period of time. In addition to the long-term financial stability this may provide the payee, structured settlement payments confer tax benefits on their beneficiaries<sup>2</sup> and annuity issuers.<sup>3</sup>

Instead of making the payments itself, the insurance company may instead decide to assign its payment obligations to a structured settlement company. In exchange for accepting its new payment obligations, the structured settlement company typically receives from the insurance company a lump-sum payment equivalent to the present value of all future payments owed to the payee.<sup>4</sup> In order to obtain the necessary liquidity to make its newly-obligated periodic payments, the structured settlement company may use this lump-sum to purchase an annuity from a life insurance company.<sup>5</sup>

The payee's financial circumstances may change. For example, the payee's periodic payments may be insufficient to pay for an immediate, large financial need. As such, instead of receiving payments under a structured settlement plan, the payee may wish to transfer his or her rights to payments to another organization—known as a transferee—in exchange for a lump sum.<sup>6</sup> In 2001, the Legislature created s. 626.99296, F.S., to protect recipients of structured settlements during the transfer process.<sup>7</sup> Fundamentally, the statute requires such transfers to receive prior court approval.<sup>8</sup> This approval must be conditioned upon statutorily-enumerated factors, including an explicit finding by the court that the transfer is “in the best interests of the” individual opting to sell his or her settlement rights in order to receive a lump sum.<sup>9</sup> Under existing law, an entity contracting to receive structured settlement rights must file an application with the court at least 20 days before the application hearing<sup>10</sup> and make a series of disclosures to the would-be payee.<sup>11</sup> One of the required disclosures is the “quotient” of the transaction.<sup>12</sup> The

---

<sup>1</sup> See s. 626.99296(m), F.S.

<sup>2</sup> 26 U.S.C. § 104 (providing that, for taxation purposes, gross income does not include the amount of damages received on account of personal physical injuries or physical sickness); s. 626.99296(2)(j), F.S. (defining “payee” as an individual receiving tax-free damage payments under a structured settlement).

<sup>3</sup> See 26 U.S.C. § 130; *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).

<sup>4</sup> Gregg D. Polksy and Brant J. Hellwig, *Taxing Structured Settlements*, 51 B.C. L. REV. 39, 41-2 (January 2010).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).

<sup>7</sup> Section 626.99296, F.S.

<sup>8</sup> *Id.* at subsection (3); *Rapid Settlements, Ltd. v. Dickerson*, 941 So. 2d 1275, 1276-77 (Fla. 4th DCA 2006) (affirming lower court decision to deny petition, noting that “[t]ransfers of structured settlement rights are regulated by statute and court approval is required before a transfer may go forward.”).

<sup>9</sup> Section 626.99296(3), F.S.

<sup>10</sup> *Id.* at subsection (4).

<sup>11</sup> *Id.* at subsection (3).

<sup>12</sup> *Id.*

“quotient” is described by statute as “a percentage, obtained by dividing the net payment amount by the discounted present value of the payments.”<sup>13</sup>

Despite the requirement that a structured settlement transfer occur or not occur under the supervision of a court, forum shopping<sup>14</sup> is not expressly prohibited by Florida’s structured settlement transfer law.<sup>15</sup> This could result in a transferee obtaining a settlement transfer venue with greater ties to the transferee, as opposed to the payee.

### III. Effect of Proposed Changes:

This bill makes the following changes to the laws governing the transfer of a structured settlement agreement:

- Eliminates the requirement that the transferee disclose to the payee the “quotient” of the transaction.
- Provides venue certainty and prevents “forum shopping” by requiring structured settlement transfer applications to be made in the circuit court of the county where the payee is located. If the payee is not domiciled in Florida, the application may be filed in the Florida court that approved the initial structured settlement agreement, or the court where the original claim was pending when the parties entered into their settlement.
- Provides additional information to the court by requiring the payee to appear personally in court during the application hearing. Further, the bill requires that additional information be provided on the transferee’s application. This includes the payee’s age, number and ages of the payee’s dependents, and additional financial history of the payee.
- Provides that, upon a court order approving the settlement transfer, both settlement obligors and annuity issuers may rely on the court’s order in redirecting future structured settlement payments and are released from liability as to all parties to the settlement except for the transferee and the transferee’s potential future assignee.<sup>16</sup>
- Confirms that, regardless of any anti-assignment language in the original structured settlement agreement, the parties to the agreement may waive or assert their rights, and the court can safely construe the anti-assignment language and apply the law to such situations.

The bill takes effect upon becoming a law.

---

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., Kelly McGann, It’s My Money and I Want it Now, Your Honor*, 48 MD. B.J. 36, 39-40 (May/June 2015).

<sup>15</sup> Section 626.99296, F.S., is silent as to which court—or venue—the initial settlement transfer petition must be filed.

<sup>16</sup> *Compare Fla R. Civ. P 1.1540(b)* which states that a judgment may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.



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

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

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

The bill may result in more favorable terms for payees who seek to sell the right to payments under their structured settlement agreements. This result may occur because courts will have more information about payees and because payees will generally be required to attend court hearings on applications to transfer structured settlement payment rights.

The bill will also increase the marketability of structured settlement payment rights by ensuring that structured settlement obligors and annuity issuers have no liability for acting in reliance on court orders approving the transfer of a structured settlement.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 626.99296 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 Richter

23-00532-16

2016458\_\_

1 A bill to be entitled  
 2 An act relating to transfers of structured settlement  
 3 payment rights; amending s. 626.99296, F.S.; revising  
 4 definitions; deleting a requirement that specified  
 5 written findings include a statement regarding net  
 6 receipts; eliminating a required disclosure that must  
 7 be made to the claimant or the claimant's legal  
 8 representative in a structured settlement; requiring  
 9 that a written response to an application be filed by  
 10 the transferee within a specified timeframe before a  
 11 scheduled hearing; requiring an application to be  
 12 filed in the circuit court of the county where the  
 13 payee is domiciled; providing an exception; specifying  
 14 requirements for a transferee's application to the  
 15 court; providing that the transferee is solely  
 16 responsible for compliance with certain requirements;  
 17 authorizing the structured settlement obligor and  
 18 annuity issuer to rely on the court order in  
 19 redirecting future settlement payments to the  
 20 transferee or assignee; providing that the structured  
 21 settlement obligor and annuity issuer are released  
 22 from any liability following a court order; specifying  
 23 that a structured settlement the terms of which  
 24 prohibit the sale, assignment, or encumbrance of  
 25 payment rights does not prohibit certain actions on  
 26 the part of the parties or the court; conforming  
 27 provisions to changes made by the act; making  
 28 technical changes; providing an effective date.  
 29

Page 1 of 15

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

23-00532-16

2016458\_\_

30 Be It Enacted by the Legislature of the State of Florida:  
 31  
 32 Section 1. Section 626.99296, Florida Statutes, is amended  
 33 to read:  
 34 626.99296 Transfers of structured settlement payment  
 35 rights.—  
 36 (1) PURPOSE.—The purpose of this section is to protect  
 37 recipients of structured settlements who are involved in the  
 38 process of transferring structured settlement payment rights.  
 39 (2) DEFINITIONS.—As used in this section, the term:  
 40 (a) "Annuity issuer" means an insurer that has issued an  
 41 annuity contract to be used to fund periodic payments under a  
 42 structured settlement.  
 43 (c) ~~(b)~~ "Applicable law" means any of the following, as  
 44 applicable in interpreting the terms of a structured settlement:  
 45 1. The laws of the United States;  
 46 2. The laws of this state, including principles of equity  
 47 applied in the courts of this state; and  
 48 3. The laws of any other jurisdiction:  
 49 a. That is the domicile of the payee ~~or any other~~  
 50 ~~interested party~~;  
 51 b. Under whose laws a structured settlement agreement was  
 52 approved by a court; or  
 53 c. In whose courts a settled claim was pending when the  
 54 parties entered into a structured settlement agreement.  
 55 (b) ~~(e)~~ "Applicable federal rate" means the most recently  
 56 published applicable rate for determining the present value of  
 57 an annuity, as issued by the United States Internal Revenue  
 58 Service pursuant to s. 7520 of the United States Internal

Page 2 of 15

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

23-00532-16

2016458\_\_

59 Revenue Code, as amended.

60 (d) "Assignee" means any party that acquires structured  
61 settlement payment rights directly or indirectly from a  
62 transferee of such rights.

63 (e) "Dependents" means a payee's spouse and minor children  
64 and all other family members and other persons for whom the  
65 payee is legally obligated to provide support, including spousal  
66 maintenance.

67 (f) "Discount and finance charge" means the sum of all  
68 charges that are payable directly or indirectly from assigned  
69 structured settlement payments and imposed directly or  
70 indirectly by the transferee and that are incident to a transfer  
71 of structured settlement payment rights, including:

72 1. Interest charges, discounts, or other compensation for  
73 the time value of money;

74 2. All application, origination, processing, underwriting,  
75 closing, filing, and notary fees and all similar charges,  
76 however denominated; and

77 3. All charges for commissions or brokerage, regardless of  
78 the identity of the party to whom such charges are paid or  
79 payable.

80  
81 The term does not include any fee or other obligation incurred  
82 by a payee in obtaining independent professional advice  
83 concerning a transfer of structured settlement payment rights.

84 (g) "Discounted present value" means, with respect to a  
85 proposed transfer of structured settlement payment rights, the  
86 fair present value of future payments, as determined by  
87 discounting the payments to the present using the most recently

23-00532-16

2016458\_\_

88 published applicable federal rate as the discount rate.

89 (h) "Independent professional advice" means advice of an  
90 attorney, certified public accountant, actuary, or other  
91 licensed professional adviser:

92 1. Who is engaged by a payee to render advice concerning  
93 the legal, tax, and financial implications of a transfer of  
94 structured settlement payment rights;

95 2. Who is not in any manner affiliated with or compensated  
96 by the transferee of the transfer; and

97 3. Whose compensation for providing the advice is not  
98 affected by whether a transfer occurs or does not occur.

99 (i) "Interested parties" means:

100 1. The payee;

101 2. Any beneficiary irrevocably designated under the annuity  
102 contract to receive payments following the payee's death or, if  
103 such designated beneficiary is a minor, the designated  
104 beneficiary's parent or guardian;

105 3. The annuity issuer;

106 4. The structured settlement obligor; or

107 5. Any other party to the structured settlement who has  
108 continuing rights or obligations to receive or make payments  
109 under the structured settlement.

110 (j) "Payee" means an individual who is receiving tax-free  
111 damage payments under a structured settlement and proposes to  
112 make a transfer of payment rights under the structured  
113 settlement.

114 (k) "Qualified assignment agreement" means an agreement  
115 providing for a qualified assignment, as authorized by 26 U.S.C.  
116 s. 130 of the United States Internal Revenue Code, as amended.

23-00532-16

2016458\_\_

117 (l) "Settled claim" means the original tort claim resolved  
118 by a structured settlement.

119 (m) "Structured settlement" means an arrangement for  
120 periodic payment of damages for personal injuries established by  
121 settlement or judgment in resolution of a tort claim.

122 (n) "Structured settlement agreement" means the agreement,  
123 judgment, stipulation, or release embodying the terms of a  
124 structured settlement, including the rights of the payee to  
125 receive periodic payments.

126 (o) "Structured settlement obligor" means the party who is  
127 obligated to make continuing periodic payments to the payee  
128 under a structured settlement agreement or a qualified  
129 assignment agreement.

130 (p) "Structured settlement payment rights" means rights to  
131 receive periodic payments, including lump-sum payments under a  
132 structured settlement, whether from the structured settlement  
133 obligor or the annuity issuer, if:

134 1. The payee ~~or any other interested party~~ is domiciled in  
135 this state;

136 2. The structured settlement agreement was approved by a  
137 court of this state; or

138 3. The settled claim was pending before the courts of this  
139 state when the parties entered into the structured settlement  
140 agreement.

141 (q) "Terms of the structured settlement" means the terms of  
142 the structured settlement agreement; the annuity contract; a  
143 qualified assignment agreement; or an order or approval of a  
144 court or other government authority authorizing or approving the  
145 structured settlement.

Page 5 of 15

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

23-00532-16

2016458\_\_

146 (r) "Transfer" means a sale, assignment, pledge,  
147 hypothecation, or other form of alienation or encumbrance made  
148 by a payee for consideration.

149 (s) "Transfer agreement" means the agreement providing for  
150 transfer of structured settlement payment rights from a payee to  
151 a transferee.

152 (t) "Transferee" means a person who is receiving or who  
153 will receive structured settlement payment rights resulting from  
154 a transfer.

155 (3) CONDITIONS TO TRANSFERS OF STRUCTURED SETTLEMENT  
156 PAYMENT RIGHTS AND STRUCTURED SETTLEMENT AGREEMENTS.—

157 (a) A direct or indirect transfer of structured settlement  
158 payment rights is not effective and a structured settlement  
159 obligor or annuity issuer is not required to make a payment  
160 directly or indirectly to a transferee or assignee of structured  
161 settlement payment rights unless the transfer is authorized in  
162 advance in a final order by a court of competent jurisdiction  
163 which is based on the written express findings by the court  
164 that:

165 1. The transfer complies with this section and does not  
166 contravene other applicable law;

167 2. At least 10 days before the date on which the payee  
168 first incurred an obligation with respect to the transfer, the  
169 transferee provided to the payee a disclosure statement in bold  
170 type, no smaller than 14 points in size, which specifies:

171 a. The amounts and due dates of the structured settlement  
172 payments to be transferred;

173 b. The aggregate amount of the payments;

174 c. The discounted present value of the payments, together

Page 6 of 15

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

23-00532-16 2016458\_\_

175 with the discount rate used in determining the discounted  
 176 present value;

177 d. The gross amount payable to the payee in exchange for  
 178 the payments;

179 e. An itemized listing of all brokers' commissions, service  
 180 charges, application fees, processing fees, closing costs,  
 181 filing fees, referral fees, administrative fees, legal fees, and  
 182 notary fees and other commissions, fees, costs, expenses, and  
 183 charges payable by the payee or deductible from the gross amount  
 184 otherwise payable to the payee;

185 f. The net amount payable to the payee after deducting all  
 186 commissions, fees, costs, expenses, and charges described in  
 187 sub-subparagraph e.;

188 g. ~~The quotient, expressed as a percentage, obtained by~~  
 189 ~~dividing the net payment amount by the discounted present value~~  
 190 ~~of the payments, which must be disclosed in the following~~  
 191 ~~statement: "The net amount that you will receive from us in~~  
 192 ~~exchange for your future structured settlement payments~~  
 193 ~~represent . . . percent of the estimated current value of the~~  
 194 ~~payments based upon the discounted value using the applicable~~  
 195 ~~federal rate";~~

196 ~~h.~~ The effective annual interest rate, which must be  
 197 disclosed in the following statement: "Based on the net amount  
 198 that you will receive from us and the amounts and timing of the  
 199 structured settlement payments that you are turning over to us,  
 200 you will, in effect, be paying interest to us at a rate of . . .  
 201 percent per year"; and

202 ~~h.i.~~ The amount of any penalty and the aggregate amount of  
 203 any liquidated damages, including penalties, payable by the

23-00532-16 2016458\_\_

204 payee in the event of a breach of the transfer agreement by the  
 205 payee;

206 3. The payee has established that the transfer is in the  
 207 best interests of the payee, taking into account the welfare and  
 208 support of the payee's dependents;

209 4. The payee has received, or waived in writing his or her  
 210 right to receive, independent professional advice regarding the  
 211 legal, tax, and financial implications of the transfer;

212 5. The transferee or assignee, if any, has given written  
 213 notice of his or her ~~the transferee's~~ name, address, and  
 214 taxpayer identification number to the annuity issuer and the  
 215 structured settlement obligor and has filed a copy of the notice  
 216 with the court;

217 6. The transfer agreement provides that if the payee is  
 218 domiciled in this state, any disputes between the parties will  
 219 be governed in accordance with the laws of this state and that  
 220 the domicile state of the payee is the proper venue to bring any  
 221 cause of action arising out of a breach of the agreement; and

222 7. The court has determined that the net amount payable to  
 223 the payee is fair, just, and reasonable under the circumstances  
 224 then existing.

225 (b) If a proposed transfer would contravene the terms of  
 226 the structured settlement, upon the filing of a written  
 227 objection by any interested party and after considering the  
 228 objection and any response to it, the court may grant, deny, or  
 229 impose conditions upon the proposed transfer which the court  
 230 deems just and proper given the facts and circumstances and in  
 231 accordance with established principles of law. Any order  
 232 approving a transfer must require that the transferee indemnify

23-00532-16 2016458\_\_

233 the annuity issuer and the structured settlement obligor for any  
234 liability, including reasonable costs and ~~attorney~~ attorney's  
235 fees, which arises from compliance by the issuer or obligor with  
236 the order of the court.

237 (c) Any provision in a transfer agreement which gives a  
238 transferee power to confess judgment against a payee is  
239 unenforceable to the extent that the amount of the judgment  
240 would exceed the amount paid by the transferee to the payee,  
241 less any payments received from the structured settlement  
242 obligor or payee.

243 (d) In negotiating a structured settlement of claims  
244 brought by or on behalf of a claimant who is domiciled in this  
245 state, the structured settlement obligor must disclose in  
246 writing to the claimant or the claimant's legal representative  
247 all of the following information that is not otherwise specified  
248 in the structured settlement agreement:

- 249 1. The amounts and due dates of the periodic payments to be  
250 made under the structured settlement agreement. In the case of  
251 payments that will be subject to periodic percentage increases,  
252 the amounts of future payments may be disclosed by identifying  
253 the base payment amount, the amount and timing of scheduled  
254 increases, and the manner in which increases will be compounded;
- 255 2. The amount of the premium payable to the annuity issuer;
- 256 3. The discounted present value of all periodic payments  
257 that are not life-contingent, together with the discount rate  
258 used in determining the discounted present value;
- 259 4. The nature and amount of any costs that may be deducted  
260 from any of the periodic payments; and
- 261 5. Where applicable, that any transfer of the periodic

23-00532-16 2016458\_\_

262 payments is prohibited by the terms of the structured settlement  
263 and may otherwise be prohibited or restricted under applicable  
264 law; ~~and~~

265 ~~6. That any transfer of the periodic payments by the~~  
266 ~~claimant may subject the claimant to serious adverse tax~~  
267 ~~consequences.~~

268 (4) VENUE JURISDICTION; PROCEDURE FOR APPROVAL OF  
269 TRANSFERS; CONTENTS OF APPLICATION.—

270 (a) At least 20 days before the scheduled hearing on an  
271 application for authorizing a transfer of structured settlement  
272 payment rights under this section, the transferee must file with  
273 the court and provide to all interested parties a notice of the  
274 proposed transfer and the application for its authorization. The  
275 notice must include:

- 276 1.(a) A copy of the transferee's application to the court;
- 277 2.(b) A copy of the transfer agreement;
- 278 3.(c) A copy of the disclosure statement required under  
279 subsection (3);
- 280 4.(d) Notification that an interested party may support,  
281 oppose, or otherwise respond to the transferee's application, in  
282 person or by counsel, by submitting written comments to the  
283 court or by participating in the hearing; and
- 284 5.(e) Notification of the time and place of the hearing and  
285 notification of the manner in which and the time by which any  
286 written response to the application must be filed in order to be  
287 considered by the court. A written response to an application  
288 must be filed no later than 5 within 15 days before the date  
289 after service of the scheduled hearing in order to be considered  
290 by the court transferee's notice.

23-00532-16

2016458\_\_

291 (b) An application must be made by the transferee and filed  
 292 in the circuit court of the county where the payee is domiciled.  
 293 However, if the payee is not domiciled in this state, the  
 294 application may be filed in the court in this state which  
 295 approved the structured settlement agreement or in the court  
 296 where the settled claim was pending when the parties entered  
 297 into the structured settlement.

298 (c) The court shall hold a hearing on the application. The  
 299 payee shall appear in person at the hearing unless the court  
 300 determines that good cause exists to excuse the payee from  
 301 appearing.

302 (d) In addition to complying with the other requirements of  
 303 this section, the application must include:

304 1. The payee's name, age, and county of domicile and the  
 305 number and ages of the payee's dependents;

306 2. A copy of the transfer agreement;

307 3. A copy of the disclosure statement required under  
 308 subsection (3);

309 4. An explanation of reasons as to why the payee is seeking  
 310 approval of the proposed transfer; and

311 5. A summary of each of the following:

312 a. Any transfers by the payee to the transferee or an  
 313 affiliate, or through the transferee or an affiliate to an  
 314 assignee, within the 4 years preceding the date of the transfer  
 315 agreement.

316 b. Any transfers within the 3 years preceding the date of  
 317 the transfer agreement made by the payee to any person or entity  
 318 other than the transferee or an affiliate, or an assignee of a  
 319 transferee or an affiliate, to the extent such transfers were

Page 11 of 15

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

23-00532-16

2016458\_\_

320 disclosed to the transferee by the payee in writing or are  
 321 otherwise actually known by the transferee.

322 c. Any proposed transfers by the payee to the transferee or  
 323 an affiliate, or through the transferee or an affiliate to an  
 324 assignee, for which an application was denied within the 2 years  
 325 preceding the date of the transfer agreement.

326 d. Any proposed transfers by the payee to any person or  
 327 entity other than the transferee, or an assignee of a transferee  
 328 or an affiliate, to the extent such proposed transfers were  
 329 disclosed to the transferee by the payee in writing or are  
 330 otherwise actually known by the transferee, for which  
 331 applications were denied within the year preceding the date of  
 332 the current transfer agreement.

333 (5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE;  
 334 RELIANCE ON COURT ORDER; COMPLIANCE; RELEASE FROM LIABILITY;  
 335 CONSTRUCTION.-

336 (a) The provisions of this section may not be waived by the  
 337 payee.

338 (b) If a transfer of structured settlement payment rights  
 339 fails to satisfy the conditions of subsection (3), the payee who  
 340 proposed the transfer does not incur any penalty, forfeit any  
 341 application fee or other payment, or otherwise incur any  
 342 liability to the proposed transferee.

343 (c) In any transfer of structured settlement payment  
 344 rights, the transferee is solely responsible for compliance with  
 345 the requirements of paragraph (3) (a) and subsection (4), and  
 346 neither the structured settlement obligor nor the annuity issuer  
 347 is liable for noncompliance.

348 (d) Following issuance of a court order approving a

Page 12 of 15

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



23-00532-16

2016458\_\_

349 transfer of structured settlement payment rights under this  
 350 section, the structured settlement obligor and annuity issuer:

351 1. May rely on the court order in redirecting future  
 352 structured settlement payments to the transferee or an assignee  
 353 in accordance with the order; and

354 2. Are released from any liability for the transferred  
 355 payments to all of the parties to the settlement except the  
 356 transferee or an assignee, notwithstanding the failure of any  
 357 party to the transfer to comply with this section or with the  
 358 orders of the court approving the transfer.

359 (e) A structured settlement the terms of which prohibit the  
 360 sale, assignment, or encumbrance of payment rights may not be  
 361 construed to prohibit:

362 1. The parties to the settlement from waiving or asserting  
 363 their rights under such terms; or

364 2. A court from hearing an application for approval of a  
 365 transfer of such rights or ruling on the merits of the  
 366 application and any objections.

367 (6) NONCOMPLIANCE.—

368 (a) If a transferee violates the requirements for  
 369 stipulating the discount and finance charge provided for in  
 370 subsection (3), neither the transferee nor any assignee may  
 371 collect from the transferred payments, or from the payee, any  
 372 amount in excess of the net advance amount, and the payee may  
 373 recover from the transferee or any assignee:

374 1. A refund of any excess amounts previously received by  
 375 the transferee or any assignee;

376 2. A penalty in an amount determined by the court, but not  
 377 in excess of three times the aggregate amount of the discount

23-00532-16

2016458\_\_

378 and finance charge; and

379 3. Reasonable costs and attorney ~~attorney's~~ fees.

380 (b) If the transferee violates the disclosure requirements  
 381 in subsection (3), the transferee and any assignee are liable to  
 382 the payee for:

383 1. A penalty in an amount determined by the court, but not  
 384 in excess of three times the amount of the discount and finance  
 385 charge; and

386 2. Reasonable costs and attorney ~~attorney's~~ fees.

387 (c) A transferee or assignee is not liable for any penalty  
 388 in any action brought under this section if the transferee or  
 389 assignee establishes by a preponderance of evidence that the  
 390 violation was not intentional and resulted from a bona fide  
 391 error, notwithstanding the transferee's maintenance of  
 392 procedures reasonably designed to avoid such errors.

393 (d) Notwithstanding any other law, an action may not be  
 394 brought under this section more than 1 year after the due date  
 395 of:

396 1. The last transferred structured settlement payment, in  
 397 the case of a violation of the requirements for stipulating the  
 398 discount and finance charge provided for in subsection (3).

399 2. The first transferred structured settlement payment, in  
 400 the case of a violation of the disclosure requirements of  
 401 subsection (3).

402 (e) When any interested party has reason to believe that  
 403 any transferee has violated this section, any interested party  
 404 may bring a civil action for injunctive relief, penalties, and  
 405 any other relief that is appropriate to secure compliance with  
 406 this section.

23-00532-16

2016458\_\_

407

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



The Florida Senate

## Committee Agenda Request

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

**Subject:** Committee Agenda Request

**Date:** October 28, 2015

---

I respectfully request that **Senate Bill #458**, relating to Transfers of Structured Settlement Payment Rights, be placed on the:

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

A handwritten signature in cursive script, appearing to read "Garrett Richter".

---

Senator Garrett Richter  
Florida Senate, District 23

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

November 17, 2015  
Meeting Date

SB 458  
Bill Number (if applicable)

Topic Structured Settlement Protection Act - 458  
Amendment Barcode (if applicable)

Name Michael Goodman

Job Title Structured Settlement Consultant / President of National Structured Settlement Trade Association

Address 150 East Palmetto Park Road  
Street Phone 561-212-5300

Boca Raton FL 210A 33432  
City State Zip

Email mgoodman@NFP.com

Speaking:  For  Against  Information

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

Representing National Structured Settlement Trade Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015

Meeting Date

SB 458

Bill Number (if applicable)

Topic Structured Settlement Transfers

Amendment Barcode (if applicable)

Name Earl Nesbitt - National Association of Settlement Purchasers

Job Title General Counsel & Executive Director

Address 15851 Dallas Parkway, Suite 800

Phone 972-371-2411

Street

Addison

TX.

75001

City

State

Zip

Email enesbitt@numlaw.com

Speaking:  For  Against  Information

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

Representing National Association of Settlement Purchasers

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)



# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**  
Ethics and Elections, *Chair*  
Banking and Insurance, *Vice Chair*  
Appropriations  
Appropriations Subcommittee on Health  
and Human Services  
Commerce and Tourism  
Regulated Industries  
Rules

## SENATOR GARRETT RICHTER

*President Pro Tempore*  
23rd District

November 16, 2015

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

Dear Chair Diaz de la Portilla:

Senate bill 80 relating to family trust companies and senate bill 458 relating to transfers of structured settlement payment rights are scheduled to be heard in the Judiciary Committee this upcoming Tuesday, November 17th. Due to conflicts in my committee schedule, I will be sending my Legislative Assistant, Michael Nacheff, as a representative to present the bill for your committee's consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Richter".

Garrett Richter

cc: Tom Cibula, Staff Director

REPLY TO:

- 3299 E. Tamiami Trail, Suite 203, Naples, Florida 34112-4961 (239) 417-6205
- 404 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5023
- 25 Homestead Road North, Suite 42 B, Lehigh Acres, Florida 33936 (239) 338-2777

Senate's Website: [www.flsenate.gov](http://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:** CS/SB 352

**INTRODUCER:** Judiciary Committee and Senator Bradley

**SUBJECT:** Self-authentication of Documents

**DATE:** November 19, 2015      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Maida	Cibula	JU	<b>Fav/CS</b>
2.			GO	
3.			RC	

---

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 352 authorizes a person to electronically file with a court self-authenticating documents, such as court records and other public or official records, during legal proceedings. Under existing law and despite requirements that most documents be electronically filed, some court clerks require that self-authenticating records be filed in physical form.<sup>1</sup> Accordingly, the bill minimizes the need to file physical documents.

The bill also provides procedures for challenging the authenticity of an electronically filed document and expressly authorizes the use of existing methods to authenticate self-authenticating documents.

**II. Present Situation:**

**Authentication of Evidence**

Under the Florida Evidence Code, evidence offered at trial must be authenticated or identified before it can be admitted.<sup>2</sup> Thus, the code recognizes a principle that evidence is inadmissible unless accompanied by some showing of its genuineness—that is, there must be a showing that

---

<sup>1</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Changes to Fla. Stat. 90.202, Concerning Authentication of Electronic Records* (Sept. 3, 2015) (on file with the Senate Committee on Judiciary).

<sup>2</sup> Section 90.901, F.S.

the evidence is, in fact, what the proponent says it is.<sup>3</sup> Certain types of evidence, however, need no additional authenticating evidence as a condition precedent to admissibility; they are considered authentic as a matter of law.<sup>4</sup> This evidence includes a copy of an “official public record, report, or entry or of a document authorized by law to be recorded or filed and actually recorded in a public office” if the record is certified as correct by the custodian of the record.<sup>5</sup>

### **Electronic Filing of Court Documents**

The Florida Rules of Judicial Administration require all court documents to be served electronically.<sup>6</sup> Facilitating this rule, all clerks of court are required to implement an electronic filing process.<sup>7</sup> Nevertheless, service of court documents may be made physically in addition to, and not in lieu of, electronic service.<sup>8</sup> Given the requirement that documents be served electronically, some clerks of court may be ill-equipped or unwilling to accept original paper certified copies of public records, rendering such records difficult to authenticate.

### **III. Effect of Proposed Changes:**

This bill grants self-authenticated status to electronically-filed certified copies of public records. It also provides a means of self-authentication to additional government records maintained online and gives an opposing party the means to contest the authenticity of such documents.

Under the bill, the authenticity of an electronically-filed document can be challenged in two ways. First, the opposing party may provide the court with a different version of the document and claim that their alternative document is the “true,” or authentic document. Second, the opposing party may file an affidavit stating the electronically-filed document does not exist on the website or web address provided. Following this initial step, the court will review the electronically-filed document and deem it authentic unless 1) the document is not filed in conformance with the bill, 2) the court sustains the opposing party’s objection, 3) the electronically-filed document is not virtually identical to how it appears on the website as claimed by the e-filing party, or 4) the court otherwise determines the document is inauthentic.

The bill takes effect upon becoming a law.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

---

<sup>3</sup> See, e.g., *Gosciminski v. State*, 132 So. 3d. 678, 700 (Fla. 2013); *DeLong v. Williams*, 232 So. 2d 246 (Fla. 4th DCA 1970).

<sup>4</sup> Section 90.902, F.S.

<sup>5</sup> *Id.*

<sup>6</sup> Rule 2.516, Fla. R. Jud. Admin.

<sup>7</sup> Section 28.22205, F.S.

<sup>8</sup> Rule 2.516, Fla. R. Jud. Admin.



C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By authorizing the electronic filing of self-authenticating documents with a court, the bill appears likely to reduce costs for attorneys and their clients.<sup>9</sup>

C. Government Sector Impact:

The Office of the State Courts Administrator has not yet submitted a fiscal impact statement on this bill. However, negative impact of the bill on the court system is likely minimal. The electronic filing of self-authenticating documents will likely occur using existing e-filing procedures and technology. Moreover, the bill will minimize the need for clerks to accept and store self-authenticating documents in a physical form.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 90.902 and 90.803.

**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 November 17, 2015:**

The committee substitute primarily simplifies and clarifies the language in the bill as originally filed. However, the CS provides additional leeway for a court to determine that a challenged electronically-filed document is inauthentic.

---

<sup>9</sup> See Real Property Probate and Trust Law Section of The Florida Bar, *supra* note 1.

B. Amendments:

None.

---

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

---



512352

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Stargel) recommended the following:

**Senate Amendment**

Delete lines 31 - 75  
and insert:

(5) A copy of any pleading, order, or other filing in any court sitting in the United States or a United States territory, or a document or record entry filed with or retained by the United States or any state, municipality, district, commonwealth, territory, or governmental department or agency of such an entity which is available to the public from a website operated by a governmental agency or authorized by a



512352

12 governmental agency.

13 (a) The party seeking authentication of a document pursuant  
14 to this subsection must:

15 1. File a Notice of Reliance on Electronic Records which  
16 attaches a copy of the document to be authenticated and  
17 discloses the website and web address where the document can be  
18 located.

19 2. Serve the written Notice of Reliance on Electronic  
20 Records at least 20 days before a hearing at which the  
21 authenticity of the document or its acceptance by a court as an  
22 authentic document is at issue. The court may waive or shorten  
23 the time period for filing the notice set forth in this  
24 subparagraph.

25 (b) A party may object to the authenticity of a document  
26 that is the subject of a Notice of Reliance on Electronic  
27 Records by filing and serving an affidavit on all other parties  
28 at least 5 days before a hearing, unless such time period is  
29 waived or shortened by the court. The affidavit must do one of  
30 the following:

31 1. Challenge the authenticity of the document by detailing  
32 in writing the portion of the document which is not authentic. A  
33 copy of what the challenging party asserts is the true, correct,  
34 and authentic document must be attached to the affidavit.

35 2. Assert that the document does not exist on the website  
36 or web address as specified in the Notice of Reliance on  
37 Electronic Records.

38 (c) After review and consideration by the court, the court  
39 shall deem authentic the document that is the subject of the  
40 Notice of Reliance on Electronic Records unless:



512352

41       1. The party seeking authentication of the document does  
42 not satisfy the requirements of paragraph (a);

43       2. An affidavit objecting to the authenticity of the  
44 document is filed pursuant to paragraph (b) and the court  
45 sustains the objection;

46       3. The document does not have the same content or text, in  
47 all material respects, as the document that appears on the  
48 website identified in the Notice of Reliance on Electronic  
49 Records; or

50       4. The court otherwise determines that the document is not  
51 authentic.

52  
53 This subsection does not prohibit a party from authenticating a  
54 document using the alternative methods of authentication under  
55 subsection (4) or s. 90.901.

By Senator Bradley

7-00437-16

2016352\_\_

A bill to be entitled

An act relating to self-authentication of documents; amending s. 90.902, F.S.; allowing certified copies of official public documents to be filed electronically; providing a method for authenticating public documents other than by certified copies; amending s. 90.803, F.S.; conforming a cross-reference; providing an effective date.

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

Section 1. Subsection (4) of section 90.902, Florida Statutes, is amended, subsections (5) through (11) of that section are renumbered as subsections (6) through (12), respectively, and a new subsection (5) is added to that section, to read:

90.902 Self-authentication.—Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

(4) A copy of an official public record, report, or entry, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with subsection (1), subsection (2), or subsection (3) or complying with any act of the Legislature or rule adopted by the Supreme Court, which certified copy may be filed electronically pursuant to s. 28.22205. An electronically filed certified copy is admissible to the same extent as the

Page 1 of 4

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

7-00437-16

2016352\_\_

original would be if it complies with this subsection.

(5) A copy of:

(a) Any pleading, order, or other filing in any court sitting in the United States or a United States territory; or  
(b) Any document or record entry filed with or retained by the United States or any state, municipality, district, commonwealth, territory, or governmental department or agency of such an entity which is available to the public from an Internet website operated by a governmental agency or authorized by a governmental agency if the party seeking authentication of the document files a Notice of Reliance on Electronic Records which:

1. Attaches a copy of the document to be admitted.

2. Discloses the website and web address on the Internet where said document can be located.

3. Serves written notice not less than 20 days before a hearing at which the authenticity of the document or its acceptance by a court as an authentic document is at issue. The court may waive or shorten the time period for filing the notice set forth in this subparagraph.

a. If a party desires to object to the authenticity of a document which is the subject of a Notice of Reliance on Electronic Records, such party shall file and serve on every other party an affidavit within 5 days before a hearing, which time period may be waived or shortened by the court, challenging either the authenticity of said document by attaching a copy of what the challenging party asserts is the true, correct, and authentic document, and detailing in writing the portion of said document which is not authentic; or that said document does not exist on the website or web address as specified in the notice.

Page 2 of 4

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

7-00437-16

2016352\_\_

59 b. After review and consideration by the court, the court  
 60 shall deem authentic the document that is the subject of the  
 61 Notice of Reliance on Electronic Records unless:

62 (I) The document does not satisfy the requirements of this  
 63 paragraph;

64 (II) An objection is filed pursuant to sub-subparagraph a.,  
 65 and the court sustains the objection or otherwise determines the  
 66 document to not be authentic; or

67 (III) The document does not have the same content or text,  
 68 in all material respects, as the document that appears on the  
 69 website identified in the Notice of Reliance on Electronic  
 70 Records.

71  
 72 This subsection does not prohibit a party from authenticating a  
 73 document under s. 90.901 or as otherwise provided in subsection  
 74 (4) or this subsection, all of which are alternative methods of  
 75 authentication.

76 Section 2. Paragraph (a) of subsection (6) of section  
 77 90.803, Florida Statutes, is amended to read:

78 90.803 Hearsay exceptions; availability of declarant  
 79 immaterial.—The provision of s. 90.802 to the contrary  
 80 notwithstanding, the following are not inadmissible as evidence,  
 81 even though the declarant is available as a witness:

82 (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.—

83 (a) A memorandum, report, record, or data compilation, in  
 84 any form, of acts, events, conditions, opinion, or diagnosis,  
 85 made at or near the time by, or from information transmitted by,  
 86 a person with knowledge, if kept in the course of a regularly  
 87 conducted business activity and if it was the regular practice

Page 3 of 4

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

7-00437-16

2016352\_\_

88 of that business activity to make such memorandum, report,  
 89 record, or data compilation, all as shown by the testimony of  
 90 the custodian or other qualified witness, or as shown by a  
 91 certification or declaration that complies with paragraph (c)  
 92 and s. 90.902(12) ~~90.902(11)~~, unless the sources of information  
 93 or other circumstances show lack of trustworthiness. The term  
 94 "business" as used in this paragraph includes a business,  
 95 institution, association, profession, occupation, and calling of  
 96 every kind, whether or not conducted for profit.

97 Section 3. 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  
**APPEARANCE RECORD**

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

11-17-2015

Meeting Date

352

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name Brian Pitts

Job Title Trustee

Address 1119 Newton Ave S  
Street

Phone 727/897-9291

Bt Petersburg FL 33705  
City State Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing Justice-2-Jesus

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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



THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-15

Meeting Date

SB 352

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name Pete Dunbar

Job Title \_\_\_\_\_

Address 215 S. Monroe #815

Phone 999-4100

Street

Tallahassee FL 32301

City

State

Zip

Email pdunbar@deanmead.com

Speaking:  For  Against  Information

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

Representing Real Property, Probate & Trust Law Section - Fla Bar

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

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

SB-352

Meeting Date

Bill Number (if applicable)

Topic SB-352 Self-Authentication of Public Record

Amendment Barcode (if applicable)

Name Kevin Faul Hood

Job Title Reported Citizen

Address 6925 Wood Place

Phone 850-785-3768  
850-358-2200

Street  
Panama City, FL 32404

Email allunited@bellsouth.net

City State Zip

Speaking:  For  Against  Information

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

Representing Southern Christian Leadership Conference

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: SB 396

INTRODUCER: Senator Bradley

SUBJECT: Nonresident Plaintiffs in Civil Actions

DATE: November 16, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	_____	_____	<u>RC</u>	_____

---

**I. Summary:**

SB 396 repeals a requirement that a nonresident plaintiff in a civil action post a bond in the amount of \$100 to secure the payment of court costs that may be adjudged against the plaintiff. The requirement applies to plaintiffs who live out of state at the time of filing a lawsuit and plaintiffs who become nonresidents of this state after filing a lawsuit.

**II. Present Situation:**

Florida law requires nonresident plaintiffs to file a bond in the amount of \$100.<sup>1</sup> The bond requirement applies to plaintiffs who are not residents of this state when they file a lawsuit, and to plaintiffs who become nonresidents after filing a lawsuit.<sup>2</sup> The bond is required as a surety for costs adjudged to the plaintiff.<sup>3</sup>

If a plaintiff does not file the bond within 30 days after being required to do so, the defendant may move to dismiss the action. However, before filing a motion to dismiss, the defendant must give 20-days' notice to the plaintiff, during which time the plaintiff may file the bond.<sup>4</sup>

The bond requirement dates back to 1828, when the state was still a territory.<sup>5</sup>

**III. Effect of Proposed Changes:**

The bill repeals a requirement that a nonresident plaintiff in a civil action post a \$100 bond with the clerk of court as security for costs that may be adjudged against the plaintiff.

---

<sup>1</sup> Section 57.011, F.S.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Section 8, Nov. 23, 1828, Acts of the Legislative Council of the Territory of Fla.

Nonresident plaintiffs will be treated the same as resident plaintiffs by not having to post a bond for costs. Nonresident plaintiffs will also not be subject to a motion to dismiss by the defendant for a failure to post a bond for costs.

The bill takes effect July 1, 2016.

**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:

Plaintiffs who either reside out-of-state at the time of filing a petition in civil court or after filing a petition will not have to post a bond for costs. Additionally, plaintiffs who reside out-of-state will not be subject to dismissal of the case for failure to post a bond for costs.

C. Government Sector Impact:

The Florida Association of Court Clerks and Comptrollers indicates that they expect an insignificant, if any, fiscal impact from this bill.<sup>6</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

<sup>6</sup> Email from Fred Baggett, General Counsel of the Florida Association of Court Clerks & Comptrollers (Nov. 10, 2015) (on file with the Senate Committee on Judiciary).

**VIII. Statutes Affected:**

This bill repeals section 57.011 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 Bradley

7-00438-16

2016396\_\_

1                           A bill to be entitled  
2       An act relating to nonresident plaintiffs in civil  
3       actions; repealing s. 57.011, F.S., relating to  
4       requirements for a nonresident plaintiff in a civil  
5       action to post security for costs; providing an  
6       effective date.  
7

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

9  
10       Section 1. Section 57.011, Florida Statutes, is repealed.

11       Section 2. This act shall take effect July 1, 2016.

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-15

Meeting Date

SB 396

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name Peter Dunbar

Job Title \_\_\_\_\_

Address 215 S. Monroe #815  
Street

Phone 999-4100

Tallahassee FL 32301  
City State Zip

Email pdunbar@doanmead.com

Speaking:  For  Against  Information

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

Representing Real Property, Probate & Trust Law Section - Fla Bar

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015

Meeting Date

396

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name Brian Pitts

Job Title Trustee

Address 1119 Newton Ave S

Phone 787/897-9291

Street

St Petersburg

City

FL

State

33705

Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing \_\_\_\_\_

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)



THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 396  
Bill Number (if applicable)

Topic Nonresident plaintiff in civil action

Amendment Barcode (if applicable)

Name Alice Vickers

Job Title Attorney

Address 623 Beard St.

Phone 850 556 3121

Tallahassee FL 32303  
City State Zip

Email alicevickers@flap.org

Speaking:  For  Against  Information

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

Representing FLORIDA Bar Public Interest Law Section

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

**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 372

INTRODUCER: Judiciary Committee and Senator Lee

SUBJECT: Administrative Procedures

DATE: November 18, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Cibula	JU	<b>Fav/CS</b>
2.			AGG	
3.			AP	

---

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 372 revises the Administrative Procedure Act, which governs agency rulemaking and decision making. The most significant changes to the act by the bill:

- Require an agency to commence and complete rulemaking activities generally within 180 days after it holds a public hearing on a petition to initiate rulemaking activities on an unadopted rule and chooses to initiate rulemaking.
- Require the dissemination of additional notices of agency rulemaking activities on the Florida Administrative Register and through e-mails by an agency to its licensees and other interested persons.
- Authorize a person to challenge agency action by asserting that a rule or unadopted rule used as a basis for the agency's action is invalid.
- Require agencies to review their rules to identify rules the violation of which would constitute a minor violation and for which a notice of noncompliance will be the first enforcement action.

**II. Present Situation:**

**Rulemaking and the Administrative Procedure Act**

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth uniform procedures that agencies must follow when exercising rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the

procedure and practice requirements of an agency.<sup>1</sup> Rulemaking authority is delegated by the Legislature<sup>2</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>3</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>4</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.<sup>5</sup> The grant of rulemaking authority itself need not be detailed.<sup>6</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>7</sup>

### ***Petition to Initiate Rulemaking Directed to an Unadopted Rule***

An agency may initiate rulemaking on its own or upon a petition to initiate rulemaking by a person regulated by the agency or having a substantial interest in an agency rule.<sup>8</sup> A petition to initiate rulemaking must specify the proposed rule and the action requested.<sup>9</sup> If the petition relates to an unadopted rule, the agency must initiate rulemaking within 30 days or hold a public hearing on the petition. The agency, if it does not initiate rulemaking or comply with the petition, must publish a statement of its reasons in the Florida Administrative Register within 30 days after the hearing.

If an agency chooses to hold a hearing on the petition, the agency must consider public comments relating to the scope and application of the proposed rule and consider whether the public interest is adequately served by applying the rule on a case-by-case basis instead of a formally adopted rule. If the agency elects to pursue rulemaking after the hearing, it is not subject to any deadlines for commencing or completing the rulemaking process.

### ***Attorney Fees***

The Florida Equal Access to Justice Act is intended to diminish the deterrent effect of seeking review of, or defending against governmental actions.<sup>10</sup> Under the act, a small business that prevails in a legal action initiated by a state agency is entitled to attorney fees and costs if the actions of the agency were not substantially justified or special circumstances exist which would make the award unjust. An agency action is reasonably justified if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA authorizes the recovery of attorney fees when:

- A non-prevailing party has participated for an improper purpose;

---

<sup>1</sup> Section 120.52(16), F.S.; *Florida Dep’t of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

<sup>2</sup> *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

<sup>3</sup> Section 120.52(17), F.S.

<sup>4</sup> Section 120.54(1)(a), F.S.

<sup>5</sup> Sections 120.52(8) and 120.536(1), F.S.

<sup>6</sup> *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.

<sup>7</sup> *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (internal citations omitted); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

<sup>8</sup> Section 120.54, F.S.

<sup>9</sup> Section 120.54(7), F.S.

<sup>10</sup> Section 57.111, F.S.

- An agency's actions are not substantially justified;
- An agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules; and
- An agency loses an appeal in a proceeding challenging an unadopted rule.<sup>11</sup>

An agency defense to attorney fees available in actions challenging agency statements defined as rules is that the agency did not know and should not have known that the agency statement was an unadopted rule. Additionally, attorney fees in such actions may be awarded only upon a finding that the agency received notice that the agency statement may constitute an unadopted rule at least 30 days before a petition challenging the agency statement is filed, and the agency fails to publish a notice of rulemaking within that 30 day period.<sup>12</sup>

The authorization for attorney fees in the Equal Access to Justice Act supplement other statutes authorizing attorney fees.<sup>13</sup>

### ***Notice of Rules***

Under current law, the Department of Management Services (DMS) is required to publish the Florida Administrative Register on the Internet.<sup>14</sup> This document must contain:

- Notices relating to the adoption or repeal of a rule.
- Notices of public meetings, hearing, and workshops.
- Notices of requests for authorization to amend or repeal an existing rule or for the adoption of a new uniform rule.
- Notices of petitions for declaratory statements or administrative determinations.
- Summaries of objections to rules filed by the Administrative Procedures Committee.
- Other material required by law or deemed useful by the department.

Additionally, DMS allows users of its e-rulemaking website to subscribe to receive free e-mail notification of notices submitted by agencies.<sup>15</sup>

### ***Burden of Proof***

In general, laws carry a presumption of validity, and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule's invalidity.<sup>16</sup> However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.<sup>17</sup> In addition, a rule may not be filed for adoption until any pending challenge is resolved.<sup>18</sup>

---

<sup>11</sup> Section 120.595, F.S.

<sup>12</sup> Section 120.595(4)(b), F.S.

<sup>13</sup> See s. 120.595(6), F.S. (providing that a statute authorizing attorney fees in challenges to agency actions does not affect the availability of attorney fees and costs under other statutes including ss. 57.105, and 57.111, F.S.).

<sup>14</sup> Section 120.55, F.S.

<sup>15</sup> See Florida Department of State, Florida Administrative Code & Florida Administrative Register, *FLRules FAQ* at <https://www.flrules.org/Help/newHelp.asp#sub> (last visited Nov. 10, 2015).

<sup>16</sup> Section 120.56(3), F.S.

<sup>17</sup> Section 120.56(2), F.S.

<sup>18</sup> Section 120.54(3)(e)2., F.S.

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.<sup>19</sup>

Rulemaking is presumed feasible unless the agency proves that:

- The agency needs more time to obtain the knowledge and experience to reasonably address a statement by rulemaking.
- Related matters must be sufficiently resolved before the agency can engage in rulemaking.<sup>20</sup>

Additionally, rulemaking is presumed practicable unless the agency proves that:

- Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances.
- The particular question addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication based on individual circumstances.<sup>21</sup>

### ***Proceedings Involving Rule Challenges***

The APA presently applies different procedures in rule challenges when proposed rules, existing rules, and unadopted rules are challenged by petition, compared to a challenge to the validity of an existing rule, or an unadopted rule defensively in a proceeding initiated by agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for the invalidation of a rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or grant or denial of a permit or license.

The APA does provide that an administrative law judge with the Division of Administrative Hearings (DOAH) may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a provision that an agency may overrule the DOAH determination if it's clearly erroneous. If the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.<sup>22</sup> Additionally, in proceedings initiated by agency action, if a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejecting or modifying the determination.<sup>23</sup>

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeal.

---

<sup>19</sup> Section 120.56(4), F.S.

<sup>20</sup> Section 120.54(1)(a)1., F.S.

<sup>21</sup> Section 120.54(1)(a)2., F.S.

<sup>22</sup> Section 120.57(1)(e)3., F.S.

<sup>23</sup> Section 120.57(1)(k-1), F.S.

### ***Final Orders***

An agency has 90 days to render a final order in any proceeding, after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

### ***Judicial Review***

A notice of appeal of an appealable order under the APA must be filed within 30 days after the rendering of the order.<sup>24</sup> An order, however, is rendered when filed with the agency clerk. On occasion, a party might not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute, a party may not seek judicial review of the validity of a rule by appealing its adoption, but the statute authorizes an appeal from a final order in a rule challenge.<sup>25</sup>

### **Minor Violations**

The APA directs agencies to issue a “notice of noncompliance” as the first response when the agency encounters a first minor violation of a rule.<sup>26</sup> The law provides that a violation is a minor violation if it “does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm.” Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency’s designation of rules under the provision is excluded from challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.<sup>27</sup> An agency under the direction of a cabinet officer has the discretion not to use the “notice of noncompliance” once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

### **Rules Ombudsman**

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor, for considering the impact of agency rules on the state’s citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules.

---

<sup>24</sup> Section 120.68(2)(a), F.S.

<sup>25</sup> Section 120.68(9), F.S.

<sup>26</sup> Section 120.695, F.S. The statute contains the following legislative intent: “It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.”

<sup>27</sup> Section 120.695(2)(c), (d), F.S. The statute provides for final review and revision of these agency designations to be at the discretion of elected constitutional officers.

### III. Effect of Proposed Changes:

#### **Deadlines for Rulemaking Following Public Hearing on an Unadopted Rule (Section 1)**

Under existing law, s. 120.54, F.S., there are no statutory deadlines for an agency to commence or complete rulemaking after a public hearing on a petition to initiate rulemaking which was directed to an unadopted rule. The bill requires an agency to commence the rulemaking process by publishing a notice of rule development within 30 days after the hearing and generally requires agencies to publish a notice of proposed rule within 180 days after the hearing.

Additionally, the bill prohibits an agency from relying on the unadopted rule during the rulemaking process following the public hearing unless the agency publishes in the Florida Administrative Register an explanation of why rulemaking was not feasible or practicable before the hearing. Under existing s. 120.54(1)(a), F.S., an agency's failure to engage in rulemaking is excusable if the agency proves that rulemaking is not feasible or practicable.<sup>28</sup>

#### **Dissemination of Notices Rulemaking Activities (Section 2)**

The bill adds the following to the list of items that must be published in the Florida Administrative Register, which is available on a website maintained by the Department of Management Services:

- Notices of rule development and rule development workshops.
- Notices of negotiated rulemaking.
- A list of all rules filed for adoption within the previous 7 days.
- A list of rules filed for legislative ratification.

The bill also requires agencies that provide an e-mail notification service to licensees and other registered recipients of notices to use that service to provide notice of the following rulemaking activities:

- Rule development and rule development workshops.
- Negotiated rulemaking.
- The intent to adopt, amend, or repeal a rule.
- Public hearings on a propose rule.
- Changes to a proposed rule.
- The withdrawal of a proposed rule.

The notices above must also include links to a website containing the proposed or final rule.

The bill further provides on lines 222-224 that the failure to comply with the requirements to publish notice of rulemaking activities may not be raised in a proceeding to challenge a rule. This statement effectively means that the violation of the publication requirements is not a legally sufficient ground for the invalidation of a rule.<sup>29</sup>

---

<sup>28</sup> The extent to which an agency's explanation or failure to provide an explanation may impact agency enforcement actions or challenges to an unadopted rule is not clear.

<sup>29</sup> Compare s. 120.56(1)(c), F.S., which states in part, "The failure of an agency to follow the applicable rulemaking procedures set forth in this chapter shall be presumed to be material."

### **Rule Challenges (Section 3)**

The bill revises several subsections of s. 120.56, F.S., which set forth the pleading requirements for a petition challenging a proposed, adopted, or unadopted rule. The changes made by the bill appear to be a rewording without any substantive changes, but the changes could be interpreted as a reduction in the pleading requirements for a person challenging a rule.<sup>30</sup>

#### ***General Procedures***

Existing s. 120.56(1), F.S., which sets forth the general procedures for rule challenges, requires a person who challenges an agency rule or proposed rule as an invalid exercise of delegated legislative authority to file a petition stating:

*with particularity* the provisions alleged to be invalid with *sufficient explanation* of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

The bill revises s. 120.56(1), F.S., to refer to the “particular” provisions alleged to be invalid and a “statement,” instead of a sufficient explanation, of the facts or grounds for the alleged invalidity. However, the bill still requires a petitioner to be substantially affected by a rule or proposed rule.

#### ***Special Provisions for Proposed Rules***

Existing s. 120.56(2), F.S., which sets forth special provisions for challenges to proposed rules, requires the petition challenging a proposed rule to “*state with particularity* the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority.” The statute further states that the “petitioner has the burden of going forward.” Case law interpreted these provisions as imposing a burden on a party challenging a proposed rule to establish the factual basis for its objections to the rule.<sup>31</sup>

The bill replaces the particularity requirement in s. 120.56(2), F.S., with the general provisions in subsection (1) which require a petition challenging a proposed rule to include a statement of the facts or grounds for the alleged invalidity. Instead of a burden of going forward with the evidence supporting its objections, the bill provides that the petitioner has a burden “to prove by a preponderance of the evidence that it would be substantially affected by the proposed rule.”

#### ***Challenges to Unadopted Rules***

Existing s. 120.56(4), F.S., sets forth special provisions for challenges to unadopted rules. The subsection, requires a petition to “*state with particularity* facts sufficient to show that the

---

<sup>30</sup> One argument that the deletion of the word “particularity” as it relates to the pleading requirements in a rule challenge, is a substantive change, not a rewording, is that the bill does not eliminate similar particularity requirements imposed on agencies in ss. 120.545, 120.569, 120.57, and 120.60, F.S.

<sup>31</sup> *St. Johns River Water Management Dist. v. Consolidated-Tamoka Land Co.* 717 So. 2d 72, 76-77 (Fla 1st DCA 1998) (superseded by statute on other grounds). Once the petitioner’s burden is met, ‘the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority.’ *Id.*



statement constitutes” an unadopted rule. The bill deletes the words “with particularity” but still requires the petition to state sufficient facts.

#### **Agency Decisions Based on an Unadopted Rule or Invalid Rule (Section 4)**

##### ***Hearings Involving Disputed Facts***

The bill expressly authorizes a person to challenge an agency action proposing to determine his or her substantial interests by asserting that the agency’s action is based on an invalid rule or an unadopted rule. This challenge is subject to the procedures governing rule challenges. The bill also allows an administrative law judge to consolidate a rule challenge with a proceeding to determine a person’s substantial interests.<sup>32</sup>

The consolidation of a rule challenge with a substantial interest proceeding will likely shorten the time period that would have been available for discovery activities.<sup>33</sup> Existing s. 120.56(1)(c), F.S., requires an administrative law judge to conduct a hearing on a rule challenge within 40 days after the filing of a petition challenging a rule, unless a continuance is granted for good cause shown. However, hearings on a petition to challenge an agency action to determine a person’s substantial interests are not subject to a statutory deadline.<sup>34</sup>

The bill in its revisions to the law governing hearings involving disputed issues of fact also provides that a petition may pursue a separate rule challenge even if an adequate remedy exists in the hearing to determine the petitioner’s substantial interests.<sup>35</sup>

##### ***Hearings Not Involving Disputed Facts***

Existing s. 120.57(2), F.S., provides additional procedures for hearings not involving disputed issues of material fact. The bill adds to that subsection a statement prohibiting an agency from basing its decisions on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority. The prohibition, however, appears to be a restatement of the limits on an agency’s authority as opposed to a new, substantive requirement.

---

<sup>32</sup> Consolidation of proceedings is currently allowed under Rule 28-106.108 of the Florida Administrative Code which states:

If there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

<sup>33</sup> The consolidation of proceedings may also shorten time periods for the issuance of a final order. The final order in a rule challenge must be issued within 30 days after the hearing. Section 120.56(1)(d), F.S. The final order in a hearing under s. 120.57(1), F.S., that doesn’t contain a rule challenge component is not due for at least 90 days after the hearing. Section 120.569(2)(1), F.S.

<sup>34</sup> Section 120.569(2)(o), F.S., describes the timeframes for a typical hearing under s. 120.57(1), F.S., as follows:  
On the request of any party, the administrative law judge shall enter an initial scheduling order to facilitate the just, speedy, and inexpensive determination of the proceeding. The initial scheduling order shall establish a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall identify expert witnesses and their opinions. The initial scheduling order also may require the parties to meet and file a joint report by a date certain.

<sup>35</sup> The bill, however, does not clearly indicate whether a person could assert both a rule challenge during a substantial interest hearing and during a separate rule challenge proceeding. The Legislature may wish to consider whether only one rule challenge proceeding should be authorized.

Unlike the bill's changes to s. 120.57(1), F.S., the changes to s. 120.57(2), F.S., do not expressly authorize a person to challenge a rule or unadopted rule used as the basis of an agency's action.<sup>36</sup> Additionally, nothing in the bill appears to allow an administrative law judge to consolidate a rule challenge with a hearing before an agency hearing officer which does not involve disputed facts. As such, a person likely must file a separate rule challenge petition with the Division of Administrative Hearings to assert the invalidity of a rule or unadopted rule that an agency is using as a basis for an agency decision in a proceeding not involving disputed facts.

### **Judicial Review (Section 5)**

Existing s. 120.68, F.S., sets forth a person's rights to seek judicial review of final agency action and other preliminary, procedural, or intermediate orders of an agency or administrative law judge. The revisions by section 6 of the bill authorize a person to seek judicial review of orders resolving a challenge to a rule during a substantial interest hearing involving a disputed issue of material fact and a similar order issued during a hearing not involving a disputed issue of material fact.

Section 4 of the bill expressly authorizes a person to assert a rule challenge during a substantial interest hearing involving a disputed issue of material fact, which is a hearing under s. 120.57(1), F.S., and provides procedures for raising and adjudicating those challenges. However, the bill does not provide similar procedures for a rule challenge raised during a hearing not involving a disputed issue of material fact under s. 120.57(2), F.S. As a result, how a rule challenge will be raised and resolved during a hearing under s. 120.57(2), F.S., is not clear. The lack of procedures for raising and resolving a rule challenge during a hearing under s. 120.57(2), F.S., implies that section 5 gives appellate courts jurisdiction over a rule challenge raised for the first time during the appeal of an order from a hearing conducted under s. 120.57(2), F.S.

### **Minor Rule Violations (Section 6)**

Existing s. 120.695, F.S., required most agencies to review their rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken. This review was required to have been completed by December 1, 1995, for some agencies and by January 1, 1996, for other agencies. The bill requires agencies to perform a similar review by June 30, 2017, and within 3 months after a request by the rules ombudsman in the Executive Office of the Governor. Similarly, for each rule filed for adoption, an agency head must certify whether a violation of the rule constitutes a minor rule violation.

Each agency must publish a list of all rules the violation of which is a minor violation on their websites and incorporate them in their disciplinary guidelines adopted as a rule. Agencies must also ensure that their investigative and enforcement personnel are knowledgeable about minor rule violations.

---

<sup>36</sup> Although s. 120.57(2), F.S., as amended by the bill, does not expressly authorize a rule challenge in a proceeding not involving a disputed issue of material fact, section 5 of the bill suggests that the bill may have been intended to allow those challenges. Section 5 allows a person to seek judicial review of an order issued under s. 120.57(2)(b), F.S., resulting from a rule challenge. If the Legislature intends to allow rule challenges under s. 120.57(2)(b), F.S., it may wish to set forth additional procedures governing those challenges.

**Technical Changes (Section 7)**

Section 7 makes a technical change conforming a cross-reference to other changes made by the bill.

**Effective Date (Section 8)**

The bill takes effect July 1, 2016.

**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:**

This bill, if interpreted as lowering the pleading requirements for a rule challenge petition, may facilitate challenges to agency rules by persons regulated or substantially affected by agency actions. However, the bill may simplify the resolution of disputes by expressly authorizing the consolidation of rule challenges and substantial interest hearings under s. 120.57(1), F.S.

**C. Government Sector Impact:**

This bill, if interpreted as lowering the pleading requirements for a rule challenge petition, may facilitate challenges to agency rules by persons regulated or substantially affected by agency actions.

**VI. Technical Deficiencies:**

There are several potentially ambiguous provisions in this bill, all of which are noted in the Effect of Proposed Changes section of this bill analysis.

**VII. Related Issues:**

After the 2015 Session, Governor Scott vetoed HB 435 (2015), relating to administrative procedures. The Governor explained the basis of his objections as follows:

This bill alters the long-standing deference granted to agencies by shifting final action authority to an administrative law judge. This change has the potential to result in prolonged litigation impeding an agency's ability to perform core functions like sanctioning bad actors and protecting public health and safety. These changes create a situation that could paralyze agency rulemaking, delay enforcement actions, and create a backlog of court cases at an increased cost to the taxpayer.<sup>37</sup>

Although the bill has some commonality with HB 435 (2015), it does not contain the provisions that would have shifted final action authority from an agency to an administrative law judge.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.55, 120.56, 120.57, 120.68, 120.695, and 120.595.

**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 November 17, 2015:**

The changes to s. 120.57(2), F.S., made by the committee substitute, may lower the pleading requirements for a challenge to a proposed agency rule. Under the amendment, a petitioner must prove by the preponderance of the evidence that the petitioner would be substantially affected by the proposed rule. In contrast, the underlying bill provided that the petitioner had the burden of going forward with evidence sufficient to support the rule challenge petition, which appeared to relate to the petitioner's factual basis for its objections to the proposed rule.

- B. **Amendments:**

None.

---

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

---

---

<sup>37</sup> Veto of Fla. CS for CS for CS for HB 435 (2015) (letter from Gov. Rick Scott to Sec'y of State Kenneth W. Detzner, June 16, 2015) available at <http://www.flgov.com/wp-content/uploads/2015/06/Transmittal-Letter-6.16.15-HB-435.pdf>.



310222

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
11/16/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Brandes) recommended the following:

**Senate Amendment (with title amendment)**

1                    **Senate Amendment (with title amendment)**  
2  
3                    Before line 42  
4 insert:  
5                    Section 1. Section 189.0695, Florida Statutes, is created  
6 to read:  
7                    189.0695 Special districts regulating transit or  
8 transportation services; procedures.—An independent or a  
9 dependent special district that regulates transit or  
10 transportation services is subject to the Administrative  
11 Procedure Act, chapter 120.



310222

12 Section 2. Paragraph (a) of subsection (1) of section  
13 120.52, Florida Statutes, is amended to read:

14 120.52 Definitions.—As used in this act:

15 (1) "Agency" means the following officers or governmental  
16 entities if acting pursuant to powers other than those derived  
17 from the constitution:

18 (a) The Governor; each state officer and state department,  
19 and each departmental unit described in s. 20.04; the Board of  
20 Governors of the State University System; the Commission on  
21 Ethics; the Fish and Wildlife Conservation Commission; a  
22 regional water supply authority; a regional planning agency; a  
23 multicounty special district, but only if a majority of its  
24 governing board is comprised of nonelected persons; an  
25 independent or a dependent special district that regulates  
26 transit or transportation services; educational units; and each  
27 entity described in chapters 163, 373, 380, and 582 and s.  
28 186.504.

29  
30 This definition does not include a municipality or legal entity  
31 created solely by a municipality; a legal entity or agency  
32 created in whole or in part pursuant to part II of chapter 361;  
33 a metropolitan planning organization created pursuant to s.  
34 339.175; a separate legal or administrative entity created  
35 pursuant to s. 339.175 of which a metropolitan planning  
36 organization is a member; an expressway authority pursuant to  
37 chapter 348 or any transportation authority or commission under  
38 chapter 343 or chapter 349; or a legal or administrative entity  
39 created by an interlocal agreement pursuant to s. 163.01(7),  
40 unless any party to such agreement is otherwise an agency as



310222

41 defined in this subsection.

42

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

44 And the title is amended as follows:

45 Delete line 2

46 and insert:

47 An act relating to administrative procedures; creating

48 s. 189.0695, F.S.; requiring certain independent and

49 dependent special districts to be subject to ch. 120,

50 F.S.; amending s. 120.52, F.S.; redefining the term

51 "agency" to conform to changes made by the act;

52 amending



138148

LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Brandes) recommended the following:

**Senate Amendment (with title amendment)**

Before line 42

insert:

Section 1. Section 189.0695, Florida Statutes, is created to read:

189.0695 Special districts regulating transit or transportation services; procedures.—An independent special district that regulates transit or transportation services is subject to the Administrative Procedure Act, chapter 120.

Section 2. Paragraph (a) of subsection (1) of section





138148

12 120.52, Florida Statutes, is amended to read:

13 120.52 Definitions.—As used in this act:

14 (1) "Agency" means the following officers or governmental  
15 entities if acting pursuant to powers other than those derived  
16 from the constitution:

17 (a) The Governor; each state officer and state department,  
18 and each departmental unit described in s. 20.04; the Board of  
19 Governors of the State University System; the Commission on  
20 Ethics; the Fish and Wildlife Conservation Commission; a  
21 regional water supply authority; a regional planning agency; a  
22 multicounty special district, but only if a majority of its  
23 governing board is comprised of nonelected persons; an  
24 independent special district that regulates transit or  
25 transportation services; educational units; and each entity  
26 described in chapters 163, 373, 380, and 582 and s. 186.504.

27  
28 This definition does not include a municipality or legal entity  
29 created solely by a municipality; a legal entity or agency  
30 created in whole or in part pursuant to part II of chapter 361;  
31 a metropolitan planning organization created pursuant to s.  
32 339.175; a separate legal or administrative entity created  
33 pursuant to s. 339.175 of which a metropolitan planning  
34 organization is a member; an expressway authority pursuant to  
35 chapter 348 or any transportation authority or commission under  
36 chapter 343 or chapter 349; or a legal or administrative entity  
37 created by an interlocal agreement pursuant to s. 163.01(7),  
38 unless any party to such agreement is otherwise an agency as  
39 defined in this subsection.

40



138148

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

42 And the title is amended as follows:

43       Delete line 2

44 and insert:

45       An act relating to administrative procedures; creating  
46       s. 189.0695, F.S.; requiring certain independent  
47       special districts to be subject to ch. 120, F.S.;  
48       amending s. 120.52, F.S.; redefining the term "agency"  
49       to conform to changes made by the act; amending



231816

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Stargel) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 297 - 302

and insert:

~~authority.~~ The petitioner has the burden to prove by a  
preponderance of the evidence that it would be substantially  
affected by the proposed rule of going forward. The agency then  
has the burden to prove by a preponderance of the evidence that  
the proposed rule is not an invalid exercise of delegated  
legislative authority as to the objections raised. ~~A person who~~  
~~is substantially affected by a~~



231816

12  
13  
14  
15  
16  
17  
18  
19

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

And the title is amended as follows:

Delete line 16

and insert:

F.S.; clarifying language regarding challenges to  
rules; specifying the petitioner's burden of proof in  
proposed rule challenges; amending s. 120.57, F.S.;

By Senator Lee

24-00433-16

2016372\_\_

1 A bill to be entitled  
 2 An act relating to administrative procedures; amending  
 3 s. 120.54, F.S.; providing procedures for agencies to  
 4 follow when initiating rulemaking after certain public  
 5 hearings; limiting reliance upon an unadopted rule in  
 6 certain circumstances; amending s. 120.55, F.S.;  
 7 providing for publication of notices of rule  
 8 development and of rules filed for adoption; providing  
 9 for additional notice of rule development, proposals,  
 10 and adoptions in the Florida Administrative Register;  
 11 requiring certain agencies to provide additional e-  
 12 mail notifications concerning specified rulemaking and  
 13 rule development activities; providing that failure to  
 14 follow certain provisions does not constitute grounds  
 15 to challenge validity of a rule; amending s. 120.56,  
 16 F.S.; clarifying language; amending s. 120.57, F.S.;  
 17 conforming proceedings that oppose agency action based  
 18 on an invalid or unadopted rule to proceedings used  
 19 for challenging rules; authorizing the administrative  
 20 law judge to make certain findings on the validity of  
 21 certain alleged unadopted rules; authorizing a  
 22 petitioner to file certain collateral challenges  
 23 regarding the validity of a rule; authorizing the  
 24 administrative law judge to consolidate proceedings in  
 25 such rule challenges; providing that agency action may  
 26 not be based on an invalid or unadopted rule; amending  
 27 s. 120.68, F.S.; specifying legal authority to file a  
 28 petition challenging an agency rule as an invalid  
 29 exercise of delegated legislative authority; amending

Page 1 of 22

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

24-00433-16

2016372\_\_

30 s. 120.695, F.S.; removing obsolete provisions with  
 31 respect to required agency review and designation of  
 32 minor violations; requiring agency review and  
 33 certification of minor violation rules by a specified  
 34 date; requiring minor violation certification for all  
 35 rules adopted after a specified date; requiring public  
 36 notice; providing applicability; amending s. 120.595,  
 37 F.S.; conforming a cross-reference; providing an  
 38 effective date.

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

41  
 42 Section 1. Paragraph (c) of subsection (7) of section  
 43 120.54, Florida Statutes, is amended, and paragraph (d) is added  
 44 to that subsection, to read:

45 120.54 Rulemaking.—

46 (7) PETITION TO INITIATE RULEMAKING.—

47 (c) If the agency does not initiate rulemaking or otherwise  
 48 comply with the requested action within 30 days after following  
 49 the public hearing provided for in by paragraph (b), ~~if the~~  
 50 ~~agency does not initiate rulemaking or otherwise comply with the~~  
 51 ~~requested action,~~ the agency shall publish in the Florida  
 52 Administrative Register a statement of its reasons for not  
 53 initiating rulemaking or otherwise complying with the requested  
 54 action, and of any changes it will make in the scope or  
 55 application of the unadopted rule. The agency shall file the  
 56 statement with the committee. The committee shall forward a copy  
 57 of the statement to the substantive committee with primary  
 58 oversight jurisdiction of the agency in each house of the

Page 2 of 22

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

24-00433-16

2016372\_\_

59 Legislature. The committee or the committee with primary  
60 oversight jurisdiction may hold a hearing directed to the  
61 statement of the agency. The committee holding the hearing may  
62 recommend to the Legislature the introduction of legislation  
63 making the rule a statutory standard or limiting or otherwise  
64 modifying the authority of the agency.

65 (d) If the agency initiates rulemaking after the public  
66 hearing provided for in paragraph (b), the agency shall publish  
67 a notice of rule development within 30 days after the hearing  
68 and file a notice of proposed rule within 180 days after the  
69 notice of rule development unless, before the 180th day, the  
70 agency publishes in the Florida Administrative Register a  
71 statement explaining its reasons for not having filed the  
72 notice. If rulemaking is initiated under this paragraph, the  
73 agency may not rely on the unadopted rule unless the agency  
74 publishes in the Florida Administrative Register a statement  
75 explaining why rulemaking under paragraph (1)(a) was not  
76 previously feasible or practicable before the public hearing.

77 Section 2. Section 120.55, Florida Statutes, is amended to  
78 read:

79 120.55 Publication.—

80 (1) The Department of State shall:

81 (a)1. Through a continuous revision and publication system,  
82 compile and publish electronically, on a ~~an Internet~~ website  
83 managed by the department, the "Florida Administrative Code."  
84 The Florida Administrative Code shall contain all rules adopted  
85 by each agency, citing the grant of rulemaking authority and the  
86 specific law implemented pursuant to which each rule was  
87 adopted, all history notes as authorized in s. 120.545(7),

Page 3 of 22

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

24-00433-16

2016372\_\_

88 complete indexes to all rules contained in the code, and any  
89 other material required or authorized by law or deemed useful by  
90 the department. The electronic code shall display each rule  
91 chapter currently in effect in browse mode and allow full text  
92 search of the code and each rule chapter. The department may  
93 contract with a publishing firm for a printed publication;  
94 however, the department shall retain responsibility for the code  
95 as provided in this section. The electronic publication shall be  
96 the official compilation of the administrative rules of this  
97 state. The Department of State shall retain the copyright over  
98 the Florida Administrative Code.

99 2. Rules general in form but applicable to only one school  
100 district, community college district, or county, or a part  
101 thereof, or state university rules relating to internal  
102 personnel or business and finance shall not be published in the  
103 Florida Administrative Code. Exclusion from publication in the  
104 Florida Administrative Code shall not affect the validity or  
105 effectiveness of such rules.

106 3. At the beginning of the section of the code dealing with  
107 an agency that files copies of its rules with the department,  
108 the department shall publish the address and telephone number of  
109 the executive offices of each agency, the manner by which the  
110 agency indexes its rules, a listing of all rules of that agency  
111 excluded from publication in the code, and a statement as to  
112 where those rules may be inspected.

113 4. Forms shall not be published in the Florida  
114 Administrative Code; but any form which an agency uses in its  
115 dealings with the public, along with any accompanying  
116 instructions, shall be filed with the committee before it is

Page 4 of 22

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

24-00433-16

2016372\_\_

117 used. Any form or instruction which meets the definition of  
 118 "rule" provided in s. 120.52 shall be incorporated by reference  
 119 into the appropriate rule. The reference shall specifically  
 120 state that the form is being incorporated by reference and shall  
 121 include the number, title, and effective date of the form and an  
 122 explanation of how the form may be obtained. Each form created  
 123 by an agency which is incorporated by reference in a rule notice  
 124 of which is given under s. 120.54(3)(a) after December 31, 2007,  
 125 must clearly display the number, title, and effective date of  
 126 the form and the number of the rule in which the form is  
 127 incorporated.

128 5. The department shall allow adopted rules and material  
 129 incorporated by reference to be filed in electronic form as  
 130 prescribed by department rule. When a rule is filed for adoption  
 131 with incorporated material in electronic form, the department's  
 132 publication of the Florida Administrative Code on its ~~Internet~~  
 133 website must contain a hyperlink from the incorporating  
 134 reference in the rule directly to that material. The department  
 135 may not allow hyperlinks from rules in the Florida  
 136 Administrative Code to any material other than that filed with  
 137 and maintained by the department, but may allow hyperlinks to  
 138 incorporated material maintained by the department from the  
 139 adopting agency's website or other sites.

140 (b) Electronically publish on a ~~an Internet~~ website managed  
 141 by the department a continuous revision and publication entitled  
 142 the "Florida Administrative Register," which shall serve as the  
 143 official publication and must contain:

144 1. All notices required by s. 120.54(2) and (3)(a)  
 145 ~~120.54(3)(a)~~, showing the text of all rules proposed for

Page 5 of 22

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

24-00433-16

2016372\_\_

146 consideration.

147 2. All notices of public meetings, hearings, and workshops  
 148 conducted in accordance with s. 120.525, including a statement  
 149 of the manner in which a copy of the agenda may be obtained.

150 3. A notice of each request for authorization to amend or  
 151 repeal an existing uniform rule or for the adoption of new  
 152 uniform rules.

153 4. Notice of petitions for declaratory statements or  
 154 administrative determinations.

155 5. A summary of each objection to any rule filed by the  
 156 Administrative Procedures Committee.

157 6. A list of rules filed for adoption in the previous 7  
 158 days.

159 7. A list of all rules filed for adoption pending  
 160 legislative ratification under s. 120.541(3). A rule shall be  
 161 removed from the list once notice of ratification or withdrawal  
 162 of the rule is received.

163 ~~8.6-~~ Any other material required or authorized by law or  
 164 deemed useful by the department.

165  
 166 The department may contract with a publishing firm for a printed  
 167 publication of the Florida Administrative Register and make  
 168 copies available on an annual subscription basis.

169 (c) Prescribe by rule the style and form required for  
 170 rules, notices, and other materials submitted for filing.

171 (d) Charge each agency using the Florida Administrative  
 172 Register a space rate to cover the costs related to the Florida  
 173 Administrative Register and the Florida Administrative Code.

174 (e) Maintain a permanent record of all notices published in

Page 6 of 22

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

24-00433-16

2016372\_\_

175 the Florida Administrative Register.

176 (2) The Florida Administrative Register ~~Internet~~ website  
177 must allow users to:

178 (a) Search for notices by type, publication date, rule  
179 number, word, subject, and agency.

180 (b) Search a database that makes available all notices  
181 published on the website for a period of at least 5 years.

182 (c) Subscribe to an automated e-mail notification of  
183 selected notices to be sent out before or concurrently with  
184 publication of the electronic Florida Administrative Register.  
185 Such notification must include in the text of the e-mail a  
186 summary of the content of each notice.

187 (d) View agency forms and other materials submitted to the  
188 department in electronic form and incorporated by reference in  
189 proposed rules.

190 (e) Comment on proposed rules.

191 (3) Publication of material required by paragraph (1)(b) on  
192 the Florida Administrative Register ~~Internet~~ website does not  
193 preclude publication of such material on an agency's website or  
194 by other means.

195 (4) Each agency shall provide copies of its rules upon  
196 request, with citations to the grant of rulemaking authority and  
197 the specific law implemented for each rule.

198 (5) Each agency that provides an e-mail notification  
199 service to inform licensees or other registered recipients of  
200 notices shall use that service to notify recipients of each  
201 notice required under s. 120.54(2) and (3) and provide Internet  
202 links to the appropriate rule page on the Secretary of State's  
203 website or Internet links to an agency website that contains the

Page 7 of 22

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

24-00433-16

2016372\_\_

204 proposed rule or final rule.

205 (6)-(5) Any publication of a proposed rule promulgated by an  
206 agency, whether published in the Florida Administrative Register  
207 or elsewhere, shall include, along with the rule, the name of  
208 the person or persons originating such rule, the name of the  
209 agency head who approved the rule, and the date upon which the  
210 rule was approved.

211 (7)-(6) Access to the Florida Administrative Register  
212 ~~Internet~~ website and its contents, including the e-mail  
213 notification service, shall be free for the public.

214 (8)-(7)(a) All fees and moneys collected by the Department  
215 of State under this chapter shall be deposited in the Records  
216 Management Trust Fund for the purpose of paying for costs  
217 incurred by the department in carrying out this chapter.

218 (b) The unencumbered balance in the Records Management  
219 Trust Fund for fees collected pursuant to this chapter may not  
220 exceed \$300,000 at the beginning of each fiscal year, and any  
221 excess shall be transferred to the General Revenue Fund.

222 (9) The failure to comply with this section may not be  
223 raised in a proceeding challenging the validity of a rule  
224 pursuant to s. 120.52(8)(a).

225 Section 3. Subsection (1), paragraph (a) of subsection (2),  
226 paragraph (a) of subsection (3), and subsection (4) of section  
227 120.56, Florida Statutes, are amended to read:

228 120.56 Challenges to rules.—

229 (1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A~~  
230 ~~RULE OR A PROPOSED RULE.~~—

231 (a) Any person substantially affected by a rule or a  
232 proposed rule may seek an administrative determination of the

Page 8 of 22

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



24-00433-16

2016372\_\_

233 invalidity of the rule on the ground that the rule is an invalid  
234 exercise of delegated legislative authority.

235 (b) The petition challenging the validity of a proposed or  
236 adopted rule under this section seeking an administrative  
237 determination must state: ~~with particularity~~

238 1. The particular provisions alleged to be invalid and a  
239 statement with sufficient explanation of the facts or grounds  
240 for the alleged invalidity, ~~and~~

241 2. Facts sufficient to show that the petitioner person  
242 challenging a rule is substantially affected by the challenged  
243 adopted rule it, or ~~that the person challenging a proposed rule~~  
244 would be substantially affected by the proposed rule it.

245 (c) The petition shall be filed by electronic means with  
246 the division which shall, immediately upon filing, forward by  
247 electronic means copies to the agency whose rule is challenged,  
248 the Department of State, and the committee. Within 10 days after  
249 receiving the petition, the division director shall, if the  
250 petition complies with ~~the requirements of~~ paragraph (b), assign  
251 an administrative law judge who shall conduct a hearing within  
252 30 days thereafter, unless the petition is withdrawn or a  
253 continuance is granted by agreement of the parties or for good  
254 cause shown. Evidence of good cause includes, but is not limited  
255 to, written notice of an agency's decision to modify or withdraw  
256 the proposed rule or a written notice from the chair of the  
257 committee stating that the committee will consider an objection  
258 to the rule at its next scheduled meeting. The failure of an  
259 agency to follow the applicable rulemaking procedures or  
260 requirements set forth in this chapter shall be presumed to be  
261 material; however, the agency may rebut this presumption by

Page 9 of 22

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

24-00433-16

2016372\_\_

262 showing that the substantial interests of the petitioner and the  
263 fairness of the proceedings have not been impaired.

264 (d) Within 30 days after the hearing, the administrative  
265 law judge shall render a decision and state the reasons for his  
266 or her decision therefor in writing. The division shall  
267 forthwith transmit by electronic means copies of the  
268 administrative law judge's decision to the agency, the  
269 Department of State, and the committee.

270 (e) Hearings held under this section shall be de novo in  
271 nature. The standard of proof shall be the preponderance of the  
272 evidence. Hearings shall be conducted in the same manner as  
273 provided by ss. 120.569 and 120.57, except that the  
274 administrative law judge's order shall be final agency action.  
275 The petitioner and the agency whose rule is challenged shall be  
276 adverse parties. Other substantially affected persons may join  
277 the proceedings as intervenors on appropriate terms which shall  
278 not unduly delay the proceedings. Failure to proceed under this  
279 section ~~does shall~~ not constitute failure to exhaust  
280 administrative remedies.

281 (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—

282 (a) A ~~substantially affected person may seek an~~  
283 ~~administrative determination of the invalidity of a proposed~~  
284 ~~rule by filing a petition alleging the invalidity of a proposed~~  
285 ~~rule shall be filed seeking such a determination with the~~  
286 ~~division~~ within 21 days after the date of publication of the  
287 notice required by s. 120.54(3)(a); within 10 days after the  
288 final public hearing is held on the proposed rule as provided by  
289 s. 120.54(3)(e)2.; within 20 days after the statement of  
290 estimated regulatory costs or revised statement of estimated

Page 10 of 22

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

24-00433-16

2016372\_\_

291 regulatory costs, if applicable, has been prepared and made  
 292 available as provided in s. 120.541(1)(d); or within 20 days  
 293 after the date of publication of the notice required by s.  
 294 120.54(3)(d). ~~The petition must state with particularity the~~  
 295 ~~objections to the proposed rule and the reasons that the~~  
 296 ~~proposed rule is an invalid exercise of delegated legislative~~  
 297 ~~authority.~~ The petitioner has the burden of going forward with  
 298 evidence sufficient to support the petition. The agency then has  
 299 the burden to prove by a preponderance of the evidence that the  
 300 proposed rule is not an invalid exercise of delegated  
 301 legislative authority as to the objections raised pursuant to  
 302 paragraph (1)(b). ~~A person who is substantially affected by a~~  
 303 ~~change in the proposed rule may seek a determination of the~~  
 304 ~~validity of such change.~~ A person who is not substantially  
 305 affected by the proposed rule as initially noticed, but who is  
 306 substantially affected by the rule as a result of a change, may  
 307 challenge any provision of the resulting proposed rule and is  
 308 not limited to challenging the change to the proposed rule.

309 (3) CHALLENGING ~~EXISTING~~ RULES IN EFFECT; SPECIAL  
 310 PROVISIONS.—

311 (a) ~~A petition alleging substantially affected person may~~  
 312 ~~seek an administrative determination of the invalidity of an~~  
 313 ~~existing rule~~ may be filed at any time during which the  
 314 ~~existence of the rule is in effect.~~ The petitioner has the a  
 315 burden of proving by a preponderance of the evidence that the  
 316 existing rule is an invalid exercise of delegated legislative  
 317 authority as to the objections raised.

318 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED  
 319 RULES; SPECIAL PROVISIONS.—

Page 11 of 22

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

24-00433-16

2016372\_\_

320 (a) Any person substantially affected by an agency  
 321 statement that is an unadopted rule may seek an administrative  
 322 determination that the statement violates s. 120.54(1)(a). The  
 323 petition shall include the text of the statement or a  
 324 description of the statement and shall state ~~with particularity~~  
 325 facts sufficient to show that the statement constitutes an  
 326 unadopted a rule ~~under s. 120.52 and that the agency has not~~  
 327 ~~adopted the statement by the rulemaking procedure provided by s.~~  
 328 ~~120.54.~~

329 (b) The administrative law judge may extend the hearing  
 330 date beyond 30 days after assignment of the case for good cause.  
 331 Upon notification to the administrative law judge provided  
 332 before the final hearing that the agency has published a notice  
 333 of rulemaking under s. 120.54(3), such notice shall  
 334 automatically operate as a stay of proceedings pending adoption  
 335 of the statement as a rule. The administrative law judge may  
 336 vacate the stay for good cause shown. A stay of proceedings  
 337 pending rulemaking shall remain in effect so long as the agency  
 338 is proceeding expeditiously and in good faith to adopt the  
 339 statement as a rule.

340 (c) If a hearing is held and the petitioner proves the  
 341 allegations of the petition, the agency shall have the burden of  
 342 proving that rulemaking is not feasible or not practicable under  
 343 s. 120.54(1)(a).

344 (d) ~~(e)~~ The administrative law judge may determine whether  
 345 all or part of a statement violates s. 120.54(1)(a). The  
 346 decision of the administrative law judge shall constitute a  
 347 final order. The division shall transmit a copy of the final  
 348 order to the Department of State and the committee. The

Page 12 of 22

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

24-00433-16

2016372\_\_

349 Department of State shall publish notice of the final order in  
350 the first available issue of the Florida Administrative  
351 Register.

352 ~~(e)(d)~~ If an administrative law judge enters a final order  
353 that all or part of an unadopted rule ~~agency statement~~ violates  
354 s. 120.54(1)(a), the agency must immediately discontinue all  
355 reliance upon the unadopted rule ~~statement~~ or any substantially  
356 similar statement as a basis for agency action.

357 ~~(f)(e)~~ If proposed rules addressing the challenged  
358 unadopted rule ~~statement~~ are determined to be an invalid  
359 exercise of delegated legislative authority as defined in s.  
360 120.52(8)(b)-(f), the agency must immediately discontinue  
361 reliance upon ~~on~~ the unadopted rule ~~statement~~ and any  
362 substantially similar statement until rules addressing the  
363 subject are properly adopted, and the administrative law judge  
364 shall enter a final order to that effect.

365 ~~(g)(f)~~ All proceedings to determine a violation of s.  
366 120.54(1)(a) shall be brought pursuant to this subsection. A  
367 proceeding pursuant to this subsection may be consolidated with  
368 a proceeding under subsection (3) or under any other section of  
369 this chapter. This paragraph does not prevent a party whose  
370 substantial interests have been determined by an agency action  
371 from bringing a proceeding pursuant to s. 120.57(1)(e).

372 Section 4. Paragraphs (e) and (h) of subsection (1) and  
373 subsection (2) of section 120.57, Florida Statutes, are amended  
374 to read:

375 120.57 Additional procedures for particular cases.—

376 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING  
377 DISPUTED ISSUES OF MATERIAL FACT.—

24-00433-16

2016372\_\_

378 (e)1. An agency or an administrative law judge may not base  
379 agency action that determines the substantial interests of a  
380 party on an unadopted rule or a rule that is an invalid exercise  
381 of delegated legislative authority. ~~The administrative law judge~~  
382 ~~shall determine whether an agency statement constitutes an~~  
383 ~~unadopted rule.~~ This subparagraph does not preclude application  
384 of valid adopted rules and applicable provisions of law to the  
385 facts.

386 2. In a matter initiated as a result of agency action  
387 proposing to determine the substantial interests of a party, the  
388 party's timely petition for hearing may challenge the proposed  
389 agency action based on a rule that is an invalid exercise of  
390 delegated legislative authority or based on an alleged unadopted  
391 rule. For challenges brought under this subparagraph:

392 a. The challenge may be pled as a defense using the  
393 procedures set forth in s. 120.56(1).

394 b. Section 120.56(3)(a) applies to a challenge alleging  
395 that a rule is an invalid exercise of delegated legislative  
396 authority.

397 c. Section 120.56(4)(c) applies to a challenge alleging an  
398 unadopted rule.

399 d. This subparagraph does not preclude the consolidation of  
400 any proceeding under s. 120.56 with any proceeding under this  
401 paragraph.

402 ~~3.2-~~ Notwithstanding subparagraph 1., if an agency  
403 demonstrates that the statute being implemented directs it to  
404 adopt rules, that the agency has not had time to adopt those  
405 rules because the requirement was so recently enacted, and that  
406 the agency has initiated rulemaking and is proceeding

24-00433-16

2016372\_\_

407 expeditiously and in good faith to adopt the required rules,  
 408 then the agency's action may be based upon those unadopted rules  
 409 ~~if, subject to de novo review by the administrative law judge~~  
 410 ~~determines that rulemaking is neither feasible nor practicable~~  
 411 ~~and the unadopted rules would not constitute an invalid exercise~~  
 412 ~~of delegated legislative authority if adopted as rules. An~~  
 413 ~~unadopted rule~~ The agency action shall not be presumed valid ~~or~~  
 414 ~~invalid~~. The agency must demonstrate that the unadopted rule:  
 415 a. Is within the powers, functions, and duties delegated by  
 416 the Legislature or, if the agency is operating pursuant to  
 417 authority vested in the agency by derived from the State  
 418 Constitution, is within that authority;  
 419 b. Does not enlarge, modify, or contravene the specific  
 420 provisions of law implemented;  
 421 c. Is not vague, establishes adequate standards for agency  
 422 decisions, or does not vest unbridled discretion in the agency;  
 423 d. Is not arbitrary or capricious. A rule is arbitrary if  
 424 it is not supported by logic or the necessary facts; a rule is  
 425 capricious if it is adopted without thought or reason or is  
 426 irrational;  
 427 e. Is not being applied to the substantially affected party  
 428 without due notice; and  
 429 f. Does not impose excessive regulatory costs on the  
 430 regulated person, county, or city.  
 431 ~~4.3-~~ The recommended and final orders in any proceeding  
 432 shall be governed by ~~the provisions of~~ paragraphs (k) and (l),  
 433 except that the administrative law judge's determination  
 434 regarding an unadopted rule under subparagraph 1. or  
 435 subparagraph 2. shall not be rejected by the agency unless the

Page 15 of 22

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

24-00433-16

2016372\_\_

436 agency first determines from a review of the complete record,  
 437 and states with particularity in the order, that such  
 438 determination is clearly erroneous or does not comply with  
 439 essential requirements of law. In any proceeding for review  
 440 under s. 120.68, if the court finds that the agency's rejection  
 441 of the determination regarding the unadopted rule does not  
 442 comport with ~~the provisions of~~ this subparagraph, the agency  
 443 action shall be set aside and the court shall award to the  
 444 prevailing party the reasonable costs and a reasonable attorney  
 445 ~~attorney's~~ fee for the initial proceeding and the proceeding for  
 446 review.  
 447 5. A petitioner may pursue a separate, collateral challenge  
 448 under s. 120.56 even if an adequate remedy exists through a  
 449 proceeding under this section. The administrative law judge may  
 450 consolidate the proceedings.  
 451 (h) Any party to a proceeding in which an administrative  
 452 law judge ~~of the Division of Administrative Hearings~~ has final  
 453 order authority may move for a summary final order when there is  
 454 no genuine issue as to any material fact. A summary final order  
 455 shall be rendered if the administrative law judge determines  
 456 from the pleadings, depositions, answers to interrogatories, and  
 457 admissions on file, together with affidavits, if any, that no  
 458 genuine issue as to any material fact exists and that the moving  
 459 party is entitled as a matter of law to the entry of a final  
 460 order. A summary final order shall consist of findings of fact,  
 461 if any, conclusions of law, a disposition or penalty, if  
 462 applicable, and any other information required by law to be  
 463 contained in the final order.  
 464 (2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT

Page 16 of 22

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

24-00433-16

2016372\_\_

465 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which  
466 subsection (1) does not apply:

467 (a) The agency shall:

468 1. Give reasonable notice to affected persons of the action  
469 of the agency, whether proposed or already taken, or of its  
470 decision to refuse action, together with a summary of the  
471 factual, legal, and policy grounds therefor.

472 2. Give parties or their counsel the option, at a  
473 convenient time and place, to present to the agency or hearing  
474 officer written or oral evidence in opposition to the action of  
475 the agency or to its refusal to act, or a written statement  
476 challenging the grounds upon which the agency has chosen to  
477 justify its action or inaction.

478 3. If the objections of the parties are overruled, provide  
479 a written explanation within 7 days.

480 (b) An agency may not base agency action that determines  
481 the substantial interests of a party on an unadopted rule or a  
482 rule that is an invalid exercise of delegated legislative  
483 authority.

484 (c) ~~(b)~~ The record shall only consist of:

485 1. The notice and summary of grounds.

486 2. Evidence received.

487 3. All written statements submitted.

488 4. Any decision overruling objections.

489 5. All matters placed on the record after an ex parte  
490 communication.

491 6. The official transcript.

492 7. Any decision, opinion, order, or report by the presiding  
493 officer.

Page 17 of 22

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

24-00433-16

2016372\_\_

494 Section 5. Subsections (1) and (9) of section 120.68,  
495 Florida Statutes, are amended to read:

496 120.68 Judicial review.—

497 (1) (a) A party who is adversely affected by final agency  
498 action is entitled to judicial review.

499 (b) A preliminary, procedural, or intermediate order of the  
500 agency or of an administrative law judge of the Division of  
501 Administrative Hearings is immediately reviewable if review of  
502 the final agency decision would not provide an adequate remedy.

503 (9) A ~~No~~ petition challenging an agency rule as an invalid  
504 exercise of delegated legislative authority shall not be  
505 instituted pursuant to this section, except to review an order  
506 entered pursuant to a proceeding under s. 120.56, s.  
507 120.57(1)(e)1., or s. 120.57(2)(b) or an agency's findings of  
508 immediate danger, necessity, and procedural fairness  
509 prerequisite to the adoption of an emergency rule pursuant to s.  
510 120.54(4), unless the sole issue presented by the petition is  
511 the constitutionality of a rule and there are no disputed issues  
512 of fact.

513 Section 6. Section 120.695, Florida Statutes, is amended to  
514 read:

515 120.695 Notice of noncompliance; designation of minor  
516 violation of rules.—

517 (1) It is the policy of the state that the purpose of  
518 regulation is to protect the public by attaining compliance with  
519 the policies established by the Legislature. Fines and other  
520 penalties may be provided in order to assure compliance;  
521 however, the collection of fines and the imposition of penalties  
522 are intended to be secondary to the primary goal of attaining

Page 18 of 22

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

24-00433-16

2016372\_\_

523 compliance with an agency's rules. It is the intent of the  
 524 Legislature that an agency charged with enforcing rules shall  
 525 issue a notice of noncompliance as its first response to a minor  
 526 violation of a rule in any instance in which it is reasonable to  
 527 assume that the violator was unaware of the rule or unclear as  
 528 to how to comply with it.

529 (2) (a) Each agency shall issue a notice of noncompliance as  
 530 a first response to a minor violation of a rule. A "notice of  
 531 noncompliance" is a notification by the agency charged with  
 532 enforcing the rule issued to the person or business subject to  
 533 the rule. A notice of noncompliance may not be accompanied by  
 534 a fine or other disciplinary penalty. It must identify the  
 535 specific rule that is being violated, provide information on how  
 536 to comply with the rule, and specify a reasonable time for the  
 537 violator to comply with the rule. A rule is agency action that  
 538 regulates a business, occupation, or profession, or regulates a  
 539 person operating a business, occupation, or profession, and  
 540 that, if not complied with, may result in a disciplinary  
 541 penalty.

542 (b) Each agency shall review all of its rules and designate  
 543 those for which a violation would be a minor violation and for  
 544 which a notice of noncompliance must be the first enforcement  
 545 action taken against a person or business subject to regulation.  
 546 A violation of a rule is a minor violation if it does not result  
 547 in economic or physical harm to a person or adversely affect the  
 548 public health, safety, or welfare or create a significant threat  
 549 of such harm. ~~If an agency under the direction of a cabinet~~  
 550 ~~officer mails to each licensee a notice of the designated rules~~  
 551 ~~at the time of licensure and at least annually thereafter, the~~

Page 19 of 22

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

24-00433-16

2016372\_\_

552 ~~provisions of paragraph (a) may be exercised at the discretion~~  
 553 ~~of the agency. Such notice shall include a subject matter index~~  
 554 ~~of the rules and information on how the rules may be obtained.~~

555 (c) 1. No later than June 30, 2017, and after such date  
 556 within 3 months after any request of the rules ombudsman in the  
 557 Executive Office of the Governor, The agency's review and  
 558 designation must be completed by December 1, 1995, each agency  
 559 shall review under the direction of the Governor shall make a  
 560 report to the Governor, and each agency under the joint  
 561 direction of the Governor and Cabinet shall report to the  
 562 Governor and Cabinet by January 1, 1996, on which of its rules  
 563 and certify to the President of the Senate, the Speaker of the  
 564 House of Representatives, the committee, and the rules ombudsman  
 565 those rules that have been designated as rules the violation of  
 566 which would be a minor violation under paragraph (b), consistent  
 567 with the legislative intent stated in subsection (1).

568 2. Beginning July 1, 2017, each agency shall:

569 a. Publish all rules that the agency has designated as  
 570 rules the violation of which would be a minor violation, either  
 571 as a complete list on the agency's website or by incorporation  
 572 of the designations in the agency's disciplinary guidelines  
 573 adopted as a rule.

574 b. Ensure that all investigative and enforcement personnel  
 575 are knowledgeable about the agency's designations under this  
 576 section.

577 3. For each rule filed for adoption, the agency head shall  
 578 certify whether any part of the rule is designated as a rule the  
 579 violation of which would be a minor violation and shall update  
 580 the listing required by sub-subparagraph 2.a.

Page 20 of 22

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

24-00433-16

2016372\_\_

581 (d) The Governor or the Governor and Cabinet, as  
 582 appropriate ~~pursuant to paragraph (e)~~, may evaluate the review  
 583 and designation effects of each agency subject to the direction  
 584 and supervision of such authority and may ~~direct apply~~ a  
 585 different designation than that applied by ~~such the~~ agency.

586 (e) Notwithstanding s. 120.52(1)(a), this section does not  
 587 apply to:

588 1. The Department of Corrections;

589 2. Educational units;

590 3. The regulation of law enforcement personnel; or

591 4. The regulation of teachers.

592 (f) Designation pursuant to this section is not subject to  
 593 challenge under this chapter.

594 Section 7. Paragraph (a) of subsection (4) of section  
 595 120.595, Florida Statutes, is amended to read:

596 120.595 Attorney's fees.—

597 (4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION

598 120.56(4).—

599 (a) If the appellate court or administrative law judge  
 600 determines that all or part of an agency statement violates s.  
 601 120.54(1)(a), or that the agency must immediately discontinue  
 602 reliance on the statement and any substantially similar  
 603 statement pursuant to s. 120.56(4)(f) ~~s. 120.56(4)(e)~~, a  
 604 judgment or order shall be entered against the agency for  
 605 reasonable costs and reasonable attorney's fees, unless the  
 606 agency demonstrates that the statement is required by the  
 607 Federal Government to implement or retain a delegated or  
 608 approved program or to meet a condition to receipt of federal  
 609 funds.

Page 21 of 22

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

24-00433-16

2016372\_\_

610 Section 8. This act shall take effect July 1, 2016.

Page 22 of 22

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



# THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

**COMMITTEES:**  
Appropriations, *Chair*  
Appropriations Subcommittee on General  
Government  
Banking and Insurance  
Reapportionment  
Rules

**JOINT COMMITTEE:**  
Joint Legislative Budget Commission,  
*Alternating Chair*

**SENATOR TOM LEE**  
24th District

October 7, 2015

The Honorable Miguel Diaz de la Portilla  
Senate Committee on Judiciary, Chair  
406 Senate Office Building  
404 South Monroe Street  
Tallahassee, FL 32399

Dear Chairman Diaz de la Portilla,

I respectfully request that SB 372 related to *Administrative Procedures*, be placed on the Senate Committee on Judiciary agenda at your earliest convenience.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Tom Lee".

Tom Lee  
Senator, District 24

Cc: Tom Cibula, Staff Director

REPLY TO:

- 915 Oakfield Drive, Suite D, Brandon, Florida 33511 (813) 653-7061
- 418 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-5024

Senate's Website: [www.flsenate.gov](http://www.flsenate.gov)

**ANDY GARDINER**  
President of the Senate

**GARRETT RICHTER**  
President Pro Tempore



THE FLORIDA SENATE

APPEARANCE RECORD

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

11-17-2015

Meeting Date

372

Bill Number (if applicable)

Topic Administrative Procedures

Amendment Barcode (if applicable)

Name Bob Cohen

Job Title Director and Chief Judge DOAH

Address 1230 Apalachee Parkway

Phone 850-488-9675

Street

Tallahassee

FL

32399-3060

Email bob.cohen@doah.state.fl.us

City

State

Zip

Speaking:  For  Against  Information

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

Representing Division of Administrative Hearings

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

CS-001 (10/14/11)

**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 494

INTRODUCER: Judiciary Committee and Senator Hukill

SUBJECT: Digital Assets

DATE: November 18, 2015      REVISED: \_\_\_\_\_

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

---

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 494 is a state adaptation of the Revised Uniform Fiduciary Access to Digital Assets Act. This version of the model act was approved by the Uniform Law Commission in July, 2015. It addresses conflicting interests between fiduciaries, who are trying to access the digital assets of someone who has died or become incapacitated, and custodians, who possess the assets.

Digital assets are electronic records in which someone has a personal interest or right. They include electronic communications and records such as emails, text messages, online photographs, documents stored in the cloud, electronic bank statements, and other electronic communications or records.

The purpose of the bill is twofold. First, it provides fiduciaries the legal authority to manage digital assets and electronic communications in the same manner that they manage tangible assets and accounts. Second, it provides custodians of digital assets and electronic communications the legal authority they need to interact with the fiduciaries of their users while honoring the user's privacy expectations for his or her personal communications.<sup>1</sup> A custodian is granted immunity from liability for acts or omissions done in good faith compliance with the provisions of this bill.

---

<sup>1</sup> National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015) Prefatory Note* (on file with the Senate Committee on Judiciary).

The general goal of the bill is to give Internet users the ability to plan for the management and disposition of their digital assets if they should die or become unable to manage their assets. This is accomplished by vesting fiduciaries with the authority to access, control, or copy digital assets and accounts.<sup>2</sup>

## II. Present Situation:

### Background

Digital age technology has dramatically transformed how people acquire and store information, communicate, and transact business. Before the Internet was developed, most information was circulated in tangible forms, often reduced to ink on paper. However, as people have embraced electronic devices, many paper documents have been replaced by digital files, inboxes often substitute for mailboxes, glossy photographs have given way to digital images, and the metal filing cabinet with a key lock has been displaced by a networked file server with user access security.

While the advantages of these new technologies surpass the disadvantages, they have created challenges, particularly to a person who is tasked with corralling the digital assets<sup>3</sup> of someone who has either lost capacity or died. When someone is declared incapacitated or dies in Florida, a fiduciary<sup>4</sup> is required and given legal authority to inventory the person's assets, pay the person's debts, taxes, and expenses, and preserve the person's property during the period of incapacity or transfer the person's property to the correct beneficiaries after death.<sup>5</sup>

Previously, someone's personal information was tangible and could be located by sifting through paper records or waiting for the incoming mail to divulge banking records and bills to be paid. Locating these records and managing property and social media accounts in the digital age is more complicated. Substantial amounts of valuable electronic data and digital assets are stored in cell phones, laptops, personal computers, online accounts, and other devices. How does someone in a fiduciary relationship identify and locate that person's digital assets? Once identified, who has control or ownership? How is an account accessed without a decedent's password? Does an original terms-of-service agreement control whether a successor may gain access to an account? Generally, a terms-of-service agreement, rather than state property law, controls the access to someone's digital assets, upon death or incapacity.

Efforts to resolve these legal issues have pitted the fiduciary's duty to identify and access the digital assets against the Internet service provider's duty to protect the original account holder's privacy interest. The Internet service provider is also concerned with not illegally divulging information that could be a violation of state and federal computer security laws. An additional

---

<sup>2</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes (2015)* (on file with the Senate Committee on Judiciary).

<sup>3</sup> Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property and client lists. The assets are generally important because of their sentimental or financial value.

<sup>4</sup> A fiduciary is defined as someone who owes to another person a duty to act in good faith and trust. BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>5</sup> Digital Assets and Information Study Committee of the Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper: Digital Assets Questions and Answers (2015)* (on file with the Senate Committee on Judiciary).

barrier is presented by the conditions of the terms-of-service agreement that the original account holder agreed to when contracting with the service provider.

Mindful that few laws exist to resolve these growing conflicts, the Uniform Law Commission<sup>6</sup> drafted a model law, the Uniform Fiduciary Access to Digital Assets, which it approved in 2014. Versions of the model act were introduced in 27 state legislatures in 2015. Not one bill passed. The bills were defeated by vocal opposition from Internet-based businesses and privacy advocates. The Uniform Law Commission reconvened in 2015 to address the issue of accessing digital assets. The commission produced a revised version of the earlier act for 2016.<sup>7</sup> CS/SB 494 is a state adaptation of the Revised Uniform Fiduciary Access to Digital Access Act, often referred to as the Revised UFADAA.

## **Privacy Laws for Electronic Communications**

### ***Federal Law***

Both federal and state laws prohibit the unauthorized access of computer systems and certain types of protected data. The most relevant federal laws, passed in 1986, are the Computer Fraud and Abuse Act<sup>8</sup> and the Stored Communications Act.<sup>9</sup>

The Computer Fraud and Abuse Act<sup>10</sup> is a computer security law that imposes penalties for the unauthorized access of stored data, devices, and computer hardware.<sup>11</sup> The law is designed to protect computers in which there is a federal interest and shields them from certain threats and forms of espionage and from being corruptly used as vehicles to commit fraud.<sup>12</sup> In essence, the law makes it a crime to access a computer, online service, or online account without authorization. When this law is read in the context of accessing digital assets, the issue becomes whether a fiduciary has been given authority to access a computer by virtue of a law or whether access must be given explicitly by the owner of the computer, online service, or account.<sup>13</sup>

---

<sup>6</sup> According to its website, the Uniform Law Commission was established in 1892 and is made up of lawyers who are appointed by state governments. Its purpose is to research, draft, and promote the enactment of non-partisan uniform state legislation. For more information about the Uniform Law Commission, see About the ULC at [http://www.uniformlawcommission.com/Narrative.aspx?title=About the ULC](http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC) (last visited Nov. 3, 2015). The commission began meeting in 2012 to develop the Uniform Fiduciary Access to Digital Assets Act.

<sup>7</sup> Benjamin Orzeske, *Managing a Digital Estate*, ABA Trust Letter, American Bankers Association, October 2015 (on file with the Senate Committee on Judiciary).

<sup>8</sup> 18 U.S.C. s. 1030 *et seq.*

<sup>9</sup> 18 U.S.C. s. 2701 *et seq.*

<sup>10</sup> According to the U.S. Department of Justice, the act is broad enough in scope to permit the Federal Government to prosecute someone if the person exceeds his or her authorized access by violating the access terms of a web site's terms-of-service agreement or usage policies. James D. Lamm, *Digital Passing: Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, <http://www.digitalpassing.com/wordpress/wp-content/uploads/2013/02/James-Lamm-Digital-Death-1-17-2013.pdf>.

<sup>11</sup> William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014), <http://www.inknowvision.com/newsletters/July2014.pdf>.

<sup>12</sup> Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, RS20830 (Oct. 15, 2014).

<sup>13</sup> *Supra*, note 5.

The Stored Communications Act, which is part of the Electronic Communications Privacy Act,<sup>14</sup> establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files.<sup>15</sup> Under the terms of the act, providers of communications services to the public may not be compelled to disclose data and information stored online. The providers are prohibited from voluntarily divulging the contents of stored communications unless an exception applies under s. 2702(b) of the act. Wrongful disclosures result in legal penalties. However, there is a “lawful consent” exception which permits a service provider to voluntarily disclose electronic communications if lawful consent is given.<sup>16</sup>

These privacy protections are viewed by some as being substantial barriers for family members and fiduciaries who seek to access the contents of a deceased or incapacitated user’s online accounts. The service providers see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. The service providers’ reasoning is that, if the Stored Communications Act applies, the online account service provider is prohibited by law from disclosing the contents of the communications and files.

### ***State Law***

Two chapters in the *Florida Statutes* address computer related crimes and the security of communications and are modeled after the Stored Communications Act. Chapter 815, F.S., is the “Florida Computer Crimes Act” and ch. 934, F.S., is entitled “Security of Communications; Surveillance.” Neither chapter addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.<sup>17</sup> Additionally, no other provision of Florida law specifically addresses digital access by fiduciaries.

### **Terms-of-Service Agreements**

Terms-of-service agreements, the conditions controlling the relationship between the account holder and the service provider, are not uniform among Internet service providers. While some Internet service providers publish explicit policies detailing what will occur to digital assets when an individual dies, other providers do not. Some providers’ policies state that upon the death of the account holder, the account will terminate, thereby prohibiting access to the account by anyone. Providers often publish their policies in the terms-of-service agreements, but the terms are frequently ignored as readers quickly move past the language to progress to the end of the document.

---

<sup>14</sup> 18 U.S.C. s. 2510 *et seq.*

<sup>15</sup> James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, <http://www.digitalpassing.com/wordpress/wp-content/uploads/2013/02/James-Lamm-Digital-Death-1-17-2013.pdf>.

<sup>16</sup> *Digital Assets and Information Study Committee of the Real Property, Probate and Trust Law Section of The Florida Bar*, *supra* note 5.

<sup>17</sup> *Id.*

### III. Effect of Proposed Changes:

#### General Overview

Because the Florida Statutes do not authorize fiduciary access to digital assets, the purpose of this bill is to provide fiduciaries with specific authority to access, control, or copy digital assets and accounts. The four types of fiduciaries this bill applies to are personal representatives of decedents' estates, guardians of the property of minors or incapacitated persons, agents who are acting under a power of attorney, and trustees.<sup>18</sup>

According to the Real Property, Probate and Trust Law Section of The Florida Bar, or RPPTL, this act provides the legal authority that a fiduciary needs to manage digital assets in compliance with a person's estate plan, while also ensuring that a person's private electronic communications remain private unless the person gave consent for disclosure. The bill allows a user to specify whether his or her digital assets will be preserved, distributed to heirs, or destroyed. In keeping with federal privacy laws, the bill prevents companies that store electronic communications from releasing them to fiduciaries unless the user has consented to the disclosure. Fiduciaries are required under the bill to provide proof of their authority under Florida law to the custodians of the digital assets. Custodians that comply with a fiduciary's apparent authorization request are given immunity from liability under the statutes that prohibit unauthorized access.<sup>19</sup>

The Uniform Law Commission has stated that this revised uniform act, which this bill mirrors, gives Internet users the ability to plan for the management and disposition of their assets in similar ways that they make plans for tangible property. The bill has a three-tiered system of priorities in the event of conflicting instructions. Additionally, the bill is designed as an overlay statute that works in conjunction with a state's existing laws involving probate, guardianship, trusts, and powers of attorney.<sup>20</sup>

#### Limited Application

According to RPPTL, the bill is limited in its scope and applies only to fiduciaries who are already bound to act in compliance with their fiduciary duties and powers. The bill does not extend to family members or other people who seek access to digital assets unless they are also a fiduciary. Moreover, the ability of a fiduciary to access a digital asset does not entitle the fiduciary to own the asset or make transactions with the asset.

The scope of the bill is further limited by the definition of "digital assets." The bill's only application is to an electronic record, which includes electronic communications, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.<sup>21</sup>

---

<sup>18</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 2.

<sup>19</sup>*Id.*

<sup>20</sup> Uniform Law Commission, *The Revised Uniform Fiduciary Access to Digital Assets Act – A Summary*, 2015 (on file with the Senate Committee on Judiciary).

<sup>21</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *supra* note 2.

## **Online Tool**

One significant addition to this year's version of the bill that was not present last year is the concept of an "online tool" for directing fiduciary assets. The online tool is an electronic service provided by a custodian which allows the user, in an agreement separate and distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

### ***Purpose (Sections 1 & 2)***

Section 740.001, F.S., creates the "Florida Fiduciary Access to Digital Assets Act." According to RPPTL the goal of this legislation is to:

- Remove barriers to a fiduciary who is seeking access to electronic records;
- Respect the user's privacy and intentions; and
- Ensure that an Internet service provider's compliance with the bill's disclosure requirements do not subject it to liability for violations of federal privacy laws.<sup>22</sup>

### ***Definitions (Section 3)***

Section 740.002, F.S., defines 27 terms used in the bill. The majority of those terms are found in the Florida Probate Code and the Florida Powers of Attorney Act, while others are adapted from federal statutes or the Revised Uniform Fiduciary Access to Digital Assets Act.<sup>23</sup> Some of the most frequently used terms in this bill are listed below.

An "account" is defined as an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

"Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person. In lay terms, this is considered to be what is on the "outside of an envelope" as opposed to the contents inside the envelope.

"Content of an electronic communication" is defined to mean information concerning the substance or meaning of the communication which:

- Has been sent or received by the account holder;
- Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
- Is not readily accessible to the public.

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

In lay terms, this is generally understood to be the “inside of an envelope” or the subject line of an e-mail, the body of an e-mail or attachment, or the body of other types of electronic communications that are protected by the Stored Communications Act.<sup>24</sup>

A “custodian” is defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user.

A “designated recipient” is defined as a person chosen by a user through an online tool to administer digital assets of the user.

A “digital asset” is defined as an electronic record in which a person has a right or interest but does not include the underlying asset or liability unless the asset or liability is itself an electronic record.

“Electronic communication” has the same meaning as that provided in 18 U.S.C. s. 2510(12). It means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce. It does not include any wire or oral communication; any communication made through a tone-only paging device; any communication from a tracking device;<sup>25</sup> or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

#### ***A User’s Direction for Disclosure of Digital Assets (Section 4)***

Section 740.003, F.S., which was not included in last year’s digital assets bill, establishes the user’s ability to direct disclosure of the digital assets and the order of preference for his or her direction. It is a three-tiered priority system.

The first priority is a user’s online direction for a specific account. If a company provides an online tool for a user to designate a person to receive access to his or her account upon death or incapacity, and the user takes advantage of the online tool, then the user’s designation prevails, even if it is in conflict with a contrary provision in the user’s will or trust, provided that the online tool allows the user to modify or delete a direction at all times. The user may direct the custodian to disclose or not disclose some or all of his or her digital assets, even the content of electronic communications.

The second priority is the user’s direction contained in a valid will, trust, power of attorney, or other record, if the user has not used an online tool to give direction or the custodian has not provided an online tool. If the user makes plans for disposing of his or her digital assets, then the

---

<sup>24</sup> According to James Lamm, an expert in this area of law, the Stored Communications Act does not protect the content of all electronic communications, and the Stored Communications Act does not protect all records held in electronic storage by storage providers. The Stored Communications Act protects the content of an electronic communication only if the content is held in electronic storage by a service provider, the service provider holding the content provides an electronic communication service or remote computing service to the public, and access to the content is restricted in a manner so that it is not completely public. *See* Lamm, *supra* note 15.

<sup>25</sup> A tracking device is an electronic or mechanical device that permits the tracking of a person or object. 18 U.S.C. s. 3117(b).



law gives effect to that plan and the custodian of the digital assets is required to comply with the plan.

The third priority is the terms-of-service agreement that governs the account. If the user does not provide for the disposition of his or her digital assets, whether online or in an estate plan, the terms-of-service governing the account controls.

#### ***Terms-of-Service Agreement is Preserved (Section 5)***

Section 740.004, F.S., clarifies that a terms-of-service agreement is preserved and the fiduciary has no greater rights than the user, unless there is a conflict with a user's direction. The fiduciary is not given any new or expanded rights. The fiduciary's access to digital assets may be modified or eliminated by a user, federal law, or by a terms-of-service agreement if the user has not provided direction under the previous section.

#### ***Procedure for Custodians When Disclosing Assets (Section 6)***

Section 740.005, F.S., establishes the custodian's procedure, or three options, for disclosing digital assets. When a custodian discloses a user's digital assets, the custodian has full discretion to:

- Allow the fiduciary or designated recipient full access to the user's account;
- Allow the fiduciary or designated recipient partial access to the account that is sufficient to perform the necessary tasks; or
- Provide the fiduciary or designated recipient a copy in a record of the digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if he or she were alive and had full capacity and access to the account.

A custodian:

- May charge a reasonable administrative fee for the cost of disclosing digital assets; and
- Is not required, under this act, to disclose a digital asset that the user deleted.

If a user directs, or a fiduciary requests, a custodian to disclose some, but not all of the user's digital assets under this act, the custodian is not required to disclose the assets if segregating the assets would be unduly burdensome. If the custodian believes that an undue burden exists, the custodian or the fiduciary may seek a court order to disclose:

- A subset of the user's digital assets, limited by date;
- All of the digital assets to the fiduciary or designated recipient, or to the court for a review in chambers; or
- None of the user's digital assets.

#### ***Sections 7—14***

Sections 7 – 14 establish the rights of personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications that are protected by federal privacy laws and for other forms of digital assets. In general, fiduciaries will have access to a catalogue of the user's communications, the outside of the envelope, but not the content, the inside of the envelope, unless the user consented to the disclosure of the content of the communication.

***Disclosure of the Content of Electronic Communications of a Deceased User (Section 7)***

Section 740.006, F.S., establishes the rights of a personal representative of a decedent to the contents, of an electronic communication of the user. Section 8, below, addresses disclosure of non-content and other digital assets of a user. A personal representative may not access the contents of a decedent's electronic communications unless the user consented or a court so directs.

In order for a custodian to disclose to the personal representative the content of an electronic communication that the user sent or received, the personal representative must supply to the custodian:

- A written request for disclosure in physical or electronic form;
- A certified copy of the death certificate of the user;
- A certified copy of the letters of administration or similar specified authority;
- A copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications unless the user provided direction in an online tool; and
- If the custodian requests, the personal representative must provide specified information that will identify the user's account, evidence linking the account to the user; or a finding by the court that the user had a specific account with the custodian based upon enumerated information; that disclosure of the contents would not violate certain federal law or other applicable laws; unless the user provided direction through an online tool, that the user consented to disclosure of the content; or disclosure of the content is reasonably necessary for the administration of the estate.

***Disclosure of Other Digital Assets of a Deceased User (Section 8)***

Section 740.007, F.S., establishes the rights of a personal representative to the *other* digital assets of a deceased user. The purpose of the section is to give a personal representative default access to the "catalogue" or outside of the envelope, of electronic communications and other digital assets that are not protected by federal privacy laws.

A personal representative is permitted to have access to all of a decedent's other digital assets, excluding the contents of electronic communications as discussed above in section 7, unless the deceased user prohibited disclosure or a court directs differently. The custodian must disclose to the personal representative a catalog of electronic communications sent or received by the user and the digital assets of the user, if the personal representative supplies the custodian with:

- A written request for disclosure in physical or electronic form;
- A certified copy of the death certificate of the user;
- A certified copy of the letters of administration or similar specified authority; and
- If the custodian requests, the personal representative must provide specified information that will identify the user's account, evidence linking the account to the principal; an affidavit stating that disclosure is reasonably necessary for the administration of the decedent's estate, or an order of the court which finds that the user had a specific account with the custodian, as specified earlier, or that disclosure of the user's digital assets is reasonably necessary for the administration of the estate.

***Disclosure of Content of Electronic Communications of a Principal (Section 9)***

Section 740.008, F.S., establishes the right of an agent, who acts pursuant to a power of attorney, to the contents of electronic communications of the principal. When acting pursuant to the power of attorney, an agent is permitted access to the contents of a principal's electronic communications if that authority is expressly granted by the principal and is not in some other way restricted by the principal or a court.

The custodian is required to disclose the content if the agent supplies the custodian:

- A written request in physical or electronic form;
- An original or copy of the power of attorney in which the authority over the content is expressly granted to the agent;
- A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
- If requested by the custodian, specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

***Disclosure of Other Digital Assets of a Principal (Section 10)***

Section 740.009, F.S., establishes the right of an agent, who acts pursuant to a power of attorney, access to the other digital assets of the principal. It establishes that the agent has default authority over the principal's digital assets, except for the content of the principal's electronic communications.

Unless otherwise ordered by a court, directed by a principal, or provided by a power of attorney, a custodian must disclose to an agent who has been granted specific authority over the digital assets or general authority to act on behalf of the principal, a catalog of electronic communications that were sent or received by the principal, and digital assets of the principal, but not the content of electronic communications.

The agent must supply the custodian with:

- A written request in physical or electronic form;
- An original or a copy of the power of attorney which grants the agent specific authority over digital assets or general authority to act on behalf of the principal;
- A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
- If requested by the custodian, certain enumerated identifying information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

***Disclosure of Digital Assets held in Trust when the Trustee is the Original User (Section 11)***

Section 740.01, F.S., establishes that a trustee who is an original account holder can access all digital assets that are held in the trust. A trustee who is an original user may access any digital asset, which includes the catalogue and the content of electronic communications, unless it is otherwise ordered by a court or provided in the trust.

***Disclosure of Content of Electronic Communications Held in Trust When a Trustee is not the Original User (Section 12)***

Section 740.02, F.S., establishes the rights of a trustee to the contents of electronic communications held in trust when the trustee is *not* the original user. Unless otherwise ordered by a court, directed by the user, or provided in a trust, the custodian must disclose to a trustee, who is not an original user, the content of an electronic communication that was sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust. The trustee must provide the custodian:

- A written request in physical or electronic form;
- A certified copy of the trust instrument or a certification of trust which includes consent to disclosure of the content to the trustee;
- A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
- If requested by the custodian, certain identifying information assigned by the custodian to identify the trust's account or evidence linking the account to the trust.<sup>26</sup>

***Disclosure of Other Digital Assets Held in Trust When the Trustee is not the Original User (Section 13)***

Section 740.03, F.S., establishes the rights of a trustee to other digital assets held in trust when the trustee is not the original user. Unless prohibited by a court, the user, or the trust instrument, a trustee who is not the original user may access the catalog of electronic communications and any digital assets, except the content of electronic communication, in an account of the trust. The trustee must supply the custodian:

- A written request for disclosure in physical or electronic form;
- A certified copy of the trust instrument or a certification of trust;
- A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee; and
- If requested by the custodian, specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

***Disclosure of Digital Assets to a Guardian of a Ward (Section 14)***

Unless a ward grants consent, a guardian is not authorized to access the contents of a ward's electronic communications. A guardian is permitted, however, to access the ward's other digital assets, except for the contents of electronic communications, pursuant to letters of guardianship or a court order, unless otherwise ordered by a court or directed by the user. The guardian must provide the custodian:

- A written request for disclosure in physical or electronic form;
- A certified copy of letters of plenary guardianship of the property or the court order giving the guardian authority over the digital assets of the ward; and
- If requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward.

---

<sup>26</sup> According to RPPTL, sections 12 and 13 of the bill address situations involving either an inter vivos transfer of a digital asset into a trust or the transfer, via a pour-over will of a digital asset into a trust.

A custodian of the ward's digital assets may suspend or terminate an account of the ward for good cause if requested to do so by a guardian with general authority to manage the ward's property. The request to suspend or terminate must be accompanied by a certified copy of the court order giving the guardian the authority over the ward's property.<sup>27</sup>

### ***Fiduciary Duty and Authority (Section 15)***

Section 740.05, F.S., establishes the legal duties of a fiduciary charged with managing digital assets. This includes the duties of care, loyalty, and confidentiality. Section 740.05(2), F.S., establishes the fiduciary's authority to exercise control over the digital assets in conjunction with other statutes.

The fiduciary's authority is:

- Subject to the terms-of-service agreement, except as directed in the online tool;
- Subject to other laws, including copyright law;
- Limited by the scope of the fiduciary's duties; and
- May not be used to impersonate the user.

A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which those persons had or has a right or interest if the digital asset is not held by a custodian or subject to a terms-of-service agreement. For purposes of any applicable computer fraud or unauthorized computer access laws, a fiduciary who acts within the scope of the fiduciary's duties is an authorized user of the property. A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access the property and any digital assets that are stored in it and is an authorized user for the purpose of computer fraud and unauthorized computer access laws.

A custodian is authorized to disclose information in an account to a fiduciary of the user if that information is required to terminate an account used to access digital assets licensed to the user.

A fiduciary who requests a custodian to terminate a user's account must submit the request in writing, either in paper or electronic form and also supply:

- A certified copy of the death certificate of the user, if the user is deceased;
- A certified copy of the letters of administration or other specified court orders; and
- If requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward, or a court finding that the user had a specific account with the custodian, identifiable by certain enumerated information.

### ***Custodian Compliance and Immunity (Section 16)***

Section 740.06, F.S., provides that a custodian has 60 days to comply with a request from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian does not comply, the fiduciary or designated representative may apply to the court for an order directing compliance. The order directing compliance must contain a finding that compliance would not be in violation of 18 U.S.C. s. 2702.

---

<sup>27</sup> According to the RPPTL, this section requires that the guardian must be specifically authorized, not implicitly authorized, to access the ward's digital assets and electronic communications.

A custodian may deny a request for disclosure or terminate an account if the custodian is aware of any lawful access to the account after the custodian receives the fiduciary's request. The bill does not limit a custodian's ability to require a fiduciary or designated recipient from obtaining a court order that specifies that an account belongs to the ward or principal, specifies that there is sufficient consent from the ward or principal, and contains a finding required by a law other than one found in this bill.

This section also establishes that a custodian and its officers, employees, and agents are immune from liability for acts or omissions done in good faith and in compliance with this chapter.

***Electronic Signatures in Global and National Commerce Act (Section 17)***

Section 740.07, F.S., establishes the relationship between this act and the Electronic Signatures in Global and National Commerce Act, noting where this act does and does not modify the federal law.

***Applicability (Section 18)***

Section 740.08, F.S., provides that the power granted by the act to fiduciaries, personal representatives, guardians, and trustees, applies to these people regardless of whether their authority arose, before, on, or after July 1, 2016, the effective date of the bill. Additionally, the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

***Severability (Section 19)***

A standard severability provision is supplied which notes that if any provision is held invalid, the other provisions of the chapter will remain in effect.

***Effective Date (Section 20)***

The bill takes effect July 1, 2016.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not affect counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**D. Other Constitutional Issues:**

The federal preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, or ECPA, a service provider, with few exceptions, may not divulge the contents of a communication without the “lawful consent” of the originator, addressee, intended recipient, or the subscriber. Under the provisions of this bill, an online tool is created and controlled by the Internet service providers that is separate from the terms of service agreement. This online tool allows the account holder or user to specifically “opt in” and grant permission to the fiduciary to access his or her digital assets. This affirmative act could be deemed to trigger the “lawful consent” exception to ECPA. It could be argued that the online tool, which the account holder or user must affirmatively use to authorize consent, avoids any conflict with the ECPA and violations of the federal law.

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

None.

**B. Private Sector Impact:**

This bill may help fiduciaries identify assets and bank accounts belonging to those who have died or become incapacitated. The custodians of digital assets, such as email service providers, however, might initially incur costs in reviewing requests for access to digital assets and then making those assets available. Custodians, however, are authorized to assess a reasonable administrative charge for the costs they incur in disclosing digital assets such that this bill should have no impact on them.

**C. Government Sector Impact:**

According to the Office of the State Courts Administrator, it cannot accurately determine the fiscal impact of the bill on the judicial branch. This is due to the unavailability of data needed to establish the increase in judicial time resulting from orders directing compliance, requests for disclosures, and determination requiring an in camera review of documents.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates the following sections of the Florida Statutes: 740.001, 740.09, 740.002, 740.003, 740.004, 740.005, 740.006, 740.007, 740.008, 740.009, 740.01, 740.02, 740.03, 740.04, 740.05, 740.06, 740.07, and 740.08.

**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 November 17, 2015:**

The definition of “ward” is amended and limited to clarify that a ward is someone for whom a guardian has already been appointed. The revised definition excludes a person for whom an application for the appointment of a guardian is pending before a court.

- B. **Amendments:**

None.





147100

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Diaz de la Portilla) recommended the following:

**Senate Amendment**

Delete lines 160 - 161  
and insert:  
been appointed.

By Senator Hukill

8-00057D-16

2016494\_\_

1 A bill to be entitled  
 2 An act relating to digital assets; providing a  
 3 directive to the Division of Law Revision and  
 4 Information; creating s. 740.001, F.S.; providing a  
 5 short title; creating s. 740.002, F.S.; defining  
 6 terms; creating s. 740.003, F.S.; authorizing a user  
 7 to use an online tool to allow a custodian to disclose  
 8 or to prohibit a custodian from disclosing digital  
 9 assets under certain circumstances; providing that  
 10 specified user's direction overrides a contrary  
 11 provision in a terms-of-service agreement under  
 12 certain circumstances; creating s. 740.004, F.S.;  
 13 providing construction; authorizing the modification  
 14 of a fiduciary's assets under certain circumstances;  
 15 creating s. 740.005, F.S.; providing procedures for  
 16 the disclosure of digital assets; creating s. 740.006,  
 17 F.S.; requiring a custodian to disclose the content of  
 18 electronic communications of a deceased user under  
 19 certain circumstances; creating s. 740.007, F.S.;  
 20 requiring a custodian to disclose other digital assets  
 21 of a deceased user under certain circumstances;  
 22 creating s. 740.008, F.S.; requiring a custodian to  
 23 disclose the content of electronic communications of a  
 24 principal under certain circumstances; creating s.  
 25 740.009, F.S.; requiring a custodian to disclose other  
 26 digital assets of a principal under certain  
 27 circumstances; creating s. 740.01, F.S.; requiring a  
 28 custodian to disclose to a trustee who is the original  
 29 user the digital assets held in trust under certain

Page 1 of 20

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

8-00057D-16

2016494\_\_

30 circumstances; creating s. 740.02, F.S.; requiring a  
 31 custodian to disclose to a trustee who is not the  
 32 original user the content of electronic communications  
 33 held in trust under certain circumstances; creating s.  
 34 740.03, F.S.; requiring a custodian to disclose to a  
 35 trustee who is not the original user other digital  
 36 assets under certain circumstances; creating s.  
 37 740.04, F.S.; authorizing the court to grant a  
 38 guardian the right to access a ward's digital assets  
 39 under certain circumstances; requiring a custodian to  
 40 disclose to a guardian a specified catalog of  
 41 electronic communications and specified digital assets  
 42 of a ward under certain circumstances; creating s.  
 43 740.05, F.S.; imposing fiduciary duties; providing for  
 44 the rights and responsibilities of certain  
 45 fiduciaries; creating s. 740.06, F.S.; requiring  
 46 compliance of a custodian; providing construction;  
 47 providing for immunity from liability for a custodian  
 48 and its officers, employees, and agents acting in good  
 49 faith in complying with their duties; creating s.  
 50 740.07, F.S.; providing construction; creating s.  
 51 740.08, F.S.; providing applicability; creating s.  
 52 740.09, F.S.; providing severability; providing an  
 53 effective date.

54  
 55 Be It Enacted by the Legislature of the State of Florida:

56  
 57 Section 1. The Division of Law Revision and Information is  
 58 directed to create chapter 740, Florida Statutes, consisting of

Page 2 of 20

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

8-00057D-16

2016494\_\_

59 ss. 740.001-740.09, Florida Statutes, to be entitled "Fiduciary  
 60 Access to Digital Assets."

61 Section 2. Section 740.001, Florida Statutes, is created to  
 62 read:

63 740.001 Short title.—This chapter may be cited as the  
 64 "Florida Fiduciary Access to Digital Assets Act."

65 Section 3. Section 740.002, Florida Statutes, is created to  
 66 read:

67 740.002 Definitions.—As used in this chapter, the term:

68 (1) "Account" means an arrangement under a terms-of-service  
 69 agreement in which the custodian carries, maintains, processes,  
 70 receives, or stores a digital asset of the user or provides  
 71 goods or services to the user.

72 (2) "Agent" means a person that is granted authority to act  
 73 for a principal under a durable or nondurable power of attorney,  
 74 whether denominated an agent, an attorney in fact, or otherwise.  
 75 The term includes an original agent, a co-agent, and a successor  
 76 agent.

77 (3) "Carries" means to engage in the transmission of  
 78 electronic communications.

79 (4) "Catalog of electronic communications" means  
 80 information that identifies each person with which a user has  
 81 had an electronic communication, the time and date of the  
 82 communication, and the electronic address of the person.

83 (5) "Content of an electronic communication" means  
 84 information concerning the substance or meaning of the  
 85 communication which:

86 (a) Has been sent or received by a user;

87 (b) Is in electronic storage by a custodian providing an

8-00057D-16

2016494\_\_

88 electronic communication service to the public or is carried or  
 89 maintained by a custodian providing a remote computing service  
 90 to the public; and

91 (c) Is not readily accessible to the public.

92 (6) "Court" means a circuit court of this state.

93 (7) "Custodian" means a person that carries, maintains,  
 94 processes, receives, or stores a digital asset of a user.

95 (8) "Designated recipient" means a person chosen by a user  
 96 through an online tool to administer digital assets of the user.

97 (9) "Digital asset" means an electronic record in which an  
 98 individual has a right or interest. The term does not include an  
 99 underlying asset or liability unless the asset or liability is  
 100 itself an electronic record.

101 (10) "Electronic" means relating to technology having  
 102 electrical, digital, magnetic, wireless, optical,  
 103 electromagnetic, or similar capabilities.

104 (11) "Electronic communication" has the same meaning as  
 105 provided in 18 U.S.C. s. 2510(12).

106 (12) "Electronic communication service" means a custodian  
 107 that provides to a user the ability to send or receive an  
 108 electronic communication.

109 (13) "Fiduciary" means an original, additional, or  
 110 successor personal representative, guardian, agent, or trustee.

111 (14) "Guardian" means a person who is appointed by the  
 112 court as guardian of the property of a minor or an incapacitated  
 113 individual. The term includes an original guardian, a co-  
 114 guardian, and a successor guardian, as well as a person  
 115 appointed by the court as an emergency temporary guardian of the  
 116 property.

8-00057D-16

2016494\_\_

117 (15) "Information" means data, text, images, videos,  
 118 sounds, codes, computer programs, software, databases, or the  
 119 like.

120 (16) "Online tool" means an electronic service provided by  
 121 a custodian which allows the user, in an agreement distinct from  
 122 the terms-of-service agreement between the custodian and user,  
 123 to provide directions for disclosure or nondisclosure of digital  
 124 assets to a third person.

125 (17) "Person" means an individual, estate, trust, business  
 126 or nonprofit entity, public corporation, government or  
 127 governmental subdivision, agency, or instrumentality, or other  
 128 legal entity.

129 (18) "Personal representative" means the fiduciary  
 130 appointed by the court to administer the estate of a deceased  
 131 individual pursuant to letters of administration or an order  
 132 appointing a curator or administrator ad litem for the estate.  
 133 The term includes an original personal representative, a  
 134 copersonal representative, and a successor personal  
 135 representative, as well as a person who is entitled to receive  
 136 and collect a deceased individual's property pursuant to an  
 137 order of summary administration issued pursuant to chapter 735.

138 (19) "Power of attorney" means a record that grants an  
 139 agent authority to act in the place of a principal pursuant to  
 140 chapter 709.

141 (20) "Principal" means an individual who grants authority  
 142 to an agent in a power of attorney.

143 (21) "Record" means information that is inscribed on a  
 144 tangible medium or that is stored in an electronic or other  
 145 medium and is retrievable in perceivable form.

8-00057D-16

2016494\_\_

146 (22) "Remote computing service" means a custodian that  
 147 provides to a user computer processing services or the storage  
 148 of digital assets by means of an electronic communications  
 149 system as defined in 18 U.S.C. s. 2510(14).

150 (23) "Terms-of-service agreement" means an agreement that  
 151 controls the relationship between a user and a custodian.

152 (24) "Trustee" means a fiduciary that holds legal title to  
 153 property under an agreement, declaration, or trust instrument  
 154 that creates a beneficial interest in the settlor or other  
 155 persons. The term includes an original trustee, a cotrustee, and  
 156 a successor trustee.

157 (25) "User" means a person that has an account with a  
 158 custodian.

159 (26) "Ward" means an individual for whom a guardian has  
 160 been appointed. The term includes an individual for whom an  
 161 application for the appointment of a guardian is pending.

162 (27) "Will" means an instrument admitted to probate,  
 163 including a codicil, executed by an individual in the manner  
 164 prescribed by the Florida Probate Code, which disposes of the  
 165 individual's property on or after his or her death. The term  
 166 includes an instrument that merely appoints a personal  
 167 representative or revokes or revises another will.

168 Section 4. Section 740.003, Florida Statutes, is created to  
 169 read:

170 740.003 User direction for disclosure of digital assets.—

171 (1) A user may use an online tool to direct the custodian  
 172 to disclose or not to disclose some or all of the user's digital  
 173 assets, including the content of electronic communications. If  
 174 the online tool allows the user to modify or delete a direction

8-00057D-16

2016494\_\_

175 at all times, a direction regarding disclosure using an online  
 176 tool overrides a contrary direction by the user in a will,  
 177 trust, power of attorney, or other record.

178 (2) If a user has not used an online tool to give direction  
 179 under subsection (1) or if the custodian has not provided an  
 180 online tool, the user may allow or prohibit disclosure to a  
 181 fiduciary of some or all of the user's digital assets, including  
 182 the content of electronic communications sent or received by the  
 183 user, in a will, trust, power of attorney, or other record.

184 (3) A user's direction under subsection (1) or subsection  
 185 (2) overrides a contrary provision in a terms-of-service  
 186 agreement that does not require the user to act affirmatively  
 187 and distinctly from the user's assent to the terms of service.

188 Section 5. Section 740.004, Florida Statutes, is created to  
 189 read:

190 740.004 Terms-of-service agreement preserved.—

191 (1) This chapter does not change or impair a right of a  
 192 custodian or a user under a terms-of-service agreement to access  
 193 and use the digital assets of the user.

194 (2) This chapter does not give a fiduciary any new or  
 195 expanded rights other than those held by the user for whom, or  
 196 for whose estate or trust, the fiduciary acts or represents.

197 (3) A fiduciary's access to digital assets may be modified  
 198 or eliminated by a user, by federal law, or by a terms-of-  
 199 service agreement if the user has not provided direction under  
 200 s. 740.003.

201 Section 6. Section 740.005, Florida Statutes, is created to  
 202 read:

203 740.005 Procedure for disclosing digital assets.—

8-00057D-16

2016494\_\_

204 (1) When disclosing the digital assets of a user under this  
 205 chapter, the custodian may, at its sole discretion:

206 (a) Grant a fiduciary or designated recipient full access  
 207 to the user's account;

208 (b) Grant a fiduciary or designated recipient partial  
 209 access to the user's account sufficient to perform the tasks  
 210 with which the fiduciary or designated recipient is charged; or

211 (c) Provide a fiduciary or designated recipient a copy in a  
 212 record of any digital asset that, on the date the custodian  
 213 received the request for disclosure, the user could have  
 214 accessed if the user were alive and had full capacity and access  
 215 to the account.

216 (2) A custodian may assess a reasonable administrative  
 217 charge for the cost of disclosing digital assets under this  
 218 chapter.

219 (3) A custodian is not required to disclose under this  
 220 chapter a digital asset deleted by a user.

221 (4) If a user directs or a fiduciary requests a custodian  
 222 to disclose under this chapter some, but not all, of the user's  
 223 digital assets to the fiduciary or a designated recipient, the  
 224 custodian is not required to disclose the assets if segregation  
 225 of the assets would impose an undue burden on the custodian. If  
 226 the custodian believes the direction or request imposes an undue  
 227 burden, the custodian or the fiduciary may seek an order from  
 228 the court to disclose:

229 (a) A subset limited by date of the user's digital assets;

230 (b) All of the user's digital assets to the fiduciary or  
 231 designated recipient, or to the court for review in chambers; or

232 (c) None of the user's digital assets.

8-00057D-16

2016494\_\_

233 Section 7. Section 740.006, Florida Statutes, is created to  
234 read:

235 740.006 Disclosure of content of electronic communications  
236 of deceased user.-If a deceased user consented to or a court  
237 directs the disclosure of the content of electronic  
238 communications of the user, the custodian shall disclose to the  
239 personal representative of the estate of the user the content of  
240 an electronic communication sent or received by the user if the  
241 personal representative gives to the custodian:

242 (1) A written request for disclosure which is in physical  
243 or electronic form;

244 (2) A certified copy of the death certificate of the user;

245 (3) A certified copy of the letters of administration, the  
246 order authorizing a curator or administrator ad litem, the order  
247 of summary administration issued pursuant to chapter 735, or  
248 other court order;

249 (4) Unless the user provided direction using an online  
250 tool, a copy of the user's will, trust, power of attorney, or  
251 other record evidencing the user's consent to disclosure of the  
252 content of electronic communications; and

253 (5) If requested by the custodian:

254 (a) A number, username, address, or other unique subscriber  
255 or account identifier assigned by the custodian to identify the  
256 user's account;

257 (b) Evidence linking the account to the user; or

258 (c) A finding by the court that:

259 1. The user had a specific account with the custodian,  
260 identifiable by information specified in paragraph (a);

261 2. Disclosure of the content of electronic communications

Page 9 of 20

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

8-00057D-16

2016494\_\_

262 of the user would not violate 18 U.S.C. s. 2701 et seq., 47  
263 U.S.C. s. 222, or other applicable law;

264 3. Unless the user provided direction using an online tool,  
265 the user consented to disclosure of the content of electronic  
266 communications; or

267 4. Disclosure of the content of electronic communications  
268 of the user is reasonably necessary for the administration of  
269 the estate.

270 Section 8. Section 740.007, Florida Statutes, is created to  
271 read:

272 740.007 Disclosure of other digital assets of deceased  
273 user.-Unless a user prohibited disclosure of digital assets or  
274 the court directs otherwise, a custodian shall disclose to the  
275 personal representative of the estate of a deceased user a  
276 catalog of electronic communications sent or received by the  
277 user and digital assets of the user, except the content of  
278 electronic communications, if the personal representative gives  
279 to the custodian:

280 (1) A written request for disclosure which is in physical  
281 or electronic form;

282 (2) A certified copy of the death certificate of the user;

283 (3) A certified copy of the letters of administration, the  
284 order authorizing a curator or administrator ad litem, the order  
285 of summary administration issued pursuant to chapter 735, or  
286 other court order; and

287 (4) If requested by the custodian:

288 (a) A number, username, address, or other unique subscriber  
289 or account identifier assigned by the custodian to identify the  
290 user's account;

Page 10 of 20

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

8-00057D-16

2016494\_\_

291 (b) Evidence linking the account to the user;  
 292 (c) An affidavit stating that disclosure of the user's  
 293 digital assets is reasonably necessary for the administration of  
 294 the estate; or  
 295 (d) An order of the court finding that:  
 296 1. The user had a specific account with the custodian,  
 297 identifiable by information specified in paragraph (a); or  
 298 2. Disclosure of the user's digital assets is reasonably  
 299 necessary for the administration of the estate.  
 300 Section 9. Section 740.008, Florida Statutes, is created to  
 301 read:  
 302 740.008 Disclosure of content of electronic communications  
 303 of principal.—To the extent a power of attorney expressly grants  
 304 an agent authority over the content of electronic communications  
 305 sent or received by the principal and unless directed otherwise  
 306 by the principal or the court, a custodian shall disclose to the  
 307 agent the content if the agent gives to the custodian:  
 308 (1) A written request for disclosure which is in physical  
 309 or electronic form;  
 310 (2) An original or copy of the power of attorney expressly  
 311 granting the agent authority over the content of electronic  
 312 communications of the principal;  
 313 (3) A certification by the agent, under penalty of perjury,  
 314 that the power of attorney is in effect; and  
 315 (4) If requested by the custodian:  
 316 (a) A number, username, address, or other unique subscriber  
 317 or account identifier assigned by the custodian to identify the  
 318 principal's account; or  
 319 (b) Evidence linking the account to the principal.

Page 11 of 20

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

8-00057D-16

2016494\_\_

320 Section 10. Section 740.009, Florida Statutes, is created  
 321 to read:  
 322 740.009 Disclosure of other digital assets of principal.—  
 323 Unless otherwise ordered by the court, directed by the  
 324 principal, or provided by a power of attorney, a custodian shall  
 325 disclose to an agent with specific authority over the digital  
 326 assets or with general authority to act on behalf of the  
 327 principal a catalog of electronic communications sent or  
 328 received by the principal, and digital assets of the principal,  
 329 except the content of electronic communications, if the agent  
 330 gives the custodian:  
 331 (1) A written request for disclosure which is in physical  
 332 or electronic form;  
 333 (2) An original or a copy of the power of attorney which  
 334 gives the agent specific authority over digital assets or  
 335 general authority to act on behalf of the principal;  
 336 (3) A certification by the agent, under penalty of perjury,  
 337 that the power of attorney is in effect; and  
 338 (4) If requested by the custodian:  
 339 (a) A number, username, address, or other unique subscriber  
 340 or account identifier assigned by the custodian to identify the  
 341 principal's account; or  
 342 (b) Evidence linking the account to the principal.  
 343 Section 11. Section 740.01, Florida Statutes, is created to  
 344 read:  
 345 740.01 Disclosure of digital assets held in trust when  
 346 trustee is the original user.—Unless otherwise ordered by the  
 347 court or provided in a trust, a custodian shall disclose to a  
 348 trustee that is an original user of an account any digital asset

Page 12 of 20

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

8-00057D-16

2016494\_\_

349 of the account held in trust, including a catalog of electronic  
 350 communications of the trustee and the content of electronic  
 351 communications.

352 Section 12. Section 740.02, Florida Statutes, is created to  
 353 read:

354 740.02 Disclosure of content of electronic communications  
 355 held in trust when trustee is not the original user.—Unless  
 356 otherwise ordered by the court, directed by the user, or  
 357 provided in a trust, a custodian shall disclose to a trustee  
 358 that is not an original user of an account the content of an  
 359 electronic communication sent or received by an original or  
 360 successor user and carried, maintained, processed, received, or  
 361 stored by the custodian in the account of the trust if the  
 362 trustee gives the custodian:

363 (1) A written request for disclosure which is in physical  
 364 or electronic form;

365 (2) A certified copy of the trust instrument, or a  
 366 certification of trust under s. 736.1017, which includes consent  
 367 to disclosure of the content of electronic communications to the  
 368 trustee;

369 (3) A certification by the trustee, under penalty of  
 370 perjury, that the trust exists and that the trustee is a  
 371 currently acting trustee of the trust; and

372 (4) If requested by the custodian:

373 (a) A number, username, address, or other unique subscriber  
 374 or account identifier assigned by the custodian to identify the  
 375 trust's account; or

376 (b) Evidence linking the account to the trust.

377 Section 13. Section 740.03, Florida Statutes, is created to

8-00057D-16

2016494\_\_

378 read:

379 740.03 Disclosure of other digital assets held in trust  
 380 when trustee is not the original user.—Unless otherwise ordered  
 381 by the court, directed by the user, or provided in a trust, a  
 382 custodian shall disclose to a trustee that is not an original  
 383 user of an account, a catalog of electronic communications sent  
 384 or received by an original or successor user and stored,  
 385 carried, or maintained by the custodian in an account of the  
 386 trust and any digital assets in which the trust has a right or  
 387 interest, other than the content of electronic communications,  
 388 if the trustee gives the custodian:

389 (1) A written request for disclosure which is in physical  
 390 or electronic form;

391 (2) A certified copy of the trust instrument, or a  
 392 certification of trust under s. 736.1017;

393 (3) A certification by the trustee, under penalty of  
 394 perjury, that the trust exists and that the trustee is a  
 395 currently acting trustee of the trust; and

396 (4) If requested by the custodian:

397 (a) A number, username, address, or other unique subscriber  
 398 or account identifier assigned by the custodian to identify the  
 399 trust's account; or

400 (b) Evidence linking the account to the trust.

401 Section 14. Section 740.04, Florida Statutes, is created to  
 402 read:

403 740.04 Disclosure of digital assets to guardian of ward.—

404 (1) After an opportunity for a hearing under chapter 744,  
 405 the court may grant a guardian access to the digital assets of a  
 406 ward.



8-00057D-16

2016494\_\_

407 (2) Unless otherwise ordered by the court or directed by  
 408 the user, a custodian shall disclose to a guardian the catalog  
 409 of electronic communications sent or received by the ward and  
 410 any digital assets in which the ward has a right or interest,  
 411 other than the content of electronic communications, if the  
 412 guardian gives the custodian:

413 (a) A written request for disclosure which is in physical  
 414 or electronic form;

415 (b) A certified copy of letters of plenary guardianship of  
 416 the property or the court order that gives the guardian  
 417 authority over the digital assets of the ward; and

418 (c) If requested by the custodian:

419 1. A number, username, address, or other unique subscriber  
 420 or account identifier assigned by the custodian to identify the  
 421 ward's account; or

422 2. Evidence linking the account to the ward.

423 (3) A guardian with general authority to manage the  
 424 property of a ward may request a custodian of the digital assets  
 425 of the ward to suspend or terminate an account of the ward for  
 426 good cause. A request made under this section must be  
 427 accompanied by a certified copy of the court order giving the  
 428 guardian authority over the ward's property.

429 Section 15. Section 740.05, Florida Statutes, is created to  
 430 read:

431 740.05 Fiduciary duty and authority.—

432 (1) The legal duties imposed on a fiduciary charged with  
 433 managing tangible property apply to the management of digital  
 434 assets, including:

435 (a) The duty of care;

Page 15 of 20

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

8-00057D-16

2016494\_\_

436 (b) The duty of loyalty; and

437 (c) The duty of confidentiality.

438 (2) A fiduciary's authority with respect to a digital asset  
 439 of a user:

440 (a) Except as otherwise provided in s. 740.003, is subject  
 441 to the applicable terms-of-service agreement;

442 (b) Is subject to other applicable law, including copyright  
 443 law;

444 (c) Is limited by the scope of the fiduciary's duties; and  
 445 (d) May not be used to impersonate the user.

446 (3) A fiduciary with authority over the tangible personal  
 447 property of a decedent, ward, principal, or settlor has the  
 448 right to access any digital asset in which the decedent, ward,  
 449 principal, or settlor had or has a right or interest and that is  
 450 not held by a custodian or subject to a terms-of-service  
 451 agreement.

452 (4) A fiduciary acting within the scope of the fiduciary's  
 453 duties is an authorized user of the property of the decedent,  
 454 ward, principal, or settlor for the purpose of applicable  
 455 computer fraud and unauthorized computer access laws, including  
 456 under chapter 815.

457 (5) A fiduciary with authority over the tangible personal  
 458 property of a decedent, ward, principal, or settlor:

459 (a) Has the right to access the property and any digital  
 460 asset stored in it; and

461 (b) Is an authorized user for the purpose of computer fraud  
 462 and unauthorized computer access laws, including under chapter  
 463 815.

464 (6) A custodian may disclose information in an account to a

Page 16 of 20

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

8-00057D-16

2016494\_\_

465 fiduciary of the user when the information is required to  
 466 terminate an account used to access digital assets licensed to  
 467 the user.

468 (7) A fiduciary of a user may request a custodian to  
 469 terminate the user's account. A request for termination must be  
 470 in writing, in paper or electronic form, and accompanied by:

471 (a) If the user is deceased, a certified copy of the death  
 472 certificate of the user;

473 (b) A certified copy of the letters of administration; the  
 474 order authorizing a curator or administrator ad litem; the order  
 475 of summary administration issued pursuant to chapter 735; or the  
 476 court order, power of attorney, or trust giving the fiduciary  
 477 authority over the account; and

478 (c) If requested by the custodian:

479 1. A number, username, address, or other unique subscriber  
 480 or account identifier assigned by the custodian to identify the  
 481 user's account;

482 2. Evidence linking the account to the user; or

483 3. A finding by the court that the user had a specific  
 484 account with the custodian, identifiable by the information  
 485 specified in subparagraph 1.

486 Section 16. Section 740.06, Florida Statutes, is created to  
 487 read:

488 740.06 Custodian compliance and immunity.—

489 (1) Not later than 60 days after receipt of the information  
 490 required under ss. 740.006-740.04, a custodian shall comply with  
 491 a request under this chapter from a fiduciary or designated  
 492 recipient to disclose digital assets or terminate an account. If  
 493 the custodian fails to comply, the fiduciary or designated

Page 17 of 20

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

8-00057D-16

2016494\_\_

494 representative may apply to the court for an order directing  
 495 compliance.

496 (2) An order under subsection (1) directing compliance must  
 497 contain a finding that compliance is not in violation of 18  
 498 U.S.C. s. 2702.

499 (3) A custodian may notify a user that a request for  
 500 disclosure or to terminate an account was made under this  
 501 chapter.

502 (4) A custodian may deny a request under this chapter from  
 503 a fiduciary or designated representative for disclosure of  
 504 digital assets or to terminate an account if the custodian is  
 505 aware of any lawful access to the account following the receipt  
 506 of the fiduciary's request.

507 (5) This chapter does not limit a custodian's ability to  
 508 obtain or require a fiduciary or designated recipient requesting  
 509 disclosure or termination under this chapter to obtain a court  
 510 order that:

511 (a) Specifies that an account belongs to the ward or  
 512 principal;

513 (b) Specifies that there is sufficient consent from the  
 514 ward or principal to support the requested disclosure; and

515 (c) Contains a finding required by a law other than this  
 516 chapter.

517 (6) A custodian and its officers, employees, and agents are  
 518 immune from liability for an act or omission done in good faith  
 519 in compliance with this chapter.

520 Section 17. Section 740.07, Florida Statutes, is created to  
 521 read:

522 740.07 Relation to Electronic Signatures in Global and

Page 18 of 20

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

8-00057D-16 2016494\_\_

523 National Commerce Act.-This chapter modifies, limits, and  
 524 supersedes the Electronic Signatures in Global and National  
 525 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,  
 526 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),  
 527 or authorize electronic delivery of any of the notices described  
 528 in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

529 Section 18. Section 740.08, Florida Statutes, is created to  
 530 read:

531 740.08 Applicability.-

532 (1) Subject to subsection (3), this chapter applies to:

533 (a) A fiduciary acting under a will, trust, or power of  
 534 attorney executed before, on, or after July 1, 2016;

535 (b) A personal representative acting for a decedent who  
 536 died before, on, or after July 1, 2016;

537 (c) A guardian appointed through a guardianship proceeding,  
 538 whether pending in a court or commenced before, on, or after  
 539 July 1, 2016; and

540 (d) A trustee acting under a trust created before, on, or  
 541 after July 1, 2016.

542 (2) This chapter applies to a custodian if the user resides  
 543 in this state or resided in this state at the time of the user's  
 544 death.

545 (3) This chapter does not apply to a digital asset of an  
 546 employer used by an employee in the ordinary course of the  
 547 employer's business.

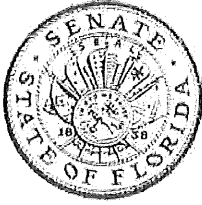
548 Section 19. Section 740.09, Florida Statutes, is created to  
 549 read:

550 740.09 Severability.-If any provision of this chapter or  
 551 its application to any person or circumstance is held invalid,

8-00057D-16 2016494\_\_

552 the invalidity does not affect other provisions or applications  
 553 of this chapter which can be given effect without the invalid  
 554 provision or application, and to this end the provisions of this  
 555 chapter are severable.

556 Section 20. This act shall take effect July 1, 2016.



## 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

October 22, 2015

The Honorable Miguel Diaz de la Portilla  
515 Knott Building  
404 S. Monroe Street  
Tallahassee, FL 32399

Re: Senate Bill 494 – Digital Assets

Dear Chairman Diaz de la Portilla:

Senate Bill 494, relating Digital Assets has been referred to the Judiciary Committee. I am requesting your consideration on placing SB 494 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 black ink, appearing to read "Dorothy L. Hukill".

Dorothy L. Hukill, District 8

cc: Tom Cibula, Staff Director of the Judiciary Committee  
Joyce Butler, 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](http://www.flsenate.gov)

**ANDY GARDINER**  
President of the Senate

**GARRETT RICHTER**  
President Pro Tempore

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

494  
Bill Number (if applicable)

Topic Digital Assets

Amendment Barcode (if applicable)

Name Greg Pound

Job Title \_\_\_\_\_

Address 9166 Sunrise Dr  
Street

Phone \_\_\_\_\_

Largo Fla 33723  
City State Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing \_\_\_\_\_

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-15

Meeting Date

SB 494

Bill Number (if applicable)

Topic SB 494 - Digital Assets

Amendment Barcode (if applicable)

Name Caitlin Brongel

Job Title Associate Lobbyist

Address 123 S. Adams St.  
Street

Phone 850-671-4401

Tallahassee FL 32301  
City State Zip

Email brongel@sostrategy.com

Speaking:  For  Against  Information

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

Representing Apple, Inc.

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 494  
Bill Number (if applicable)

Topic Digital Assets

Amendment Barcode (if applicable)

Name Kenneth Pratt

Job Title Senior VP of Governmental Affairs

Address 1001 Thomasville Rd, Ste 201  
Street

Phone 850-224-2265

Tallahassee FL 32303  
City State Zip

Email kpratt@floridabankers.com

Speaking:  For  Against  Information

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

Representing Florida Bankers Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 494  
Bill Number (if applicable)

Topic DIGITAL RECORDS AND COMMUNICATIONS

Amendment Barcode (if applicable)

Name JEFF NOVAK

Job Title CHIEF COUNSEL - LITIGATION & COMPLIANCE; VICE PRES. - PUBLIC POLICY

Address AOL INC. 22000 AOL WAY Phone 703 265 2923  
Street

DULLES VIRGINIA 20166  
City State Zip

Email jeffrey.novak@team.aol.com

Speaking:  For  Against  Information

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

Representing AOL

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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



THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015

Meeting Date

494

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name BRIAN PITHS

Job Title Trustee

Address 1119 Newton Ave S  
Street

Phone 727/897-9291

St Petersburg  
City

FL  
State

33705  
Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing Justice-2-Jesus

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 494  
Bill Number (if applicable)

Topic Digital Assets

Amendment Barcode (if applicable)

Name Eric Virgil

Job Title Attorney

Address 4100 Anderson Road

Phone 305 812 8343

Coral Gables FL 33146

City State Zip

Email eric@virgillaw.com

Speaking:  For  Against  Information

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

Representing RPPTL Section - Digital Assets Comm.

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: CS/SB 540

INTRODUCER: Judiciary Committee and Senator Hukill

SUBJECT: Estates

DATE: November 18, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Caldwell	Cibula	JU	<b>Fav/CS</b>
2.			BI	
3.			RC	

---

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 540 specifies when a trustee may use trust assets to pay attorney fees and costs and establishes a procedure when a trustee seeks to use trust assets to pay attorney fees and costs incurred when defending a breach of trust claim. The bill also provides that Florida law determines the validity and effect of the disposition of real property located in the state. Lastly, the bill also provides criteria for the nonjudicial modification of an irrevocable trust.

**II. Present Situation:**

The Florida Trust Code<sup>1</sup> provides the duties and powers of the trustee, including the duty of loyalty.<sup>2</sup> A trustee is required to administer a trust in good faith, in accordance with the terms and purposes of the trust, in accordance with the Florida Trust Code, and solely in the interests of the beneficiaries of the trust.<sup>3</sup>

---

<sup>1</sup> Chapter 736, F.S.

<sup>2</sup> Section 736.0802, F.S.

<sup>3</sup> Sections 736.0801 and 736.0802, F.S.

### **Payment of Costs and Attorney Fees from Assets of a Trust**

A trustee may pay costs and attorney fees that have incurred in any proceeding, including a claim or defense based upon breach of trust,<sup>4</sup> from the assets of the trust without the approval of any person and without court authorization unless the court orders otherwise.<sup>5</sup>

Currently, if a claim or defense based upon a breach of trust is made against a trustee in a proceeding, the trustee must provide written notice to each qualified beneficiary of the trust whose share of the trust may be affected by the intention to pay costs or attorney fees before making such payment. The written notice must be delivered by a method requiring a signed receipt and inform each qualified beneficiary of the right to apply to the court for an order prohibiting the trustee from paying attorney fees or costs from trust assets. A trustee who has been served the motion and pays attorney fees or costs, and the attorney who receives such fees or costs, before an order on the motion is issued by the court, are subject to certain remedies.<sup>6</sup>

A party must obtain a court order to prohibit a trustee from paying costs or attorney fees from trust assets if a claim or defense based upon breach of trust is made against a trustee in a proceeding. To obtain such court order, a party must make a reasonable showing by evidence in the record or by proffering evidence that provides a reasonable basis for a court to conclude that there has been a breach of trust. The trustee may proffer evidence to rebut the evidence. The court may defer ruling on the motion to allow for discovery to be taken by the parties. The court is required to enter an order prohibiting the payment of further attorney fees and costs from the assets of the trust and order attorney fees or costs previously paid from assets of the trust to be refunded if it finds that there is a reasonable basis to conclude that there has been a breach of trust, unless the court otherwise finds good cause. Such order does not limit a trustee's right to seek an order permitting the payment of some or all of the attorney fees or costs incurred in the proceeding from trust assets, including any fees required to be refunded, after the claim or defense is finally determined by the court.<sup>7</sup>

If a claim or defense based upon a breach of trust is withdrawn, dismissed, or resolved without a determination by the court that the trustee committed a breach of trust after the entry of an order prohibiting payment of attorney fees and costs, the trustee may pay costs or attorney fees incurred in the proceeding from the assets of the trust without further court authorization.<sup>8</sup>

If the court orders a refund, it may enter such sanctions as are appropriate if a refund is not made as directed by the court, including but not limited to, striking defenses or pleadings filed by the trustee.<sup>9</sup>

---

<sup>4</sup> Section 736.801(10)(b), F.S.

<sup>5</sup> Section 736.801(10), F.S.

<sup>6</sup> Section 736.0802(10)(a), F.S. See paragraphs (b) and (c) for remedies.

<sup>7</sup> Section 736.0802(10)(b), F.S.

<sup>8</sup> Section 736.0802(10)(b), F.S.

<sup>9</sup> Section 736.0802(10)(c), F.S.

The court's power to review fees and costs or the right of any interested persons to challenge fees and costs after payment, after an accounting, or after conclusion of the litigation is not limited.<sup>10</sup>

A trustee is not required to provide written notice if the action or defense is later withdrawn or dismissed by the party that is alleging a breach of trust or resolved without a determination of the court that the trustee committed a breach of trust.<sup>11</sup>

According to the Real Property Probate and Trust Law Section, "the current statute lacks clarity, and thus fails to provide direction to lawyers and the court" on certain issues.<sup>12</sup> The paper identifies the following issues stating s. 736.0802(10), F.S. [lacks clarity regarding]:

- The circumstance under which the limitations imposed by the statute are triggered.
- Which categories of attorney's fees and costs are subject to the limitations.
- The circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such attorney's fees and costs from trust assets prior to serving notice.
- [Mandates that literally and unconditionally] require qualified beneficiaries to seek a court order to prohibit a trustee from using trust assets to pay attorney's fees and costs even when a trustee has no intention of doing so.
- Whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or whether the trustee must wait until a final determination by the appellate court.
- What type of showing is required to preclude a trustee from using trust assets to pay its attorney's fees and costs, and regarding the type of evidence that may be used to make or to rebut such a showing.<sup>13</sup>

Section 736.0816, F.S., provides for the specific powers of a trustee and allows a trustee to employ certain persons, including attorneys and pay reasonable compensation and costs incurred in connection with such employment from assets of the trust.

Section 736.1007, F.S., provides for a trustee's attorney fees if a trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust. The trustee may pay the attorney without a court order.

### **Nonjudicial Modification of an Irrevocable Trust**

After the settlor's death, a trust may be modified at any time pursuant to s. 736.04113(2), F.S., if all the trustees and qualified beneficiaries agree unanimously.<sup>14</sup> Trusts modified pursuant to s. 736.0412, F.S., may be modified notwithstanding a spendthrift clause or a provision in the trust instrument that prohibits amendment or revocation of the trust. A beneficiary whose interest

---

<sup>10</sup> Section 736.0802(10)(d), F.S.

<sup>11</sup> Section 736.0802(10)(e), F.S.

<sup>12</sup> Real Property Probate and Trust Law Section of The Florida Bar, *White Paper Regarding a Trustee's Use of Trust Assets to Pay Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust*, (on file with the Senate Committee on Judiciary).

<sup>13</sup> *Id.*

<sup>14</sup> Section 736.0412(1), F.S.

is represented by another person under Part III of chapter 736, F.S., is bound by an agreement to modify a trust pursuant to s. 736.0412, F.S. However, a nonjudicial modification of an irrevocable trust does not apply to:

- Any trust created before January 1, 2001.
- Any trust created after December 31, 2000, if under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities,<sup>15</sup> unless the terms of the trust expressly authorize nonjudicial modification.
- Any trust for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

A revocable trust is treated as created when the right of revocation terminates. The statutory provisions are in addition to and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.<sup>16</sup>

---

<sup>15</sup> Section 689.225(2), F.S., relating to the rule against perpetuities provides:

STATEMENT OF THE RULE.—

(a) A nonvested property interest in real or personal property is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
2. The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

1. When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
2. The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

1. When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
2. The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subparagraph (a)1., subparagraph (b)1., or subparagraph (c)1., the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of:

1. The expiration of a period of time not exceeding 21 years after the death of a specified life or the survivor of specified lives, or upon the death of a specified life or the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or
2. The expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

(f) As to any trust created after December 31, 2000, this section shall apply to a nonvested property interest or power of appointment contained in a trust by substituting 360 years in place of "90 years" in each place such term appears in this section unless the terms of the trust require that all beneficial interests in the trust vest or terminate within a lesser period.

<sup>16</sup> Section 736.0412(6), F.S.

### **Assets of Nondomiciliaries**

Florida law determines the validity and effect of a testamentary disposition of tangible or intangible personal property or real property in this state.<sup>17</sup>

### **III. Effect of Proposed Changes:**

#### **Payment of Costs and Attorney Fees from Assets of a Trust**

Section 4 of the bill amends s. 736.0802(10), F.S., relating to a trustee's duty of loyalty and the payment of costs and attorney fees from assets of a trust. According to the Real Property Probate and Trust Law Section, the introduction to s. 736.0802(10), F.S., is rewritten to specify that the authority granted to a trustee under ss. 736.0816(20) and 736.1007(1), F.S., to pay attorney fees and costs from assets of the trust remains the general rule, while the provisions of this section are the exception to that rule.

Paragraph (a) defines the term "pleading" to mean the same as defined in rule 1.110 of the Florida Rules of Civil Procedure. Generally, these are claims of relief. Paragraph (b) authorizes a trustee to pay attorney fees or costs in connection with a claim or defense of breach of trust made in a filed pleading without the approval of any person and without court authorization. However, the trustee must first serve a written notice of intent upon each qualified beneficiary of the trust whose share of the trust may be affected by the payment before the payment is made. The written notice does not need to be served upon a qualified beneficiary whose identity or location is unknown to, and not reasonably ascertainable by, the trustee. According to the Real Property Probate and Trust Law Section, the clarification is the specific reference to attorney fees and costs incurred in connection with a claim or defense of breach of trust that is set forth in a filed pleading and not other instances where attorney fees or costs are incurred such as ordinary trust administration or other judicial proceedings not alleging breach of trust or allegations of breach of trust that have not been set forth in a filed pleading.<sup>18</sup>

Paragraph (c) provides for the content of the written notice of intent and the manner of service. The written notice must identify the judicial proceeding in which the claim or defense of breach of trust has been made in a filed pleading and inform the person served of the right to apply to the court for an order prohibiting the trustee from using trust assets to pay attorney fees or costs or compelling the return of the attorney fees and costs already paid to the trust. The written notice of intent must be served by any commercial delivery service or form of mail requiring a signed receipt, the manner provided in the Florida Rules of Civil Procedure for service of process;<sup>19</sup> or if the court has already acquired jurisdiction over any party in that judicial

---

<sup>17</sup> Section 731.106(2), F.S.

<sup>18</sup> Real Property Probate and Trust Law Section of The Florida Bar, *supra note 12*.

<sup>19</sup> Rule 1.070 of the Florida Rules of Civil Procedure states in part:

(a) Summons; Issuance. Upon the commencement of the action, summons or other process authorized by law shall be issued forthwith by the clerk or judge under the clerk's or the judge's signature and the seal of the court and delivered for service without praecipe.

(b) Service; By Whom Made. Service of process may be made by an officer authorized by law to serve process, but the court may appoint any competent person not interested in the action to serve the process. When so appointed, the person serving process shall make proof of service by affidavit promptly and in any event within the time during which the person served must respond to the process. Failure to make proof of

proceeding, in the manner provided for service of pleading and other documents by the Florida Rules of Civil Procedure.<sup>20</sup>

Paragraph (d) provides that in the event a trustee pays attorney fees and costs from trust assets before serving a notice of intent, any qualified beneficiary whose share of the trust may have been affected by such payment, who is not otherwise barred pursuant to the provisions of s. 736.1007, F.S., (that limits certain proceedings against a trustee), and who files a motion is entitled to an order compelling the return of such payment, together with statutory interest, to the trust. The court must award attorney fees and costs incurred in connection with the motion to compel as provided in s. 736.1004, F.S.

Paragraph (e) sets forth the process the court must follow. A qualified beneficiary must file a motion with the court and must have a share of the trust that is affected by the use of trust assets to pay attorney fees or costs and may not be barred under s. 736.1008, F.S. The court may prohibit the trustee from using trust assets to make a payment and, if a payment has been made from trust assets after service of a notice of intent, the court may enter an order compelling the return of the attorney fees and costs to the trust, with interest. If a hearing is held on a qualified beneficiary's motion, the court must deny the motion unless it finds a reasonable basis to conclude that there has been a breach of trust. However, the court may deny the motion if it finds good cause to do so. At the hearing, the movant may show that a reasonable basis exists that there has been a breach of trust, and the trustee may rebut such showing, by presenting affidavits, answers to interrogatories, admissions, depositions, and any evidence otherwise admissible under the Florida Evidence Code. According to the Real Property Probate and Trust Section, the types of evidence permitted are "summary judgement evidence" and also includes live witness testimony.<sup>21</sup> This language clarifies that the qualified beneficiary needs to file a motion only if he or she wants to prohibit or compel the return of the payments, clarifies that the court may not prohibit or compel the return of such payments, and clarifies that the court may not prohibit or compel the return of such payments in the absence of making the requisite finding.<sup>22</sup>

Paragraph (f) provides remedies. If a trustee fails to comply with a court order prohibiting the use of trust assets to pay attorney fees or costs or compelling such payment be refunded to the trust, the court may impose such remedies or sanctions as the court deems appropriate, including, without limitation, striking the defenses or pleadings filed by the trustee.

Paragraph (g) addresses the withdrawal, dismissal, or judicial resolution of a claim or defense of breach of trust. A trustee may use trust assets to pay attorney fees and costs without service of a notice of intent or order of the court if a claim or defense of breach of trust is withdrawn, dismissed, or judicially resolved in the trial court without a determination that the trustee has committed a breach of trust, notwithstanding an order prohibiting the use of trust assets to pay

---

service shall not affect the validity of the service. When any process is returned not executed or returned improperly executed for any defendant, the party causing its issuance shall be entitled to such additional process against the unserved party as is required to effect service.

<sup>20</sup> Rule 1.080(a) of the Florida Rules of Civil Procedure states in part: "Every pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516."

<sup>21</sup> Real Property Probate and Trust Law Section of The Florida Bar, *supra* note 12.

<sup>22</sup> *Id.*



attorney fees and costs or compelling the return of such attorney fees and costs. The payment of attorney fees and costs from trust assets include those payments that the trustee may have returned to the trust pursuant to court order.

Paragraph (h) provides that the statute does not operate to limit the right of any interested person to challenge or object to the payment of compensation or costs from the trust at any time, to seek review of compensation under s. 736.0206, F.S., or to seek remedies for breach of trust under s. 736.1001, F.S.

Sections 5 and 6 amend ss. 736.0816 and 736.1007, F.S., to make conforming references and alerts attorneys and the courts that the authority of a trustee to use trust assets to pay the trustee's attorney fees and costs are subject to the limitations of s. 736.0802(10), F.S.

### **Nonjudicial Modification of an Irrevocable Trust**

Section 3 amends s. 736.0412, F.S., by adding a new paragraph (c) providing that a trust created on or after July 1, 2016, may not be modified without court approval during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification. Paragraph (b) is amended to limit its application to trusts created after December 31, 2000, and before July 1, 2016. Technical and conforming changes for clarity are also made in this section as well as adding in Section 2 a cross reference to s. 736.0105(2)(k), F.S., that relates to exceptions to default and mandatory rules.

### **Assets of Nondomiciliaries**

Section 1 creates new s. 731.1055, F.S., to provide for the validity and effect of a disposition of all real property located in Florida. Such disposition, whether intestate or testate, is to be determined by Florida law.

Section 2 amends s. 731.106(2), F.S., to remove real property from the provisions addressing the disposition of property, both real and personal, in a will of a nonresident decedent. The disposition of real property is addressed separately in section 1.

### **Effective Date**

Section 7 provides that the act takes effect July 1, 2016.

## **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:

Individuals may not incur attorneys fees litigating statutes that were previously unclear.

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: 731.106, 736.0105, 736.0412, 736.0802, 736.0816, and 736.1007. The bill creates section 731.1055, 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 on November 17, 2015:**

The committee substitute creates a new section providing that the validity and effect of a disposition of all real property located in Florida, whether intestate or testate, is to be determined by Florida law. The bill also removes the qualification “under this section” from s. 736.0412(4)(c), F.S., in the underlying bill. The phrase related to a provision authorizing the nonjudicial modification of a trust if permitted by the terms of the trust.

B. Amendments:

None.



454764

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Bean) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 47 - 96

and insert:

Section 1. Section 731.1055, Florida Statutes, is created to read:

731.1055 Disposition of real property.-The validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.

Section 2. Subsection (2) of section 731.106, Florida Statutes, is amended to read:



454764

12           731.106 Assets of nondomiciliaries.—

13           (2) When a nonresident decedent, whether or not a citizen  
14 of the United States, provides by will that the testamentary  
15 disposition of tangible or intangible personal property having a  
16 situs within this state, ~~or of real property in this state,~~  
17 shall be construed and regulated by the laws of this state, the  
18 validity and effect of the dispositions shall be determined by  
19 Florida law. The court may, and in the case of a decedent who  
20 was at the time of death a resident of a foreign country the  
21 court shall, direct the personal representative appointed in  
22 this state to make distribution directly to those designated by  
23 the decedent's will as beneficiaries of the tangible or  
24 intangible property or to the persons entitled to receive the  
25 decedent's personal estate under the laws of the decedent's  
26 domicile.

27           Section 3. Paragraph (k) of subsection (2) of section  
28 736.0105, Florida Statutes, is amended to read:

29           736.0105 Default and mandatory rules.—

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

32           (k) The ability to modify a trust under s. 736.0412, except  
33 as provided in s. 736.0412(4) (b) or (c).

34           Section 3. Section 736.0412, Florida Statutes, is amended  
35 to read:

36           736.0412 Nonjudicial modification of irrevocable trust.—

37           (1) After the settlor's death, a trust may be modified at  
38 any time as provided in s. 736.04113(2) upon the unanimous  
39 agreement of the trustee and all qualified beneficiaries.

40           (2) Modification of a trust as authorized in this section



454764

41 is not prohibited by a spendthrift clause or by a provision in  
42 the trust instrument that prohibits amendment or revocation of  
43 the trust.

44 (3) An agreement to modify a trust under this section is  
45 binding on a beneficiary whose interest is represented by  
46 another person under part III of this code.

47 (4) This section does ~~shall~~ not apply to any trust:

48 (a) ~~Any trust~~ Created prior to January 1, 2001.

49 (b) ~~Any trust~~ Created after December 31, 2000, and before  
50 July 1, 2016, if, under the terms of the trust, all beneficial  
51 interests in the trust must vest or terminate within the period  
52 prescribed by the rule against perpetuities in s. 689.225(2),  
53 notwithstanding s. 689.225(2)(f), unless the terms of the trust  
54 expressly authorize nonjudicial modification.

55 (c) Created on or after July 1, 2016, during the first 90  
56 years after it is created, unless the terms of the trust  
57 expressly authorize nonjudicial modification.

58  
59 ===== T I T L E A M E N D M E N T =====

60 And the title is amended as follows:

61 Delete lines 2 - 6

62 and insert:

63 An act relating to estates; creating s. 731.1055,  
64 F.S.; providing that the validity and the effect of a  
65 specified disposition of real property be determined  
66 by Florida law; amending ss. 731.106 and 736.0105,  
67 F.S.; conforming provisions to changes made by the  
68 act, amending s.

By Senator Hukill

8-00335B-16

2016540\_\_

1 A bill to be entitled  
 2 An act relating to estates; amending s. 731.106, F.S.;  
 3 providing that the validity and the effect of a  
 4 specified disposition of real property be determined  
 5 by Florida law; amending s. 736.0105, F.S.; conforming  
 6 a provision to changes made by the act; amending s.  
 7 736.0412, F.S.; providing applicability for  
 8 nonjudicial modification of irrevocable trust;  
 9 amending s. 736.0802, F.S.; defining the term  
 10 "pleading"; authorizing a trustee to pay attorney fees  
 11 and costs from the assets of the trust without  
 12 specified approval or court authorization in certain  
 13 circumstances; requiring the trustee to serve a  
 14 written notice of intent upon each qualified  
 15 beneficiary of the trust before the payment is made;  
 16 requiring the notice of intent to contain specified  
 17 information and to be served in a specified manner;  
 18 providing that specified qualified beneficiaries may  
 19 be entitled to an order compelling the refund of a  
 20 specified payment to the trust; requiring the court to  
 21 award specified attorney fees and costs in certain  
 22 circumstances; authorizing the court to prohibit a  
 23 trustee from using trust assets to make a specified  
 24 payment; authorizing the court to enter an order  
 25 compelling the return of specified attorney fees and  
 26 costs to the trust with interest at the statutory  
 27 rate; requiring the court to deny a specified motion  
 28 unless the court finds a reasonable basis to conclude  
 29 that there has been a breach of the trust; authorizing

Page 1 of 10

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

8-00335B-16

2016540\_\_

30 a court to deny the motion if it finds good cause to  
 31 do so; authorizing the movant to show that a  
 32 reasonable basis exists, and a trustee to rebut the  
 33 showing, through specified means; authorizing the  
 34 court to impose such remedies or sanctions as it deems  
 35 appropriate; providing that a trustee is authorized to  
 36 use trust assets in a specified manner if a claim or  
 37 defense of breach of trust is withdrawn, dismissed, or  
 38 judicially resolved in a trial court without a  
 39 determination that the trustee has committed a breach  
 40 of trust; providing that specified proceedings,  
 41 remedies, and rights are not limited; amending ss.  
 42 736.0816 and 736.1007, F.S.; conforming provisions to  
 43 changes made by the act; providing an effective date.  
 44

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

46  
 47 Section 1. Subsection (2) of section 731.106, Florida  
 48 Statutes, is amended to read:

49 731.106 Assets of nondomiciliaries.—

50 (2) When a nonresident decedent, whether or not a citizen  
 51 of the United States, provides by will that the testamentary  
 52 disposition of tangible or intangible personal property having a  
 53 situs within this state, ~~or of real property in this state,~~  
 54 shall be construed and regulated by the laws of this state, the  
 55 validity and effect of the dispositions shall be determined by  
 56 Florida law. The validity and the effect of a disposition,  
 57 whether intestate or testate, of real property in this state  
 58 shall be determined by Florida law. The court may, and in the

Page 2 of 10

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

8-00335B-16

2016540\_\_

59 case of a decedent who was at the time of death a resident of a  
60 foreign country the court shall, direct the personal  
61 representative appointed in this state to make distribution  
62 directly to those designated by the decedent's will as  
63 beneficiaries of the tangible or intangible property or to the  
64 persons entitled to receive the decedent's personal estate under  
65 the laws of the decedent's domicile.

66 Section 2. Paragraph (k) of subsection (2) of section  
67 736.0105, Florida Statutes, is amended to read:

68 736.0105 Default and mandatory rules.—

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

71 (k) The ability to modify a trust under s. 736.0412, except  
72 as provided in s. 736.0412(4) (b) or (c).

73 Section 3. Section 736.0412, Florida Statutes, is amended  
74 to read:

75 736.0412 Nonjudicial modification of irrevocable trust.—

76 (1) After the settlor's death, a trust may be modified at  
77 any time as provided in s. 736.04113(2) upon the unanimous  
78 agreement of the trustee and all qualified beneficiaries.

79 (2) Modification of a trust as authorized in this section  
80 is not prohibited by a spendthrift clause or by a provision in  
81 the trust instrument that prohibits amendment or revocation of  
82 the trust.

83 (3) An agreement to modify a trust under this section is  
84 binding on a beneficiary whose interest is represented by  
85 another person under part III of this code.

86 (4) This section ~~does shall~~ not apply to any trust:

87 (a) ~~Any trust~~ Created prior to January 1, 2001.

Page 3 of 10

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

8-00335B-16

2016540\_\_

88 (b) ~~Any trust~~ Created after December 31, 2000, and before  
89 July 1, 2016, if, under the terms of the trust, all beneficial  
90 interests in the trust must vest or terminate within the period  
91 prescribed by the rule against perpetuities in s. 689.225(2),  
92 notwithstanding s. 689.225(2) (f), unless the terms of the trust  
93 expressly authorize nonjudicial modification.

94 (c) Created on or after July 1, 2016, during the first 90  
95 years after it is created, unless the terms of the trust  
96 expressly authorize nonjudicial modification under this section.

97 (d) ~~Any trust~~ For which a charitable deduction is allowed  
98 or allowable under the Internal Revenue Code until the  
99 termination of all charitable interests in the trust.

100 (5) For purposes of subsection (4), a revocable trust shall  
101 be treated as created when the right of revocation terminates.

102 (6) The provisions of this section are in addition to, and  
103 not in derogation of, rights under the common law to modify,  
104 amend, terminate, or revoke trusts.

105 Section 4. Subsection (10) of section 736.0802, Florida  
106 Statutes, is amended to read:

107 736.0802 Duty of loyalty.—

108 (10) Unless otherwise provided in this subsection, payment  
109 of costs or attorney ~~attorney's~~ fees incurred in any proceeding  
110 ~~from the assets of the trust~~ may be made by a ~~the~~ trustee from  
111 assets of the trust without the approval of any person and  
112 without court authorization, ~~unless the court orders otherwise~~  
113 as provided in ss. 736.0816(20) and 736.1007(1) paragraph (b).

114 (a) As used in this subsection, the term "pleading" means a  
115 pleading as defined in Rule 1.110 of the Florida Rules of Civil  
116 Procedure.

Page 4 of 10

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

8-00335B-16

2016540\_\_

117 (b) If a trustee incurs attorney fees or costs in  
 118 connection with a claim or defense of breach of trust which is  
 119 made in a filed pleading, the trustee may pay such attorney fees  
 120 or costs from trust assets without the approval of any person  
 121 and without any court authorization. However, the trustee must  
 122 serve a written notice of intent upon each qualified beneficiary  
 123 of the trust whose share of the trust may be affected by the  
 124 payment before such payment is made. The notice of intent does  
 125 not need to be served upon a qualified beneficiary whose  
 126 identity or location is unknown to, and not reasonably  
 127 ascertainable by, the trustee.

128 (c) The notice of intent must identify the judicial  
 129 proceeding in which the claim or defense of breach of trust has  
 130 been made in a filed pleading and must inform the person served  
 131 of his or her right under paragraph (e) to apply to the court  
 132 for an order prohibiting the trustee from using trust assets to  
 133 pay attorney fees or costs as provided in paragraph (b) or  
 134 compelling the return of such attorney fees and costs to the  
 135 trust. The notice of intent must be served by any commercial  
 136 delivery service or form of mail requiring a signed receipt; the  
 137 manner provided in the Florida Rules of Civil Procedure for  
 138 service of process; or, as to any party over whom the court has  
 139 already acquired jurisdiction in that judicial proceeding, in  
 140 the manner provided for service of pleadings and other documents  
 141 by the Florida Rules of Civil Procedure.

142 (d) If a trustee has used trust assets to pay attorney fees  
 143 or costs described in paragraph (b) before service of a notice  
 144 of intent, any qualified beneficiary who is not barred under s.  
 145 736.1008 and whose share of the trust may have been affected by

Page 5 of 10

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

8-00335B-16

2016540\_\_

146 such payment is entitled, upon the filing of a motion to compel  
 147 the return of such payment to the trust, to an order compelling  
 148 the return of such payment, with interest at the statutory rate.  
 149 The court shall award attorney fees and costs incurred in  
 150 connection with the motion to compel as provided in s. 736.1004.

151 (e) Upon the motion of any qualified beneficiary who is not  
 152 barred under s. 736.1008 and whose share of the trust may be  
 153 affected by the use of trust assets to pay attorney fees or  
 154 costs as provided in paragraph (b), the court may prohibit the  
 155 trustee from using trust assets to make such payment and, if  
 156 such payment has been made from trust assets after service of a  
 157 notice of intent, the court may enter an order compelling the  
 158 return of the attorney fees and costs to the trust, with  
 159 interest at the statutory rate. In connection with any hearing  
 160 on a motion brought under this paragraph:

161 1. The court shall deny the motion unless it finds a  
 162 reasonable basis to conclude that there has been a breach of  
 163 trust. If the court finds there is a reasonable basis to  
 164 conclude there has been a breach of trust, the court may still  
 165 deny the motion if it finds good cause to do so.

166 2. The movant may show that such reasonable basis exists,  
 167 and the trustee may rebut any such showing by presenting  
 168 affidavits, answers to interrogatories, admissions, depositions,  
 169 and any evidence otherwise admissible under the Florida Evidence  
 170 Code.

171 (f) If a trustee fails to comply with an order of the court  
 172 prohibiting the use of trust assets to pay attorney fees or  
 173 costs described in paragraph (b) or fails to comply with an  
 174 order compelling that such payment be refunded to the trust, the

Page 6 of 10

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



8-00335B-16

2016540\_\_

175 court may impose such remedies or sanctions as the court deems  
 176 appropriate, including, without limitation, striking the  
 177 defenses or pleadings filed by the trustee.

178 (g) Notwithstanding the entry of an order prohibiting the  
 179 use of trust assets to pay attorney fees and costs as provided  
 180 in paragraph (b), or compelling the return of such attorney fees  
 181 or costs, if a claim or defense of breach of trust is withdrawn,  
 182 dismissed, or judicially resolved in the trial court without a  
 183 determination that the trustee has committed a breach of trust,  
 184 the trustee is authorized to use trust assets to pay attorney  
 185 fees and costs as provided in paragraph (b) and may do so  
 186 without service of a notice of intent or order of the court. The  
 187 attorney fees and costs may include fees and costs that were  
 188 refunded to the trust pursuant to an order of the court.

189 (h) This subsection does not limit proceedings under s.  
 190 736.0206 or remedies for breach of trust under s. 736.1001, or  
 191 the right of any interested person to challenge or object to the  
 192 payment of compensation or costs from the trust.

193 ~~(a) If a claim or defense based upon a breach of trust is~~  
 194 ~~made against a trustee in a proceeding, the trustee shall~~  
 195 ~~provide written notice to each qualified beneficiary of the~~  
 196 ~~trust whose share of the trust may be affected by the payment of~~  
 197 ~~attorney's fees and costs of the intention to pay costs or~~  
 198 ~~attorney's fees incurred in the proceeding from the trust prior~~  
 199 ~~to making payment. The written notice shall be delivered by~~  
 200 ~~sending a copy by any commercial delivery service requiring a~~  
 201 ~~signed receipt, by any form of mail requiring a signed receipt,~~  
 202 ~~or as provided in the Florida Rules of Civil Procedure for~~  
 203 ~~service of process. The written notice shall inform each~~

Page 7 of 10

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

8-00335B-16

2016540\_\_

204 ~~qualified beneficiary of the trust whose share of the trust may~~  
 205 ~~be affected by the payment of attorney's fees and costs of the~~  
 206 ~~right to apply to the court for an order prohibiting the trustee~~  
 207 ~~from paying attorney's fees or costs from trust assets. If a~~  
 208 ~~trustee is served with a motion for an order prohibiting the~~  
 209 ~~trustee from paying attorney's fees or costs in the proceeding~~  
 210 ~~and the trustee pays attorney's fees or costs before an order is~~  
 211 ~~entered on the motion, the trustee and the trustee's attorneys~~  
 212 ~~who have been paid attorney's fees or costs from trust assets to~~  
 213 ~~defend against the claim or defense are subject to the remedies~~  
 214 ~~in paragraphs (b) and (c).~~

215 ~~(b) If a claim or defense based upon breach of trust is~~  
 216 ~~made against a trustee in a proceeding, a party must obtain a~~  
 217 ~~court order to prohibit the trustee from paying costs or~~  
 218 ~~attorney's fees from trust assets. To obtain an order~~  
 219 ~~prohibiting payment of costs or attorney's fees from trust~~  
 220 ~~assets, a party must make a reasonable showing by evidence in~~  
 221 ~~the record or by proffering evidence that provides a reasonable~~  
 222 ~~basis for a court to conclude that there has been a breach of~~  
 223 ~~trust. The trustee may proffer evidence to rebut the evidence~~  
 224 ~~submitted by a party. The court in its discretion may defer~~  
 225 ~~ruling on the motion, pending discovery to be taken by the~~  
 226 ~~parties. If the court finds that there is a reasonable basis to~~  
 227 ~~conclude that there has been a breach of trust, unless the court~~  
 228 ~~finds good cause, the court shall enter an order prohibiting the~~  
 229 ~~payment of further attorney's fees and costs from the assets of~~  
 230 ~~the trust and shall order attorney's fees or costs previously~~  
 231 ~~paid from assets of the trust to be refunded. An order entered~~  
 232 ~~under this paragraph shall not limit a trustee's right to seek~~

Page 8 of 10

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

8-00335B-16

2016540\_\_

233 ~~an order permitting the payment of some or all of the attorney's~~  
 234 ~~fees or costs incurred in the proceeding from trust assets,~~  
 235 ~~including any fees required to be refunded, after the claim or~~  
 236 ~~defense is finally determined by the court. If a claim or~~  
 237 ~~defense based upon a breach of trust is withdrawn, dismissed, or~~  
 238 ~~resolved without a determination by the court that the trustee~~  
 239 ~~committed a breach of trust after the entry of an order~~  
 240 ~~prohibiting payment of attorney's fees and costs pursuant to~~  
 241 ~~this paragraph, the trustee may pay costs or attorney's fees~~  
 242 ~~incurred in the proceeding from the assets of the trust without~~  
 243 ~~further court authorization.~~

244 ~~(c) If the court orders a refund under paragraph (b), the~~  
 245 ~~court may enter such sanctions as are appropriate if a refund is~~  
 246 ~~not made as directed by the court, including, but not limited~~  
 247 ~~to, striking defenses or pleadings filed by the trustee. Nothing~~  
 248 ~~in this subsection limits other remedies and sanctions the court~~  
 249 ~~may employ for the failure to refund timely.~~

250 ~~(d) Nothing in this subsection limits the power of the~~  
 251 ~~court to review fees and costs or the right of any interested~~  
 252 ~~persons to challenge fees and costs after payment, after an~~  
 253 ~~accounting, or after conclusion of the litigation.~~

254 ~~(e) Notice under paragraph (a) is not required if the~~  
 255 ~~action or defense is later withdrawn or dismissed by the party~~  
 256 ~~that is alleging a breach of trust or resolved without a~~  
 257 ~~determination by the court that the trustee has committed a~~  
 258 ~~breach of trust.~~

259 Section 5. Subsection (20) of section 736.0816, Florida  
 260 Statutes, is amended to read:  
 261 736.0816 Specific powers of trustee.—Except as limited or

8-00335B-16

2016540\_\_

262 restricted by this code, a trustee may:

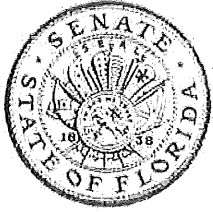
263 (20) Employ persons, including, but not limited to,  
 264 attorneys, accountants, investment advisers, or agents, even if  
 265 they are the trustee, an affiliate of the trustee, or otherwise  
 266 associated with the trustee, to advise or assist the trustee in  
 267 the exercise of any of the trustee's powers and pay reasonable  
 268 compensation and costs incurred in connection with such  
 269 employment from the assets of the trust, subject to s.  
 270 736.0802(10) with respect to attorney fees and costs, and act  
 271 without independent investigation on the recommendations of such  
 272 persons.

273 Section 6. Subsection (1) of section 736.1007, Florida  
 274 Statutes, is amended to read:

275 736.1007 Trustee's attorney's fees.—

276 (1) If the trustee of a revocable trust retains an attorney  
 277 to render legal services in connection with the initial  
 278 administration of the trust, the attorney is entitled to  
 279 reasonable compensation for those legal services, payable from  
 280 the assets of the trust, subject to s. 736.0802(10), without  
 281 court order. The trustee and the attorney may agree to  
 282 compensation that is determined in a manner or amount other than  
 283 the manner or amount provided in this section. The agreement is  
 284 not binding on a person who bears the impact of the compensation  
 285 unless that person is a party to or otherwise consents to be  
 286 bound by the agreement. The agreement may provide that the  
 287 trustee is not individually liable for the attorney ~~attorney's~~  
 288 fees and costs.

289 Section 7. This act shall take effect July 1, 2016.



## THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

### 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

**SENATOR DOROTHY L. HUKILL**

8th District

October 22, 2015

The Honorable Miguel Diaz de la Portilla  
515 Knott Building  
404 S. Monroe Street  
Tallahassee, FL 32399

Re: Senate Bill 540 – Estates

Dear Chairman Diaz de la Portilla:

Senate Bill 540, relating Estates has been referred to the Judiciary Committee. I am requesting your consideration on placing SB 540 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 black ink that reads "Dorothy L. Hukill".

Dorothy L. Hukill, District 8

cc: Tom Cibulla, Staff Director of the Judiciary Committee  
Joyce Butler, 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](http://www.flsenate.gov)

**ANDY GARDINER**  
President of the Senate

**GARRETT RICHTER**  
President Pro Tempore

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 540  
Bill Number (if applicable)

Topic Estates

Amendment Barcode (if applicable)

Name Kenneth Pratt

Job Title Senior VP of Governmental Affairs

Address 1001 Thomasville Rd, Ste 201  
Street

Phone 850-224-2265

Tallahassee FL 32303  
City State Zip

Email kpratt@floridabankers.com

Speaking:  For  Against  Information

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

Representing Florida Bankers Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

This form is part of the public record for this meeting

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

SB 540  
Bill Number (if applicable)

Topic Estates

Amendment Barcode (if applicable)

Name Eric Vigil

Job Title Attorney

Address 4100 Anderson Rd.

Phone 305 812 9343

Coral Gables FL 33146  
City State Zip

Email eric@vigillaw.com

Speaking:  For  Against  Information

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

Representing RPTL Section of The FL Bar

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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



## THE FLORIDA SENATE

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

November 10, 2015

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

Re: Senate Bill 540 – Estates

Dear Chairman Diaz de la Portilla:

Senate Bill 540, relating to Estates, is on the Judiciary Committee agenda for November 17, 2015. I will not be able to present the bill as I will be out of town due to a prior engagement.

Please recognize my Legislative Assistant, Elizabeth Fetterhoff, to present SB 540 on my behalf. Thank you for your kind consideration of this legislation and allowing it to be presented in your committee. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Dorothy L. Hukill".

Dorothy L. Hukill  
State Senator, District 08

cc: Tom Cibula, Staff Director

**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](http://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 7008

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: Housing Discrimination

DATE: November 16, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	Peacock	McVaney		<b>GO Submitted as Committee Bill</b>
1.	Brown	Cibula	JU	<b>Favorable</b>
2.			AGG	
3.			AP	

---

**I. Summary:**

SB 7008 eliminates a prerequisite to filing a civil action alleging an injury caused by a discriminatory housing practice. Under an interpretation of the Florida Fair Housing Act by the Fourth District Court of Appeal, a person must first exhaust his or her administrative remedies before pursuing a civil action under the Florida Fair Housing Act.

According to the United States Department of Housing and Urban Development (HUD), the Florida Fair Housing Act as interpreted by the Fourth DCA is not substantially equivalent to the federal Fair Housing Act. As a result, HUD has notified the Florida Commission on Human Relations (Commission) that its participation in the Fair Housing Assistance Program will be terminated if the prerequisite to filing a civil action is not eliminated by March 12, 2016. During the 2014-2015 fiscal year, the Fair Housing Assistance Program provided more than \$600,000 to the Commission for investigative costs, administrative costs, and training.

**II. Present Situation:**

**Florida Civil Rights Act (Part I, Chapter 760, F.S.)**

The Florida Civil Rights Act (FCRA) protects persons from discrimination based on race, color, religion, sex, pregnancy,<sup>1</sup> national origin, age, handicap, and marital or familial status.

---

<sup>1</sup> The 2015 Florida Legislature added pregnancy as a protected status from discrimination (Chapter 2015-68, L.O.F.); Section 760.01(2), F.S.

### ***The Florida Commission on Human Relations***

The FCRA establishes the Florida Commission on Human Relations within the Department of Management Services. The Commission is granted broad powers to enforce the FCRA.<sup>2</sup> The Governor appoints, and the Senate confirms the 12 members of the Commission.<sup>3</sup> The Commission is empowered to receive, initiate, investigate, conciliate and hold hearings on and act upon complaints alleging discriminatory practice.<sup>4</sup> Additionally, the Attorney General may initiate a civil action for damages, injunctive relief, civil penalties of up to \$10,000 a violation, and other appropriate relief.<sup>5</sup>

### ***Timeline for Filing and Processing Claims***

An aggrieved person, the Commission, a Commissioner, or the Attorney General has 365 days after the alleged violation to file a complaint with the Commission.<sup>6</sup> Within 180 days of the filing, the Commission must make a determination of reasonable cause.<sup>7</sup> If the Commission issues a finding of reasonable cause, the aggrieved person may request an administrative hearing or bring civil action.<sup>8</sup> A civil action must be brought within a year of the determination of reasonable cause.<sup>9</sup> The FCRA expressly requires a plaintiff to exhaust his or her administrative remedy as a prerequisite to filing a civil action alleging unlawful discrimination, including housing discrimination.<sup>10</sup>

### ***Remedies***

The remedy available through an administrative hearing is affirmative relief, including back pay, and reasonable attorney fees and other costs.<sup>11</sup> Remedies available through a civil action are injunctive and affirmative relief, which includes back pay, compensatory damages, punitive damages of up to \$100,000, and reasonable attorney fees and other costs.<sup>12</sup>

### ***Bases of Discrimination under the Florida Civil Rights Act***

The FCRA specifically defines and prohibits discrimination based on unlawful practices in employment and public accommodations.<sup>13</sup> Remedies are also available for unlawful discrimination in the areas of education, employment, housing discrimination, and public accommodation. Other than in the section of law on remedies, the term “housing discrimination” is not addressed elsewhere in the FCRA.<sup>14</sup> Additionally, housing discrimination is specifically prohibited in the Florida Fair Housing Act.<sup>15</sup>

---

<sup>2</sup> Section 760.06(6), F.S.

<sup>3</sup> Section 760.03(1), F.S.

<sup>4</sup> Section 760.06(5), F.S.

<sup>5</sup> Section 760.021(1), F.S.

<sup>6</sup> Section 760.11(1), F.S.

<sup>7</sup> Section 760.11(3), F.S.

<sup>8</sup> Section 760.11(4), F.S.

<sup>9</sup> Section 760.11(5), F.S.

<sup>10</sup> Section 760.07, F.S.

<sup>11</sup> Section 760.11(6) and (7), F.S.

<sup>12</sup> Section 760.11(5), F.S.

<sup>13</sup> Sections 760.02(7), (8), and (11), 760.08, and 760.10, F.S.

<sup>14</sup> Section 760.07, F.S.

<sup>15</sup> Part II of Chapter 760, F.S. The inclusion of housing discrimination in the FCRA may have been a drafting oversight because the issue is addressed fully in the FFHA.



## **Florida Fair Housing Act**

### ***Purpose of the Florida Fair Housing Act***

The Florida Fair Housing Act (FFHA) is modelled after the Federal Fair Housing Act.<sup>16</sup> The FFHA prohibits a person from refusing to sell or rent, or otherwise make unavailable a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.<sup>17</sup> In addition, protection is afforded to persons who are pregnant or in the process of becoming legal custodians of children of 18 years of age or younger, or persons who are themselves handicapped or associated with a handicapped person.<sup>18</sup>

### ***Timeline for Filing and Processing Claims***

A person alleging discrimination under the FFHA has 1 year after the discriminatory housing practice to file a complaint with the Commission.<sup>19</sup> The Commission has 100 days after receiving the complaint to complete its investigation and issue a determination.<sup>20</sup> The Commission can also decide to resolve the complaint and eliminate or correct the alleged discriminatory housing practice through conciliation.<sup>21</sup> If, within 180 days after a complaint is filed, the Commission has been unable to obtain voluntary compliance, the complainant may initiate civil action or petition for an administrative determination.<sup>22</sup> If the Commission finds reasonable cause, the claimant may request that the Attorney General bring an action against the respondent.<sup>23</sup>

A civil action must be commenced within 2 two years after the alleged discriminatory act occurred.<sup>24</sup> The court may continue a civil case if conciliation efforts by the Commission or by the local housing agency are likely to result in a satisfactory settlement.<sup>25</sup> If the court finds that a discriminatory housing practice has occurred, the court must issue an order prohibiting the practice and providing affirmative relief.<sup>26</sup> If the Commission is unable to obtain voluntary compliance or has reasonable cause to believe that a discriminatory act has occurred, the Commission may institute an administrative proceeding. Alternatively, the aggrieved person may request administrative relief under ch. 120, F.S., within 30 days after receiving notice that the Commission has concluded its investigation.<sup>27</sup>

The Commission may institute a civil action if it is unable to achieve voluntary compliance with the Fair Housing Act and is not required to have petitioned for an administrative hearing or

---

<sup>16</sup> Part II of Chapter 760, F.S., is the Florida Fair Housing Act. See Florida Fair Housing Commission, *Fair Housing Laws* [http://fchr.state.fl.us/resources/the\\_laws/florida\\_fair\\_housing\\_laws](http://fchr.state.fl.us/resources/the_laws/florida_fair_housing_laws) (last visited Oct. 27, 2015).

<sup>17</sup> Section 760.23(1), F.S.

<sup>18</sup> Sections 760.23(6)-(9), F.S.

<sup>19</sup> Section 760.34(1) and (2), F.S.

<sup>20</sup> Section 760.34(1), F.S.

<sup>21</sup> *Id.*

<sup>22</sup> Section 760.34(4), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> Section 760.35(1), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Section 760.35(2), F.S.

<sup>27</sup> Section 760.35(3), F.S.

exhausted its administrative remedies prior to bringing a civil action.<sup>28</sup> Remedies available under the Fair Housing Act include fines and actual and punitive damages.<sup>29</sup> The court may also award reasonable attorney's fees and costs to the Commission.<sup>30</sup>

The Commission, or any local agency certified as substantially equivalent may institute a civil action in an appropriate court if it is unable to obtain voluntary compliance with the local fair housing law.<sup>31</sup> The local agency does not have to petition for an administrative hearing or exhaust its administrative remedies prior to bringing civil action.<sup>32</sup>

### **Financial Reimbursement from HUD**

The federal Fair Housing Assistance Program (FHAP) permits HUD to reimburse state and local agencies for services that further the purposes of the federal Fair Housing Act. To be eligible for participation in the FHAP, a state or local agency must enforce a fair housing law that is substantially equivalent to the federal Fair Housing Act. The HUD will then certify these agencies as substantially equivalent, qualifying the agencies for federal funding.<sup>33</sup> In Florida, in addition to the Florida Commission on Human Relations serving as the main agency certified as substantially equivalent, six other localities also qualify.<sup>34</sup>

Through annual work-share agreements with HUD, the Commission, in its capacity as a substantially equivalent agency, accepts and investigates housing discrimination cases from HUD. The Commission is reimbursed by HUD for closing housing cases, through deposit from HUD into the Commission's trust fund. Trust fund monies received from HUD in FY 2014-15 totaled \$604,978, an increase from the FY 2013-14 total of \$516,536.<sup>35</sup>

According to the Commission's FY 2010-11 through FY 2014-15 Annual Reports, housing complaints represented on average 15 percent of all complaints received by the Commission. From FY 2010-11 through FY 2014-15, 1,009 cases were closed, distributed as follows:

---

<sup>28</sup> Section 760.34(7)(a), F.S.

<sup>29</sup> Fines are capped in a tiered system based on the number of prior violations of the Fair Housing Act: up to \$10,000 if the respondent has no prior findings of guilt under the Fair Housing Act; up to \$25,000 if the respondent has had one prior violation of the Fair Housing Act; and up to \$50,000, if the respondent has had two or more violations of the Fair Housing Act. Section 760.34(7)(b), F.S.

<sup>30</sup> Section 760.34(7)(c), F.S.

<sup>31</sup> Sections 760.22(9) and 760.34(8), F.S.

<sup>32</sup> Section 760.34(8), F.S.

<sup>33</sup> United States Department of Housing and Urban Development, *Fair Housing Assistance Program (FHAP)*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP) (last visited Nov. 2, 2015).

<sup>34</sup> HUD additionally certified as substantially equivalent the Broward County Office of Equal Opportunity, Jacksonville Human Rights Commission, Office of Community Affairs – Human Relations Department (Orlando), Palm Beach County Office of Equal Opportunity, Pinellas County Office of Human Rights, and City of Tampa Office of Community Relations. United States Department of Housing and Urban Development, *Fair Housing Assistance Program (FHAP) Agencies*, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/partners/FHAP/agencies#FL](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP/agencies#FL) (last visited Oct. 29, 2015).

<sup>35</sup> E-mail from Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 8, 2015) (on file with the Senate Committee on Judiciary).

Closure Type	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15
<b>No Cause</b>	171 (64%)	126 (69%)	92 (50%)	138 (73%)	123 (67%)
<b>Administrative Closure</b>	46 (17%)	15 (8%)	50 (27%)	29 (15%)	52 (28%)
<b>Cause</b>	20 (7%)	14 (8%)	4 (2%)	11 (6%)	0 (0%)
<b>Settlement</b>	16 (6%)	16 (9%)	18 (10%)	0 (0%)	0 (0%)
<b>Withdrawal with Benefits</b>	16 (6%)	11 (6%)	19 (11%)	12 (6%)	10 (5%)
<b>Total Closures</b>	269	182	183	190	185

**Case Law on the Exhaustion of Administrative Remedies**

In *Belletete v. Halford*, the Florida Fourth District Court of Appeal held that individuals claiming discrimination under the Florida Fair Housing Act (FFHA) must first exhaust administrative remedies before bringing a judicial claim, citing the doctrine of exhaustion of administrative remedies.<sup>36</sup> In a 2012 opinion, *Sun Harbor Homeowners’ Association v. Bonura*, the Fourth DCA reiterated that the FFHA requires exhaustion of administrative remedies as a condition precedent to bringing a civil suit.<sup>37</sup> The court, however, did not rule on that particular issue because it was moot.<sup>38</sup> To date, the Florida Supreme Court has not addressed this issue, rendering the Fourth DCA decision the only one on point in the state court system.

However, in a case brought before the U.S. District Court for the Southern District of Florida and decided in 2010, the Florida Attorney General, in a motion to intervene, stated that “as co-enforcer with the Florida Commission on Human Relations of the FFHA, it has always interpreted the right of the private individual to file a judicial action under the FFHA without first pursuing an administrative remedy.”<sup>39</sup> The U.S. District court agreed that the Fourth DCA decided *Belletete* incorrectly and that aggrieved parties did not have to exhaust administrative remedies before filing a civil lawsuit in a cause of action grounded in the FFHA.<sup>40</sup>

Based upon the Fourth DCA holdings, the HUD notified the Commission that the HUD will suspend the Commission’s participation in the Fair Housing Assistance Program if the FFHA is not amended to overcome the judicially-created requirement that a state court plaintiff must exhaust their administrative remedies as a precondition to filing a housing discrimination claim

<sup>36</sup> *Belletete v. Halford*, 886 So. 2d 308, 310 (Fla. 4th DCA 2004); See also *Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co. of Boston*, 285 So. 2d 386, 389-90 (Fla. 1973). The doctrine of the exhaustion of administrative remedies is the principle that if an administrative remedy is provided by statute, a claimant must first seek relief from the administrative body before judicial relief is available. BLACK’S LAW DICTIONARY (2014).

<sup>37</sup> *Sun Harbor Homeowners’ Ass’n, Inc. v. Bonura*, 95 So. 3d 262, 267 (Fla. 4th DCA 2012).

<sup>38</sup> *Id.*

<sup>39</sup> *Milsap v. Cornerstone Residential Mgmt., Inc.*, 2010 WL 427436, \*1 (S.D. Fla. 2010).

<sup>40</sup> *Id.* at 2. The court held that the FFHA should be interpreted similarly to the federal Fair Housing Act, which has been interpreted by federal courts as allowing for actions in court whether or not all administrative remedies have been exhausted. “The Court is now of the opinion that were this issue before the Florida Supreme Court, that Court would not follow the *Belletete* decision on this narrow issue, and that this Court’s ruling dismissing the FFHA claims for failure to exhaust administrative remedies based on *Belletete* was incorrect.” *Id.* at 2.

in state court.<sup>41</sup> HUD has agreed to extend the deadline for the Commission to have the FFHA amended until March 12, 2016.<sup>42</sup>

### III. Effect of Proposed Changes:

#### **Removal of Housing Discrimination from the Florida Civil Rights Act**

The bill removes housing discrimination as one of the forms of prohibited discrimination under the Florida Civil Rights Act (FCRA). The FCRA expressly requires the exhaustion of administrative remedies as a prerequisite to a civil action. The Florida Fair Housing Act, which has similar prohibitions against housing discrimination, does not include any express prerequisites. As such, the bill clarifies that a person must pursue housing discrimination claims exclusively through the Fair Housing Act.

According to the Commission, this change will also clear up confusion by the courts that plaintiffs who wish to file a civil action for housing discrimination must first exhaust administrative remedies.<sup>43</sup>

#### ***Flexibility and Limits on Filing a Claim***

The bill clarifies that a person does not have to petition for an administrative hearing or exhaust administrative remedies as a condition to bringing a civil action. The bill also removes the requirement that an aggrieved person wait to file the civil action until 180 days after filing a complaint with the Florida Commission on Human Relations or a local agency. Therefore, a person who alleges that he or she has been injured by unlawful housing discrimination may file a civil action at any time.

The bill also prohibits the filing of a civil action if the claimant and the respondent have entered into a conciliation agreement which has been approved by the Commission other than to enforce the terms of the agreement. Also, an aggrieved person may not file a civil action regarding a discriminatory housing practice once an administrative hearing has begun.

#### ***Continuation of Federal Funding***

In removing the term “housing discrimination” from the FCRA and specifying that a petitioner is not required to petition for an administrative hearing or exhaust administrative remedies prior to filing a lawsuit, the bill will make the Florida Fair Housing Act substantially equivalent to its federal counterpart. These changes appear sufficient to preserve the eligibility of the Commission to receive federal funds for investigations, administrative costs, and training for use in housing discrimination cases filed with the HUD. In the 2014-2015 fiscal year, the Commission received \$604,978 from HUD.<sup>44</sup>

---

<sup>41</sup> Letter from HUD to Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 8, 2015) (on file with the Senate Committee on Judiciary).

<sup>42</sup> *Id.*

<sup>43</sup> Email from Michelle Wilson, Executive Direction, Florida Commission on Human Relations (Nov. 5, 2015) (copy on file with the Senate Committee on Judiciary).

<sup>44</sup> E-mail from Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 7, 2015) (copy on file with the Senate Committee on Judiciary).

The bill takes effect July 1, 2016.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

Article VII, s. 18, Fla. Const., provides that a mandate potentially exists if a law:

- Requires cities or counties to spend funds or take action requiring the expenditure of funds;
- Reduces the authority of cities or counties to raise revenues in the aggregate; or
- Reduces the percentage of a state tax shared with cities and counties in the aggregate.<sup>45</sup>

This bill does not impact the ability of a city or county to raise revenue. The bill also does not negatively impact the tax base of a city or county. Therefore, the bill does not appear to be 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:

By eliminating a requirement that a person exhaust his or her administrative remedies before filing a lawsuit, some housing discrimination claims may be resolved by the court system instead of the conciliation processes available through the Florida Commission on Human Relations.

##### C. Government Sector Impact:

###### **Florida Commission on Human Relations**

The Commission does not expect a fiscal or workload impact from this bill.<sup>46</sup> While the Commission maintains that existing law allows a person aggrieved by a discriminatory housing practice to commence a civil action without first filing a complaint for an

---

<sup>45</sup> Article VII, x. 18(a) through (c), Fla. Const.

<sup>46</sup> E-mail from Cheyanne Costilla, General Counsel, Florida Commission on Human Relations (Aug. 20, 2015) (on file with the Senate Committee on Judiciary).

administrative remedy, the bill confirms that individuals can bypass the investigation and conciliation process in order to better access Florida's court system.

According to the Commission, if the proposed bill does not pass, this agency will continue to investigate any complaints of housing discrimination directly filed with the Commission, but would no longer receive or investigate cases for HUD.<sup>47</sup> Additionally, federal funding from HUD for investigations, administrative costs, or training would be at risk.<sup>48</sup> The Commission received \$604,978 from HUD in the 2014-15 fiscal year.<sup>49</sup> HUD has indicated to the Commission that cases previously referred to the Commission by HUD would have to be investigated by HUD.<sup>50</sup>

### **Office of the State Courts Administrator**

The Office of the State Courts Administrator indicates that the fiscal impact of the bill is unknown due to the unavailability of data needed to establish both additional revenue expected to be generated from an increase in civil filings and increased expenditures due to additional workload.<sup>51</sup>

### **VI. Technical Deficiencies:**

None.

### **VII. Related Issues:**

None.

### **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 760.07, 760.34, and 760.35.

---

<sup>47</sup> E-mail from Cheyanne Costilla, General Counsel, Florida Commission on Human Relations (Aug. 19, 2015) (on file with the Senate Committee on Judiciary).

<sup>48</sup> Letter from Michael Keller, Chair of the Florida Commission on Human Relations, to Senator Diaz de La Portilla (Oct. 22, 2015) (on file with the Senate Committee on Judiciary).

<sup>49</sup> E-mail from Michelle Wilson, Executive Director, Florida Commission on Human Relations (July 7, 2015) (on file with the Senate Committee on Judiciary).

<sup>50</sup> *Id.*

<sup>51</sup> Office of the State Courts Administrator, *2016 Judicial Impact Statement* (Nov. 2, 2015).

**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 the Committee on Governmental Oversight and Accountability

585-00725-16

20167008\_\_

A bill to be entitled

An act relating to housing discrimination; amending s. 760.07, F.S.; removing housing discrimination as a cause of action for certain relief and damages stemming from violations of the Florida Civil Rights Act of 1992; amending s. 760.34, F.S.; making technical changes; revising the conditions under which an aggrieved person may commence a civil action in any appropriate court against a specified respondent to enforce specified rights; providing that the aggrieved person does not need to take specified actions before bringing a civil action; amending s. 760.35, F.S.; authorizing, rather than requiring, a civil action to commence within 2 years after an alleged discriminatory housing practice; authorizing an aggrieved person to commence a civil action regardless of whether a specified complaint has been filed and regardless of the status of any such complaint; prohibiting an aggrieved person from filing a specified action in certain circumstances; providing an exception; prohibiting an aggrieved person from commencing a specified civil action if an administrative law judge has commenced a hearing on the record on the allegation; providing an effective date.

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

Section 1. Section 760.07, Florida Statutes, is amended to

Page 1 of 6

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

585-00725-16

20167008\_\_

read:

760.07 Remedies for unlawful discrimination.—Any violation of any Florida statute that makes ~~making~~ unlawful discrimination because of race, color, religion, gender, pregnancy, national origin, age, handicap, or marital status in the areas of education, employment, ~~housing,~~ or public accommodations gives rise to a cause of action for all relief and damages described in s. 760.11(5), unless greater damages are expressly provided for. If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

Section 2. Subsections (2) and (4) of section 760.34, Florida Statutes, are amended to read:

760.34 Enforcement.—

(2) Any person who files a complaint under subsection (1) must ~~do so be filed~~ within 1 year after the alleged discriminatory housing practice occurred. The complaint must be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. A complaint may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him or her and, with the leave of the commission, which shall be granted whenever it would be reasonable and fair to do so, may amend his or her

Page 2 of 6

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



585-00725-16

20167008\_\_

59 answer at any time. Both the complaint and the answer shall be  
60 verified.

61 ~~(4) If, within 180 days after a complaint is filed with the~~  
62 ~~commission or within 180 days after expiration of any period of~~  
63 ~~reference under subsection (3), the commission has been unable~~  
64 ~~to obtain voluntary compliance with ss. 760.20-760.37, The~~  
65 person aggrieved may commence a civil action in any appropriate  
66 court against the respondent named in the complaint or petition  
67 for an administrative determination pursuant to s. 760.35 to  
68 enforce the rights granted or protected by ss. 760.20-760.37.  
69 The person aggrieved is not required to petition for an  
70 administrative hearing or exhaust administrative remedies before  
71 bringing a civil action. If, as a result of its investigation  
72 under subsection (1), the commission finds there is reasonable  
73 cause to believe that a discriminatory housing practice has  
74 occurred, at the request of the person aggrieved, the Attorney  
75 General may bring an action in the name of the state on behalf  
76 of the aggrieved person to enforce the provisions of ss. 760.20-  
77 760.37.

78 Section 3. Section 760.35, Florida Statutes, is amended to  
79 read:

80 760.35 Civil actions and relief; administrative  
81 procedures.-

82 (1) An aggrieved person may commence a civil action ~~shall~~  
83 ~~be commenced~~ no later than 2 years after an alleged  
84 discriminatory housing practice has occurred. However, the court  
85 shall continue a civil case brought pursuant to this section or  
86 s. 760.34 from time to time before bringing it to trial if the  
87 court believes that the conciliation efforts of the commission

585-00725-16

20167008\_\_

88 or local agency are likely to result in satisfactory settlement  
89 of the discriminatory housing practice complained of in the  
90 complaint made to the commission or to the local agency and  
91 which practice forms the basis for the action in court. Any  
92 sale, encumbrance, or rental consummated prior to the issuance  
93 of any court order issued under the authority of ss. 760.20-  
94 760.37 and involving a bona fide purchaser, encumbrancer, or  
95 tenant without actual notice of the existence of the filing of a  
96 complaint or civil action under the provisions of ss. 760.20-  
97 760.37 shall not be affected.

98 (2) An aggrieved person may commence a civil action under  
99 this section regardless of whether a complaint has been filed  
100 under s. 760.34(1) and regardless of the status of any such  
101 complaint. If the commission has obtained a conciliation  
102 agreement with the consent of an aggrieved person under s.  
103 760.36, the aggrieved person may not file any action under this  
104 section regarding the alleged discriminatory housing practice  
105 that forms the basis for the complaint except for the purpose of  
106 enforcing the terms of such an agreement.

107 (3) An aggrieved person may not commence a civil action  
108 under this section regarding an alleged discriminatory housing  
109 practice if an administrative law judge has commenced a hearing  
110 on the record on the allegation.

111 ~~(4)(2)~~ If the court finds that a discriminatory housing  
112 practice has occurred, it shall issue an order prohibiting the  
113 practice and providing affirmative relief from the effects of  
114 the practice, including injunctive and other equitable relief,  
115 actual and punitive damages, and reasonable attorney ~~attorney's~~  
116 fees and costs.

585-00725-16

20167008\_\_

117       ~~(5)(3)~~(a) If the commission is unable to obtain voluntary  
 118 compliance with ss. 760.20-760.37 or has reasonable cause to  
 119 believe that a discriminatory practice has occurred:  
 120       1. The commission may institute an administrative  
 121 proceeding under chapter 120; or  
 122       2. The person aggrieved may request administrative relief  
 123 under chapter 120 within 30 days after receiving notice that the  
 124 commission has concluded its investigation under s. 760.34.  
 125       (b) Administrative hearings shall be conducted pursuant to  
 126 ss. 120.569 and 120.57(1). The respondent must be served written  
 127 notice by certified mail. If the administrative law judge finds  
 128 that a discriminatory housing practice has occurred or is about  
 129 to occur, he or she shall issue a recommended order to the  
 130 commission prohibiting the practice and recommending affirmative  
 131 relief from the effects of the practice, including quantifiable  
 132 damages and reasonable attorney ~~attorney's~~ fees and costs. The  
 133 commission may adopt, reject, or modify a recommended order only  
 134 as provided under s. 120.57(1). Judgment for the amount of  
 135 damages and costs assessed pursuant to a final order by the  
 136 commission may be entered in any court having jurisdiction  
 137 thereof and may be enforced as any other judgment.  
 138       (c) The district courts of appeal may, upon the filing of  
 139 appropriate notices of appeal, review final orders of the  
 140 commission pursuant to s. 120.68. Costs or fees may not be  
 141 assessed against the commission in any appeal from a final order  
 142 issued by the commission under this subsection. Unless  
 143 specifically ordered by the court, the commencement of an appeal  
 144 does not suspend or stay an order of the commission.  
 145       (d) This subsection does not prevent any other legal or

Page 5 of 6

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

585-00725-16

20167008\_\_

146 administrative action provided by law.  
 147       Section 4. This act shall take effect July 1, 2016.  
 148

Page 6 of 6

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



## THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

### COMMITTEES:

Governmental Oversight and Accountability, *Chair*  
Judiciary, *Vice Chair*  
Appropriations  
Appropriations Subcommittee on Education  
Children, Families, and Elder Affairs  
Commerce and Tourism

**SENATOR JEREMY RING**

29th District

October 29, 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 7008, relating to Housing Discrimination, 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  
Joyce Butler, 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](http://www.flsenate.gov)

**ANDY GARDINER**  
President of the Senate

**GARRETT RICHTER**  
President Pro Tempore

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015  
Meeting Date

7008  
Bill Number (if applicable)

Topic \_\_\_\_\_

\_\_\_\_\_  
Amendment Barcode (if applicable)

Name Brian Pitts

Job Title Trustee

Address 1119 Newton Ave S  
Street

Phone 727/897-9291

St Petersburg FL 33705  
City State Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing \_\_\_\_\_

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: CS/SB 604

INTRODUCER: Judiciary Committee and Senators Diaz de la Portilla and Hutson

SUBJECT: Mental Health Services in the Criminal Justice System

DATE: November 19, 2015      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Fav/CS
2.			AHS	
3.			AP	

---

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

---

**I. Summary:**

CS/SB 604 expands the authority of courts to use treatment-based mental health and substance abuse treatment programs and specifies minimum requirements of those programs. Among the changes in the bill, the bill expands the eligibility criteria for these programs to enable the participation of children in delinquency court and veterans who were released under a general discharge. The bill also allows courts to grant conditional release to some defendants to enable them to receive treatment to become competent for trial or who would otherwise be committed subsequent to being found not guilty by reason of insanity. Other provisions of the bill address county-funded mental health court programs and a forensic hospital diversion pilot program.

**Mental Health Court Programs**

The bill encourages counties to establish and fund treatment-based mental health court programs. The bill also authorizes courts to admit defendants, on a voluntary basis, at both the pretrial intervention and postadjudicatory level into the programs. The bill further encourages coordination among various state agencies, local government, and law enforcement agencies to facilitate these programs.

If annually appropriated by the Legislature, each judicial circuit must establish at least one coordinator position for treatment-based mental health court programs. Each judicial circuit must annually report data on the program to the Office of the State Courts Administrator (OSCA) for purposes of program evaluation.

## **Forensic Hospital Diversion Pilot Program**

This bill creates the Forensic Hospital Diversion Pilot Program, which replicates the model of the Miami-Dade Forensic Alternative Center into 2 additional counties. In addition to Miami-Dade, the Department of Children and Families (DCF) will implement the program in Escambia and Hillsborough Counties. The purpose of the program is to divert incarcerated defendants found mentally incompetent to proceed or not guilty by reason of insanity into a therapeutic setting which offers beds and community outpatient treatment.

### **Fiscal Impact**

Although the implementation of some components of the bill are contingent upon appropriations or sufficient existing resources, the estimated costs to implement the bill are significant. The cost to implement the pilot program is \$4.5 million and the cost of the conditional release program for misdemeanor defendants is \$74 million, for a total estimated cost of \$79.5 million. Additionally, the cost of employing at least one mental health coordinator in each county, as authorized by the bill, would require significant funding.

## **II. Present Situation:**

### **Problem-solving Courts**

A problem-solving court is a type of specialty court designed to address specific needs of a defendant, including a:

- Drug court;
- Veterans' court; and
- Mental health court.<sup>1</sup>

A veteran is defined as a person who served in the active military, naval, or air service and who was discharged or released under honorable conditions only, or who later received an upgraded discharge under honorable conditions.<sup>2</sup>

Both pretrial intervention and postadjudicatory cases may be referred to a problem-solving court.<sup>3</sup>

A defendant who is eligible to participate in a problem-solving court may request that the court transfer the case to another county to receive treatment.<sup>4</sup>

Across the state:

- 17 counties operate felony Veterans' courts;
- 38 counties operate felony Drug Courts; and

---

<sup>1</sup> Section 910.035(5)(a), F.S.

<sup>2</sup> Section 1.01(14), F.S.

<sup>3</sup> Section 910.35(5)(d)1. and 2., F.S.

<sup>4</sup> Section 910.35(5)(b), F.S.

- 18 counties operate Mental Health Courts.<sup>5</sup>

Offenders sentenced in problem-solving courts to felony probation are supervised by Department of Corrections' probation officers.

### **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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> If the defendant successfully completes the program, the program administrator may recommend that charges be dismissed without prejudice.<sup>9</sup>

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.<sup>10</sup>

### **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.<sup>11</sup> More recently in 2014, a veterans' court report found that 46 percent of participants were diagnosed with substance abuse and mental health problems.

---

<sup>5</sup> Department of Corrections, *2016 Agency Legislative Bill Analysis* (Nov. 12, 2015) (on file with the Senate Committee on Judiciary).

<sup>6</sup> A misdemeanor is punishable by up to a 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.

<sup>7</sup> Section 948.08 (2), F.S.

<sup>8</sup> Section 948.08(3) and (4), F.S.

<sup>9</sup> Section 948.08(5), F.S. If a case is dismissed without prejudice, the case can be refiled at a later time.

<sup>10</sup> Section 948.08(1), F.S.

<sup>11</sup> Office of Program Policy Analysis & Government Accountability, Research Memorandum, *State-Funded Veterans' Courts in Florida*, pg. 1 (Jan. 30, 2015).

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."<sup>12</sup>

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.<sup>13</sup>

### ***Veterans' Courts in Florida Law***

The 2012 Florida Legislature placed into law the "T. Patt Maney Veterans' Treatment Intervention Act."<sup>14</sup> The law:

- 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 a substance abuse disorder 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.<sup>15</sup> 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.<sup>16</sup>

### ***Pre-trial Intervention Programs***

To be eligible to participate in diversion programs, veterans can be charged with misdemeanors<sup>17</sup> or felonies.<sup>18</sup> 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;

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Senate Bill 138 (ch. 2012-159, Laws of Fla.).

<sup>15</sup> 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.

<sup>16</sup> The authority for Veterans' Courts Programs is in ch. 394, F.S., which addresses mental health. Section 394.47891, F.S.

<sup>17</sup> Section 948.16 (2)(a), F.S., establishes the misdemeanor pretrial veterans' treatment intervention program.

<sup>18</sup> Section 948.08(7)(a), F.S., authorizes courts to consider veterans charged with non-disqualifying felonies for pretrial veterans' treatment intervention programs.



- 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;
- Burglary or attempted burglary;
- Aggravated assault;
- Aggravated stalking; and
- Treason.<sup>19</sup>

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.<sup>20</sup>

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 servicemembers<sup>21</sup> on probation or community control who committed a crime on or after July 1, 2012, and who suffer from a military-related mental illness, a traumatic brain injury, or a substance abuse disorder 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.<sup>22</sup>

---

<sup>19</sup> Section 948.06(8)(c), F.S.

<sup>20</sup> 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.

<sup>21</sup> 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.).

<sup>22</sup> Section 948.21, F.S.

## **Forensic Facilities and Mental Health Treatment for Criminal Defendants**

### ***State Forensic System***

Chapter 916, F.S., governs secure forensic facilities that are under the jurisdiction of the Department of Children and Families. The state forensic system is a network of state facilities and community services for persons who have mental health issues and who are involved with the criminal justice system.

Two types of mentally ill defendants charged with felonies are eligible for involuntary commitment:

- Persons found incompetent to proceed<sup>23</sup> to trial or the entry of a plea; and
- Persons found not guilty by reason of insanity.<sup>24</sup>

Forensic treatment is provided in these settings:

- Separate and secure forensic facilities;
- Civil facilities; and
- Community residential programs or other community settings.

Circuit courts have the option of committing a person to a facility or releasing the person on conditional release.<sup>25</sup> Conditional release is release into the community, accompanied by outpatient care and treatment.<sup>26</sup> The committing court retains jurisdiction over the defendant while the defendant is either under involuntary commitment or conditional release.<sup>27</sup>

The DCF oversees two state-operated facilities, Florida State Hospital and North Florida Evaluation and Treatment Center, and two privately-operated, maximum-security forensic treatment facilities, South Florida Evaluation and Treatment Center and Treasure Coast Treatment Center. In the 2011-2012 fiscal year, the appropriation for state forensic facilities was \$139 million from the General Revenue Fund.<sup>28</sup>

### ***Miami-Dade Forensic Alternative Center***

The Miami-Dade Forensic Alternative Center (MDFAC) opened in 2009 as a community-based, forensic commitment program. The MDFAC serves adults who have lesser felony offenses and are not a danger to the community.<sup>29</sup> The MDFAC provides competency restoration and a continuum of care during commitment and after reentry into the community.<sup>30</sup> The Center currently operates a 16-bed facility at a daily cost of \$284.81 per bed.<sup>31</sup>

---

<sup>23</sup> Mental incompetence to proceed is defined in s. 916.12(1), F.S.

<sup>24</sup> Section 916.105(1), F.S.; The Florida Rules of Criminal Procedure define what is meant by “not guilty by reason of insanity,” rather than the statutes. Section 916.15(1), F.S.

<sup>25</sup> Section 916.17(1), F.S.

<sup>26</sup> *Id.*

<sup>27</sup> Section 916.16(1), F.S.

<sup>28</sup> Budget Subcommittee on Health and Human Services Appropriations, The Florida Senate, *Interim Report 2012-108, The Forensic Mental Health System* (Sept. 2011).

<sup>29</sup> Department of Children and Families (DCF), *2016 Agency Legislative Bill Analysis* (Nov. 13, 2015) (on file with the Senate Committee on Judiciary).

<sup>30</sup> The Florida Senate, *supra* note 28.

<sup>31</sup> DCF, *supra* note 29, at 2.

### III. Effect of Proposed Changes:

This bill expands the authority of courts to use treatment-based mental health and substance abuse treatment programs and specifies minimum requirements of those programs. The premise of the bill is that some who become involved with the criminal justice system are less likely to become involved in the future if they receive treatment for mental health or substance abuse issues.

#### **Eligibility for Participation in a Problem-Solving Court**

A problem-solving court is a type of specialty court, including a drug court, a veterans' court, and a mental health court. This bill expands the population who may be served through a problem-solving court to include children who are enrolled in delinquency pretrial intervention programs.

The bill clarifies that:

- Servicemembers are eligible to participate in problem-solving courts; and
- Veterans and servicemembers may participate in a Military Veterans and Servicemembers Court Program as part of a pretrial intervention program.

Under current law, a veterans' court serves veterans who have been released from military service through an honorable discharge. The bill makes veterans who have been discharged or released under a less than honorable discharge also eligible to participate in veterans' court.

#### **Treatment-based Mental Health Court Programs**

##### ***Creation of the Treatment-based Mental Health Court Program***

This bill authorizes counties to establish and fund treatment-based mental health court programs. The program facilitates the provision of therapeutic mental health treatment for persons who have mental health issues who are in the criminal justice system. Participation by defendants is voluntary.

The program may apply to:

- Pretrial intervention programs;
- Postadjudicatory treatment-based mental health court programs; and
- Court review of the status of compliance or noncompliance of sentenced defendants.

In determining the suitability of a postadjudicatory treatment-based mental health court program, for a particular defendant, the court must review the defendant's:

- Criminal history;
- Mental health screening outcome;
- Amenability to services of the program;
- Total sentence points; and
- Agreement to enter the program.

The court must also consider the recommendation of the state attorney and the victim.

If a defendant sentenced to a post-adjudicatory mental health court program is charged with a violation of probation or community control while in the program, the judge of the program will hear the violation of probation or community control case.

This bill encourages coordination among various state agencies, local government, and law enforcement agencies to establish and support these programs.

If annually appropriated by the Legislature, each judicial circuit shall establish at least one coordinator position for the treatment-based mental health court program to coordinate responsibilities of participating agencies and service providers. The bill requires mental health court programs to collect client-level data and programmatic information to evaluate the program. Of the information collected, each mental health court program must then report programmatic information and aggregate data to the Office of the State Courts Administrator (OSCA).

If a county establishes a treatment-based mental health court program, the county must secure funding from sources other than the state for costs not otherwise required under the state constitution for state court system funding.<sup>32</sup> Agencies of the state executive branch may provide funding for the program and counties may enter into interlocal agreements for the collective funding of these programs.

The bill authorizes the chief judge of each judicial circuit to appoint an advisory committee for the treatment-based mental health court program. Members of the committee are:

- The chief judge or his or her designee serving as chair;
- The judge of the treatment-based mental health court program, unless otherwise designated by the chief judge or his or her designee;
- The state attorney and the public defender;
- Treatment-based mental health program coordinators;
- Community representatives and treatment representatives; and
- Any other person whom the chair deems appropriate.

### ***Pretrial Intervention Mental Health Court Programs***

Current law authorizes courts to establish specialty pretrial intervention programs for persons charged with misdemeanor or felony crimes.

#### **Misdemeanor Program for Adults**

Under the bill, a misdemeanor pretrial mental health court program is included as a type of pretrial intervention program. A defendant who is charged with a misdemeanor and identified as having a mental illness is eligible to participate in the program.

---

<sup>32</sup> Section 29.004, F.S., provides that pursuant to s. 14, Art. V of the State Constitution, state revenue funding for the state court system includes funding for appointed and elected judges; juror compensation and expenses; reasonable court reporting and transcription services; court administration; and case management, including the initial review and evaluation of cases, case monitoring, tracking, and coordination; and service referral, coordination, monitoring, and tracking for treatment-based drug court programs.

Felony Program for Adults

Current law authorizes a court to voluntarily admit a defendant who is a veteran released from military service under an honorable discharge into a pretrial veterans' treatment intervention program. This bill authorizes veterans who were released from military service under a less than honorable discharge to participate in a pretrial intervention program.

The bill specifies how a veteran charged with a felony qualifies to participate in a pretrial mental health program. To be eligible to participate, the defendant:

- Must be identified as having a mental illness;
- Must not have been convicted of a felony; and
- Must be charged with a nonviolent felony<sup>33</sup> or certain violent felonies if the state attorney and the victim consent.<sup>34</sup>

The court retains jurisdiction over the disposition of the pending charges. If the court finds in writing that the defendant has successfully completed the program, the court shall order the dismissal of the criminal charges. If the court finds that the defendant has failed to successfully complete the program, the case may proceed to prosecution.

Delinquency Pretrial Intervention Program for Children

The bill establishes a pretrial intervention program for children who have been identified as having a mental illness. Treatment under the program is to be based on the clinical needs of the child and participation in the program is voluntarily.

To qualify:

- The child must not have been previously adjudicated for a felony; and
- The criminal charge that is currently pending is limited to a misdemeanor, a nonviolent felony<sup>35</sup>, or certain forcible felonies, with victim consent.<sup>36</sup>

At the end of the pretrial intervention period, the court shall determine how to proceed with the case, based on the recommendation of the state attorney and the program administrator and whether the child has successfully completed the program.

If the court dismisses the charges after a child successfully completes a mental health court program, if the child otherwise qualifies, he or she may have his or her arrest record and plea of no lo contendere expunged.

***Postconviction Treatment-based Mental Health Court Program***

Regardless of how a defendant would rank under the Criminal Punishment Code, a court is authorized to place a defendant convicted of a felony or a felony violation of probation or community control into a postadjudicatory treatment-based mental health court program if:

---

<sup>33</sup> A nonviolent felony is defined in the bill as an offense of burglary or trespass listed under ch. 810, F.S., which is charged as a third-degree felony or a non-forcible felony.

<sup>34</sup> These offenses are resisting arrest of an officer with violence; battery on a law enforcement officer; or aggravated assault.

<sup>35</sup> A nonviolent felony is defined in the bill as an offense of burglary or trespass listed under ch. 810, F.S., which is charged as a third-degree felony or a non-forcible felony.

<sup>36</sup> These offenses are resisting arrest of an officer with violence; battery on a law enforcement officer; or aggravated assault.

- The offense is a nonviolent felony;<sup>37</sup>
- The defendant is amenable to mental health treatment, including taking prescribed medication; and
- The court determines the defendant is suitable for placement, based on criteria identical to that required for assessments into the program of other defendants.

A court may also consider a defendant for the program for the offenses of certain forcible felonies, after the court has considered a victim statement or testimony, if provided by the victim.<sup>38</sup>

After a court orders placement of a defendant into a treatment-based mental health program, jurisdiction of the case transfers from the sentencing court to the postadjudicatory treatment-based mental health court program for the interim that the defendant is in the program. Satisfactory completion of the program is a condition of the defendant's probation or community control.

The court may impose specialized treatment for probationers or community controllees who are veterans or servicemembers and whose crime is committed after July 1, 2016, the effective date of this bill. Specialized treatment will address a defendants' mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, as appropriate.

The bill appears to authorize courts to place certain offenders on mental health probation which requires an offender to take psychotropic medication in accordance with an individualized treatment plan. Offenders on mental health probation are to be supervised by specialized probation officers whose caseloads should be limited to a maximum of 50 cases per officer.

## **Forensic Services**

### ***Forensic Hospital Diversion Pilot Program***

This bill authorizes the Department of Children and Families to create the Forensic Hospital Diversion Pilot Program (Program). The Program would divert incarcerated defendants who are found mentally incompetent to proceed at trial or not guilty by reason of insanity from state forensic mental health treatment facilities to community outpatient treatment. The goals of the Program are to provide competency-restoration and community-reintegration services. Services would be provided in either a locked residential treatment facility or a community-based facility, based on public safety, the needs of the individual, and available resources.

Under the bill, if DCF decides to implement the Program, the Program will be implemented in Escambia, Hillsborough, and Miami-Dade counties. The model for the Program is the Miami-Dade Forensic Alternative Center, currently in operation.

Participation in the program is limited to persons who are:

---

<sup>37</sup> A nonviolent felony is defined in the bill as an offense of burglary or trespass listed under ch. 810, F.S., which is charged as a third-degree felony or a non-forcible felony.

<sup>38</sup> These offenses are resisting arrest of an officer with violence; battery on a law enforcement officer; or aggravated assault.

- 18 years of age and older;
- Charged with a second or third degree felony;
- Do not have a significant history of violent criminal offenses;
- Have been adjudicated either incompetent to proceed to trial or not guilty by reason of insanity;
- Meet safety and treatment criteria established by the DCF for placement in the community; and
- Would otherwise be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in conjunction with the Florida Supreme Court Task Force on Substance Abuse and Mental Health Issues in the Courts, to develop educational training for judges in the pilot program counties on the community forensic system.

The DCF is authorized to adopt rules to facilitate the provisions of the bill relating to the Program.

### ***Conditional Release***

Current law authorizes circuit courts to order mentally deficient or mentally ill defendants who are charged or convicted of felonies to be released on conditional release as an alternative to involuntary commitment to a forensic facility. This bill authorizes county courts to order the conditional release of a misdemeanor defendant solely for the purpose of providing outpatient care and treatment.

The bill takes effect July 1, 2016.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

This bill does not appear to contain a mandate because the bill authorizes but does not require counties to spend funds.

### **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:

**Forensic Hospital Diversion Pilot Program**

This bill authorizes the Department of Children and Families to replicate the Miami-Dade Forensic Alternative Center as a pilot program in Escambia, Hillsborough, and Miami-Dade counties. However, the authorization is contingent on the availability of existing resources on a recurring basis.

The DCF's current contract with the center is almost \$1.6 million annually. Funding this model for three programs will require almost \$4.8 million. The DCF anticipates that the redirection of \$4.8 million from the department's budget for this program could impact or decrease the provision of services to other department clients. Therefore, the DCF would be unable to absorb the additional costs and would need additional funding to create the pilot program.

Cost savings may be realized, however, based on the success of the pilot program. The program is able to keep individuals whose competency has been restored in the program rather than in jail while awaiting trial. Doing so may shorten the process, as defendants are less likely to decompensate, or lose competency again from the stress and the less-than-optimal treatment provided in a jail setting. Commitment bed and court cost savings are expected through this bill. Competency is restored more quickly through the program, which requires 100 days on average, than at state facilities, which require 125 days on average.

In Fiscal Year 2011-12, the average cost for a secure forensic bed was \$333 per day. A bed at the program cost much less, at \$229 a day in 2011-12.<sup>39</sup> However, the current cost per bed per day at the program is \$285 a day.<sup>40</sup>

**Conditional Release of Misdemeanor Defendants**

Current law allows only circuit courts to release felony defendants who are mentally ill on conditional release. This bill additionally allows county judges to release misdemeanor defendants who are mentally ill on conditional release. For FY 2012-13, the Office of the State Courts Administrator reported a total of 308,467 misdemeanor filings in the state.<sup>41</sup> The current adult population in Florida is 15.6 million, with a serious mental illness rate ranging on average at 5.4 percent.

---

<sup>39</sup> The Florida Senate, *supra* note 28.

<sup>40</sup> DCF, *supra* note 29, at 2.

<sup>41</sup> Office of the State Courts Administrator, *County Criminal Overview, FY 2012-13 Statistical Reference Guide*, <http://www.flcourts.org/core/fileparse.php/250/urlt/reference-guide-1213-county-crim.pdf>



Multiplying the number of misdemeanor filings, 308,467 by the rate of mental illness, 5.4 percent, 16,657 misdemeanor defendants would be served. Multiplying the number of persons to be served by the average cost of services, which is \$4,462, the total cost is estimated at \$74 million.

Estimated fiscal costs are the cost of the pilot program (\$4.5 million) plus the cost of the conditional release for misdemeanor defendants (\$74 million), for a total estimated cost of \$79.5 million from the provisions of this bill.<sup>42</sup>

### **County Expenses for Treatment-Based Mental Health Court Programs**

The bill encourages, but does not require, counties to create and fund treatment-based mental health court programs. The bill also, contingent upon appropriations, requires each judicial circuit to establish at least one coordinator for the treatment-based mental health programs within the circuit.

### **Problem-solving Courts**

The Office of the State Courts Administrator anticipates additional judicial and court workload from:

- Creating mental health courts, as problem-solving court cases require more extensive hearings and time monitoring than traditional criminal cases. However, cost savings may be realized from lower recidivism and costs of incarceration.
- Expanding the eligibility criteria for veterans. Like other problem-solving courts, veterans' courts require more judicial time than traditional criminal cases.

However, fiscal impact from this legislation cannot be accurately determined due to the unavailability of data needed to quantifiably establish the impact on judicial and court workload.<sup>43</sup>

The Department of Corrections expects a minimal impact for the Department's supervised offender population, as felony offenders are already being referred by pretrial intervention drug courts or are sentenced to probation or community control by felony circuit courts and problem-solving courts. Some of these referrals include special conditions to address mental health or substance abuse treatment.<sup>44</sup>

## **VI. Technical Deficiencies:**

None.

## **VII. Related Issues:**

None.

---

<sup>42</sup> DCF, *supra* note 29, at 3-6.

<sup>43</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement* (Nov. 13, 2015) (on file with the Senate Committee on Judiciary).

<sup>44</sup> Department of Corrections, *supra* note 5, at 4.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 394.47891, 910.035, 916.106, 916.17, 948.01, 948.06, 948.08, 948.16, and 948.21.

This bill creates the following sections of the Florida Statutes: 394.48792 and 916.185.

This bill reenacts the following sections of the Florida Statutes: 394.658, 916.16, 397.334, and 948.012.

**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 November 17, 2015:**

- Establishes mental health probation as a form of specialized supervision that emphasizes mental health treatment;
- Clarifies that the mental health court program must collect client-level data but report aggregate data to the Office of the State Courts Administrator; and
- Makes technical clarifying changes.

- B. **Amendments:**

None.



542820

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

The Committee on Judiciary (Diaz de la Portilla) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 86 - 558

and insert:

394.47892 Mental health court programs.-

(1) Each county may fund a mental health court program under which a defendant in the justice system assessed with a mental illness shall be processed in such a manner as to appropriately address the severity of the identified mental illness through treatment services tailored to the individual



542820

11 needs of the participant. The Legislature intends to encourage  
12 the department, the Department of Corrections, the Department of  
13 Juvenile Justice, the Department of Health, the Department of  
14 Law Enforcement, the Department of Education, and other such  
15 agencies, local governments, law enforcement agencies,  
16 interested public or private entities, and individuals to  
17 support the creation and establishment of problem-solving court  
18 programs. Participation in a mental health court program does  
19 not relieve a public or private agency of its responsibility for  
20 a child or an adult, but enables such agency to better meet the  
21 child's or adult's needs through shared responsibility and  
22 resources.

23 (2) Mental health court programs may include pretrial  
24 intervention programs as provided in ss. 948.08, 948.16, and  
25 985.345, postadjudicatory mental health court programs as  
26 provided in ss. 948.01 and 948.06, and review of the status of  
27 compliance or noncompliance of sentenced defendants through a  
28 mental health court program.

29 (3) Entry into a pretrial mental health court program is  
30 voluntary.

31 (4) (a) Entry into a postadjudicatory mental health court  
32 program as a condition of probation or community control  
33 pursuant to s. 948.01 or s. 948.06 must be based upon the  
34 sentencing court's assessment of the defendant's criminal  
35 history, mental health screening outcome, amenability to the  
36 services of the program, and total sentence points; the  
37 recommendation of the state attorney and the victim, if any; and  
38 the defendant's agreement to enter the program.

39 (b) A defendant who is sentenced to a postadjudicatory



542820

40 mental health court program and who, while a mental health court  
41 program participant, is the subject of a violation of probation  
42 or community control under s. 948.06 shall have the violation of  
43 probation or community control heard by the judge presiding over  
44 the postadjudicatory mental health court program. After a  
45 hearing on or admission of the violation, the judge shall  
46 dispose of any such violation as he or she deems appropriate if  
47 the resulting sentence or conditions are lawful.

48 (5) (a) Contingent upon an annual appropriation by the  
49 Legislature, the state courts system shall establish, at a  
50 minimum, one coordinator position in each mental health court  
51 program to coordinate the responsibilities of the participating  
52 agencies and service providers. Each coordinator shall provide  
53 direct support to the mental health court program by providing  
54 coordination between the multidisciplinary team and the  
55 judiciary, providing case management, monitoring compliance of  
56 the participants in the mental health court program with court  
57 requirements, and managing the collection of data for program  
58 evaluation and accountability.

59 (b) Each mental health court program shall collect  
60 sufficient client-level data and programmatic information for  
61 purposes of program evaluation. Client-level data include  
62 primary offenses that resulted in the mental health court  
63 program referral or sentence, treatment compliance, completion  
64 status and reasons for failure to complete, offenses committed  
65 during treatment and the sanctions imposed, frequency of court  
66 appearances, and units of service. Programmatic information  
67 includes referral and screening procedures, eligibility  
68 criteria, type and duration of treatment offered, and



542820

69 residential treatment resources. The programmatic information  
70 and aggregate data on the number of mental health court program  
71 admissions and terminations by type of termination shall be  
72 reported annually by each mental health court program to the  
73 Office of the State Courts Administrator.

74 (6) If a county chooses to fund a mental health court  
75 program, the county must secure funding from sources other than  
76 the state for those costs not otherwise assumed by the state  
77 pursuant to s. 29.004. However, this subsection does not  
78 preclude counties from using funds for treatment and other  
79 services provided through state executive branch agencies.  
80 Counties may provide, by interlocal agreement, for the  
81 collective funding of these programs.

82 (7) The chief judge of each judicial circuit may appoint an  
83 advisory committee for the mental health court program. The  
84 committee shall be composed of the chief judge, or his or her  
85 designee, who shall serve as chair; the judge of the mental  
86 health court program, if not otherwise designated by the chief  
87 judge as his or her designee; the state attorney, or his or her  
88 designee; the public defender, or his or her designee; the  
89 mental health court program coordinators; community  
90 representatives; treatment representatives; and any other  
91 persons who the chair deems appropriate.

92 Section 3. Paragraph (a) of subsection (5) of section  
93 910.035, Florida Statutes, is amended to read:

94 910.035 Transfer from county for plea, sentence, or  
95 participation in a problem-solving court.—

96 (5) TRANSFER FOR PARTICIPATION IN A PROBLEM-SOLVING COURT.—

97 (a) For purposes of this subsection, the term "problem-



542820

98 solving court" means a drug court pursuant to s. 948.01, s.  
99 948.06, s. 948.08, s. 948.16, or s. 948.20; a military veterans'  
100 and servicemembers' court pursuant to s. 394.47891, s. 948.08,  
101 s. 948.16, or s. 948.21; ~~or~~ a mental health court program  
102 pursuant to s. 394.47892, s. 948.01, s. 948.06, s. 948.08, or s.  
103 948.16; or a delinquency pretrial intervention court program  
104 pursuant to s. 985.345.

105 Section 4. Subsection (5) of section 916.106, Florida  
106 Statutes, is amended to read:

107 916.106 Definitions.—For the purposes of this chapter, the  
108 term:

109 (5) "Court" means the circuit court and includes a county  
110 court ordering the conditional release of a defendant as  
111 provided in s. 916.17.

112 Section 5. Subsection (1) of section 916.17, Florida  
113 Statutes, is amended to read:

114 916.17 Conditional release.—

115 (1) Except for an inmate currently serving a prison  
116 sentence, the committing court may order a conditional release  
117 of any defendant in lieu of an involuntary commitment to a  
118 facility pursuant to s. 916.13 or s. 916.15 based upon an  
119 approved plan for providing appropriate outpatient care and  
120 treatment. A county court may order the conditional release of a  
121 defendant for purposes of the provision of outpatient care and  
122 treatment only. Upon a recommendation that outpatient treatment  
123 of the defendant is appropriate, a written plan for outpatient  
124 treatment, including recommendations from qualified  
125 professionals, must be filed with the court, with copies to all  
126 parties. Such a plan may also be submitted by the defendant and



542820

127 filed with the court with copies to all parties. The plan shall  
128 include:

129 (a) Special provisions for residential care or adequate  
130 supervision of the defendant.

131 (b) Provisions for outpatient mental health services.

132 (c) If appropriate, recommendations for auxiliary services  
133 such as vocational training, educational services, or special  
134 medical care.

135

136 In its order of conditional release, the court shall specify the  
137 conditions of release based upon the release plan and shall  
138 direct the appropriate agencies or persons to submit periodic  
139 reports to the court regarding the defendant's compliance with  
140 the conditions of the release and progress in treatment, with  
141 copies to all parties.

142 Section 6. Section 916.185, Florida Statutes, is created to  
143 read:

144 916.185 Forensic Hospital Diversion Pilot Program.—

145 (1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds  
146 that many jail inmates who have serious mental illnesses and who  
147 are committed to state forensic mental health treatment  
148 facilities for restoration of competency to proceed could be  
149 served more effectively and at less cost in community-based  
150 alternative programs. The Legislature further finds that many  
151 people who have serious mental illnesses and who have been  
152 discharged from state forensic mental health treatment  
153 facilities could avoid returning to the criminal justice and  
154 forensic mental health systems if they received specialized  
155 treatment in the community. Therefore, it is the intent of the





542820

156 Legislature to create the Forensic Hospital Diversion Pilot  
157 Program to serve offenders who have mental illnesses or co-  
158 occurring mental illnesses and substance use disorders and who  
159 are involved in or at risk of entering state forensic mental  
160 health treatment facilities, prisons, jails, or state civil  
161 mental health treatment facilities.

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

163 (a) "Best practices" means treatment services that  
164 incorporate the most effective and acceptable interventions  
165 available in the care and treatment of offenders who are  
166 diagnosed as having mental illnesses or co-occurring mental  
167 illnesses and substance use disorders.

168 (b) "Community forensic system" means the community mental  
169 health and substance use forensic treatment system, including  
170 the comprehensive set of services and supports provided to  
171 offenders involved in or at risk of becoming involved in the  
172 criminal justice system.

173 (c) "Evidence-based practices" means interventions and  
174 strategies that, based on the best available empirical research,  
175 demonstrate effective and efficient outcomes in the care and  
176 treatment of offenders who are diagnosed as having mental  
177 illnesses or co-occurring mental illnesses and substance use  
178 disorders.

179 (3) CREATION.—There is created a Forensic Hospital  
180 Diversion Pilot Program to provide competency-restoration and  
181 community-reintegration services in either a locked residential  
182 treatment facility when appropriate or a community-based  
183 facility based on considerations of public safety, the needs of  
184 the individual, and available resources.



542820

185       (a) The department may implement a Forensic Hospital  
186 Diversion Pilot Program modeled after the Miami-Dade Forensic  
187 Alternative Center, taking into account local needs and  
188 resources, in Escambia County, in conjunction with the First  
189 Judicial Circuit in Escambia County; in Hillsborough County, in  
190 conjunction with the Thirteenth Judicial Circuit in Hillsborough  
191 County; and in Miami-Dade County, in conjunction with the  
192 Eleventh Judicial Circuit in Miami-Dade County.

193       (b) If the department elects to create and implement the  
194 program, the department shall include a comprehensive continuum  
195 of care and services that use evidence-based practices and best  
196 practices to treat offenders who have mental health and co-  
197 occurring substance use disorders.

198       (c) The department and the corresponding judicial circuits  
199 may implement this section if existing resources are available  
200 to do so on a recurring basis. The department may request budget  
201 amendments pursuant to chapter 216 to realign funds between  
202 mental health services and community substance abuse and mental  
203 health services in order to implement this pilot program.

204       (4) ELIGIBILITY.—Participation in the Forensic Hospital  
205 Diversion Pilot Program is limited to offenders who:

206       (a) Are 18 years of age or older.

207       (b) Are charged with a felony of the second degree or a  
208 felony of the third degree.

209       (c) Do not have a significant history of violent criminal  
210 offenses.

211       (d) Are adjudicated incompetent to proceed to trial or not  
212 guilty by reason of insanity pursuant to this part.

213       (e) Meet public safety and treatment criteria established



542820

214 by the department for placement in a community setting.

215 (f) Otherwise would be admitted to a state mental health  
216 treatment facility.

217 (5) TRAINING.—The Legislature encourages the Florida  
218 Supreme Court, in consultation and cooperation with the Florida  
219 Supreme Court Task Force on Substance Abuse and Mental Health  
220 Issues in the Courts, to develop educational training for judges  
221 in the pilot program areas which focuses on the community  
222 forensic system.

223 (6) RULEMAKING.—The department may adopt rules to  
224 administer this section.

225 Section 7. Present subsections (6) through (13) of section  
226 948.001, Florida Statutes, are renumbered as subsections (7)  
227 through (14), respectively, and new subsection (6) is added to  
228 that section, to read:

229 948.001 Definitions.—As used in this chapter, the term:

230 (6) "Mental health probation" means a form of specialized  
231 supervision that emphasizes mental health treatment and working  
232 with treatment providers to focus on the underlying mental  
233 health disorders and compliance with a prescribed psychotropic  
234 medication regimen in accordance with individualized treatment  
235 plans. Mental health probation shall be supervised by officers  
236 with restricted caseloads who are sensitized to the unique needs  
237 of individuals with mental health disorders, and who will work  
238 in tandem with community mental health case managers assigned to  
239 the defendant. Caseloads of such officers should be restricted  
240 to a maximum of 50 cases per officer in order to ensure an  
241 adequate level of staffing and supervision.

242 Section 8. Subsection (8) is added to section 948.01,



542820

243 Florida Statutes, to read:

244 948.01 When court may place defendant on probation or into  
245 community control.—

246 (8)(a) Notwithstanding s. 921.0024 and effective for  
247 offenses committed on or after July 1, 2016, the sentencing  
248 court may place the defendant into a postadjudicatory mental  
249 health court program if the offense is a nonviolent felony, the  
250 defendant is amenable to mental health treatment, including  
251 taking prescribed medications, and the defendant is otherwise  
252 qualified under s. 394.47892(4). The satisfactory completion of  
253 the program must be a condition of the defendant's probation or  
254 community control. As used in this subsection, the term  
255 "nonviolent felony" means a third degree felony violation under  
256 chapter 810 or any other felony offense that is not a forcible  
257 felony as defined in s. 776.08. Defendants charged with  
258 resisting an officer with violence under s. 843.01, battery on a  
259 law enforcement officer under s. 784.07, or aggravated assault  
260 may participate in the mental health court program if the court  
261 so orders after the victim is given his or her right to provide  
262 testimony or written statement to the court as provided in s.  
263 921.143.

264 (b) The defendant must be fully advised of the purpose of  
265 the mental health court program and the defendant must agree to  
266 enter the program. The original sentencing court shall  
267 relinquish jurisdiction of the defendant's case to the  
268 postadjudicatory mental health court program until the defendant  
269 is no longer active in the program, the case is returned to the  
270 sentencing court due to the defendant's termination from the  
271 program for failure to comply with the terms thereof, or the



542820

272 defendant's sentence is completed.

273 (c) The Department of Corrections may establish designated  
274 and trained mental health probation officers to support  
275 individuals under supervision of the mental health court  
276 program.

277 Section 9. Paragraph (j) is added to subsection (2) of  
278 section 948.06, Florida Statutes, to read:

279 948.06 Violation of probation or community control;  
280 revocation; modification; continuance; failure to pay  
281 restitution or cost of supervision.—

282 (2)

283 (j)1. Notwithstanding s. 921.0024 and effective for  
284 offenses committed on or after July 1, 2016, the court may order  
285 the offender to successfully complete a postadjudicatory mental  
286 health court program under s. 394.47892 or a military veterans  
287 and servicemembers court program under s. 394.47891 if:

288 a. The court finds or the offender admits that the offender  
289 has violated his or her community control or probation;

290 b. The underlying offense is a nonviolent felony. As used  
291 in this subsection, the term "nonviolent felony" means a third  
292 degree felony violation under chapter 810 or any other felony  
293 offense that is not a forcible felony as defined in s. 776.08.  
294 Offenders charged with resisting an officer with violence under  
295 s. 843.01, battery on a law enforcement officer under s. 784.07,  
296 or aggravated assault may participate in the mental health court  
297 program if the court so orders after the victim is given his or  
298 her right to provide testimony or written statement to the court  
299 as provided in s. 921.143;

300 c. The court determines that the offender is amenable to



542820

301 the services of a postadjudicatory mental health court program,  
302 including taking prescribed medications, or a military veterans  
303 and servicemembers court program;

304 d. The court explains the purpose of the program to the  
305 offender and the offender agrees to participate; and

306 e. The offender is otherwise qualified to participate in a  
307 postadjudicatory mental health court program under s.  
308 394.47892(4) or a military veterans and servicemembers court  
309 program under s. 394.47891.

310 2. After the court orders the modification of community  
311 control or probation, the original sentencing court shall  
312 relinquish jurisdiction of the offender's case to the  
313 postadjudicatory mental health court program until the offender  
314 is no longer active in the program, the case is returned to the  
315 sentencing court due to the offender's termination from the  
316 program for failure to comply with the terms thereof, or the  
317 offender's sentence is completed.

318 Section 10. Present subsection (8) of section 948.08,  
319 Florida Statutes, is renumbered as subsection (9), paragraph (a)  
320 of subsection (7) is amended, and a new subsection (8) is added  
321 to that section, to read:

322 948.08 Pretrial intervention program.—

323 (7) (a) Notwithstanding any provision of this section, a  
324 person who is charged with a felony, other than a felony listed  
325 in s. 948.06(8) (c), and identified as a veteran, as defined in  
326 s. 1.01, including a veteran who was discharged or released  
327 under a general discharge, or servicemember, as defined in s.  
328 250.01, who suffers from a military service-related mental  
329 illness, traumatic brain injury, substance abuse disorder, or



542820

330 psychological problem, is eligible for voluntary admission into  
331 a pretrial veterans' treatment intervention program approved by  
332 the chief judge of the circuit, upon motion of either party or  
333 the court's own motion, except:

334 1. If a defendant was previously offered admission to a  
335 pretrial veterans' treatment intervention program at any time  
336 before trial and the defendant rejected that offer on the  
337 record, the court may deny the defendant's admission to such a  
338 program.

339 2. If a defendant previously entered a court-ordered  
340 veterans' treatment program, the court may deny the defendant's  
341 admission into the pretrial veterans' treatment program.

342 (8) (a) Notwithstanding any provision of this section, a  
343 defendant is eligible for voluntary admission into a pretrial  
344 mental health court program established pursuant to s. 394.47892  
345 and approved by the chief judge of the circuit for a period to  
346 be determined by the court, based on the clinical needs of the  
347 defendant, upon motion of either party or the court's own motion  
348 if:

349 1. The defendant is identified as having a mental illness;

350 2. The defendant has not been convicted of a felony; and

351 3. The defendant is charged with:

352 a. A nonviolent felony that includes a third degree felony  
353 violation of chapter 810 or any other felony offense that is not  
354 a forcible felony as defined in s. 776.08;

355 b. Resisting an officer with violence under s. 843.01, if  
356 the law enforcement officer and state attorney consent to the  
357 defendant's participation;

358 c. Battery on a law enforcement officer under s. 784.07, if



542820

359 the law enforcement officer and state attorney consent to the  
360 defendant's participation; or

361 d. Aggravated assault, if the victim and state attorney  
362 consent to the defendant's participation.

363 (b) At the end of the pretrial intervention period, the  
364 court shall consider the recommendation of the program  
365 administrator and the recommendation of the state attorney as to  
366 disposition of the pending charges. The court shall determine,  
367 by written finding, whether the defendant has successfully  
368 completed the pretrial intervention program. If the court finds  
369 that the defendant has not successfully completed the pretrial  
370 intervention program, the court may order the person to continue  
371 in education and treatment, which may include a mental health  
372 program offered by a licensed service provider, as defined in s.  
373 394.455, or order that the charges revert to normal channels for  
374 prosecution. The court shall dismiss the charges upon a finding  
375 that the defendant has successfully completed the pretrial  
376 intervention program.

377 Section 11. Present subsections (3) and (4) of section  
378 948.16, Florida Statutes, are renumbered as subsections (4) and  
379 (5), respectively, paragraph (a) of subsection (2) and present  
380 subsection (4) of that section are amended, and a new subsection  
381 (3) is added to that section, to read:

382 948.16 Misdemeanor pretrial substance abuse education and  
383 treatment intervention program; misdemeanor pretrial veterans'  
384 treatment intervention program; misdemeanor pretrial mental  
385 health court program.-

386 (2) (a) A veteran, as defined in s. 1.01, including a  
387 veteran who was discharged or released under a general





542820

388 discharge, or servicemember, as defined in s. 250.01, who  
389 suffers from a military service-related mental illness,  
390 traumatic brain injury, substance abuse disorder, or  
391 psychological problem, and who is charged with a misdemeanor is  
392 eligible for voluntary admission into a misdemeanor pretrial  
393 veterans' treatment intervention program approved by the chief  
394 judge of the circuit, for a period based on the program's  
395 requirements and the treatment plan for the offender, upon  
396 motion of either party or the court's own motion. However, the  
397 court may deny the defendant admission into a misdemeanor  
398 pretrial veterans' treatment intervention program if the  
399 defendant has previously entered a court-ordered veterans'  
400 treatment program.

401 (3) A defendant who is charged with a misdemeanor and  
402 identified as having a mental illness is eligible for voluntary  
403 admission into a misdemeanor pretrial mental health court  
404 program established pursuant to s. 394.47892, approved by the  
405 chief judge of the circuit, for a period to be determined by the  
406 court, based on the clinical needs of the defendant, upon motion  
407 of either party or the court's own motion.

408 (5)~~(4)~~ Any public or private entity providing a pretrial  
409 substance abuse education and treatment program or mental health  
410 court program under this section shall contract with the county  
411 or appropriate governmental entity. The terms of the contract  
412 shall include, but not be limited to, the requirements  
413 established for private entities under s. 948.15(3). This  
414 requirement does not apply to services provided by the  
415 Department of Veterans' Affairs or the United States Department  
416 of Veterans Affairs.



542820

417 Section 12. Section 948.21, Florida Statutes, is amended to  
418 read:

419 948.21 Condition of probation or community control;  
420 military servicemembers and veterans.-

421 (1) Effective for a probationer or community controllee  
422 whose crime ~~is was~~ committed on or after July 1, 2012, and who  
423 is a veteran, as defined in s. 1.01, or servicemember, as  
424 defined in s. 250.01, who suffers from a military service-  
425 related mental illness, traumatic brain injury, substance abuse  
426 disorder, or psychological problem, the court may, in addition  
427 to any other conditions imposed, impose a condition requiring  
428 the probationer or community controllee to participate in a  
429 treatment program capable of treating the probationer's  
430 ~~probationer~~ or community controllee's mental illness, traumatic  
431 brain injury, substance abuse disorder, or psychological  
432 problem.

433 (2) Effective for a probationer or community controllee  
434 whose crime is committed on or after July 1, 2016, and who is a  
435 veteran, as defined in s. 1.01, including a veteran who was  
436 discharged or released under a general discharge, or  
437 servicemember, as defined in s. 250.01, who suffers from a  
438 military service-related mental illness, traumatic brain injury,  
439 substance abuse disorder, or psychological problem, the court  
440 may, in addition to any other conditions imposed, impose a  
441 condition requiring the probationer or community controllee to  
442 participate in a treatment program capable of treating the  
443 probationer's or community controllee's mental illness,  
444 traumatic brain injury, substance abuse disorder, or  
445 psychological problem.



542820

446           (3) The court shall give preference to treatment programs  
447 for which the probationer or community controllee is eligible  
448 through the United States Department of Veterans Affairs or the  
449 Florida Department of Veterans' Affairs. The Department of  
450 Corrections is not required to spend state funds to implement  
451 this section.

452           Section 13. Present subsection (4) of section 985.345,  
453 Florida Statutes, is renumbered as subsection (7) and amended,  
454 and new subsections (4), (5), and (6) are added to that section,  
455 to read:

456           985.345 Delinquency pretrial intervention program.—

457           (4) Notwithstanding any other provision of law, a child who  
458 has been identified as having a mental illness and who has not  
459 been previously adjudicated for a felony is eligible for  
460 voluntary admission into a delinquency pretrial mental health  
461 court program, established pursuant to s. 394.47892, approved by  
462 the chief judge of the circuit, for a period to be determined by  
463 the court, based on the clinical needs of the child, upon motion  
464 of either party or the court's own motion if the child is  
465 charged with:

466           (a) A misdemeanor;

467           (b) A nonviolent felony; for purposes of this paragraph,  
468 the term "nonviolent felony" means a third degree felony  
469 violation of chapter 810 or any other felony offense that is not  
470 a forcible felony as defined in s. 776.08;

471           (c) Resisting an officer with violence under s. 843.01, if  
472 the law enforcement officer and state attorney consent to the  
473 child's participation;

474           (d) Battery on a law enforcement officer under s. 784.07,



542820

475 if the law enforcement officer and state attorney consent to the  
476 child's participation; or

477 (e) Aggravated assault, if the victim and state attorney  
478 consent to the child's participation.

479 (5) At the end of the delinquency pretrial intervention  
480 period, the court shall consider the recommendation of the state  
481 attorney and the program administrator as to disposition of the  
482 pending charges. The court shall determine, by written finding,  
483 whether the child has successfully completed the delinquency  
484 pretrial intervention program. If the court finds that the child  
485 has not successfully completed the delinquency pretrial  
486 intervention program, the court may order the child to continue  
487 in an education, treatment, or monitoring program if resources  
488 and funding are available or order that the charges revert to  
489 normal channels for prosecution. The court may dismiss the  
490 charges upon a finding that the child has successfully completed  
491 the delinquency pretrial intervention program.

492 (6) A child whose charges are dismissed after successful  
493 completion of the mental health court program, if otherwise  
494 eligible, may have his or her arrest record and plea of nolo  
495 contendere to the dismissed charges expunged under s. 943.0585.

496 (7)~~(4)~~ Any entity, whether public or private, providing  
497 pretrial substance abuse education, treatment intervention, ~~drug~~  
498 testing, or ~~and~~ a mental health court ~~urine monitoring~~ program  
499 under this

500  
501 ===== T I T L E A M E N D M E N T =====

502 And the title is amended as follows:

503 Delete lines 6 - 45



542820

504 and insert:

505 F.S.; authorizing the funding for mental health court  
506 programs; providing legislative intent; providing for  
507 eligibility; providing program requirements; providing  
508 requirements for mental health court programs and  
509 counties that participate in the program; requiring  
510 the state courts system to establish at least one  
511 coordinator position in each mental health court  
512 program, contingent upon an annual appropriation;  
513 annually report to the Office of the State Courts  
514 Administrator specified data, programmatic  
515 information, and aggregate data; providing for an  
516 advisory committee; amending s. 910.035, F.S.;  
517 revising the definition of the term "problem-solving  
518 court"; amending s. 916.106, F.S.; redefining the term  
519 "court" to include county courts in certain  
520 circumstances; amending s. 916.17, F.S.; authorizing a  
521 county court to order the conditional release of a  
522 defendant for the provision of outpatient care and  
523 treatment; creating s. 916.185, F.S.; creating the  
524 Forensic Hospital Diversion Pilot Program; providing  
525 legislative findings and intent; providing  
526 definitions; authorizing the Department of Children  
527 and Families to implement a Forensic Hospital  
528 Diversion Pilot Program in specified judicial  
529 circuits; providing for funding; providing for  
530 eligibility for the program; providing legislative  
531 intent concerning training; authorizing rulemaking;  
532 amending s. 948.001, F.S.; defining the term "mental



542820

533 health probation"; amending ss. 948.01 and 948.06,  
534 F.S.; authorizing courts to order certain offenders on  
535 probation or community control to postadjudicatory  
536 mental health court programs; amending s. 948.08,  
537 F.S.; expanding eligibility requirements for certain  
538 pretrial intervention programs; providing for  
539 voluntary admission into a pretrial mental health  
540 court program; amending s. 948.16, F.S.; expanding  
541 eligibility of veterans for a misdemeanor pretrial  
542 veterans' treatment intervention program; providing  
543 eligibility of misdemeanor defendants for a  
544 misdemeanor pretrial mental health court program;  
545 amending s. 948.21, F.S.; expanding veterans'  
546 eligibility for participating in treatment programs  
547 while on court-ordered probation or community control;  
548 amending s. 985.345, F.S.; authorizing pretrial mental  
549 health court programs for certain juvenile offenders;  
550 providing for disposition of pending charges after  
551 completion of the pretrial intervention program;  
552 expanding the services for which an entity must enter  
553 into a contract with specified governmental entities  
554 if such entity provides such services; reenacting ss.  
555 394.658(1)(a) and

By Senator Diaz de la Portilla

40-00444-16

2016604\_\_

1 A bill to be entitled  
 2 An act relating to mental health services in the  
 3 criminal justice system; amending s. 394.47891, F.S.;  
 4 expanding eligibility for military veterans and  
 5 servicemembers court programs; creating s. 394.47892,  
 6 F.S.; authorizing the creation of treatment-based  
 7 mental health court programs; providing for  
 8 eligibility; providing program requirements; providing  
 9 requirements for judicial circuits and counties that  
 10 participate in the program; providing for an advisory  
 11 committee; amending s. 910.035, F.S.; revising the  
 12 definition of the term "problem-solving court";  
 13 amending s. 916.106, F.S.; redefining the term "court"  
 14 to include county courts in certain circumstances;  
 15 amending s. 916.17, F.S.; authorizing a county court  
 16 to order the conditional release of a defendant for  
 17 the provision of outpatient care and treatment;  
 18 creating s. 916.185, F.S.; creating the Forensic  
 19 Hospital Diversion Pilot Program; providing  
 20 legislative findings and intent; providing  
 21 definitions; authorizing the Department of Children  
 22 and Families to implement a Forensic Hospital  
 23 Diversion Pilot Program in specified judicial  
 24 circuits; providing for eligibility for the program;  
 25 providing legislative intent concerning training;  
 26 authorizing rulemaking; amending ss. 948.01 and  
 27 948.06, F.S.; providing for courts to order certain  
 28 offenders on probation or community control to  
 29 postadjudicatory mental health court programs;

Page 1 of 24

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

40-00444-16

2016604\_\_

30 amending s. 948.08, F.S.; expanding eligibility  
 31 requirements for certain pretrial intervention  
 32 programs; providing for voluntary admission into a  
 33 pretrial mental health court program; amending s.  
 34 948.16, F.S.; expanding eligibility of veterans for a  
 35 misdemeanor pretrial veterans' treatment intervention  
 36 program; providing eligibility of misdemeanor  
 37 defendants for a misdemeanor pretrial mental health  
 38 court program; amending s. 948.21, F.S.; expanding  
 39 veterans' eligibility for participating in treatment  
 40 programs while on court-ordered probation or community  
 41 control; amending s. 985.345, F.S.; authorizing  
 42 pretrial mental health court programs for certain  
 43 juvenile offenders; providing for disposition of  
 44 pending charges after completion of the pretrial  
 45 intervention program; reenacting ss. 394.658(1)(a) and  
 46 916.16(2), F.S., relating to diverting individuals  
 47 from judicial commitment to community-based service  
 48 programs and the jurisdiction of committing courts,  
 49 respectively, to incorporate the amendment made to s.  
 50 916.17, F.S., in references thereto; reenacting s.  
 51 397.334(3)(a) and (5), F.S., relating to treatment-  
 52 based drug court programs, to incorporate the  
 53 amendments made to ss. 948.01 and 948.06, F.S., in  
 54 references thereto; reenacting s. 948.012(2)(b), F.S.,  
 55 relating to split sentence probation or community  
 56 control and imprisonment, to incorporate the amendment  
 57 made to s. 948.06, F.S., in a reference thereto;  
 58 providing an effective date.

Page 2 of 24

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

40-00444-16

2016604\_\_

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

61 Section 1. Section 394.47891, Florida Statutes, is amended  
62 to read:

64 394.47891 Military veterans and servicemembers court  
65 programs.—The chief judge of each judicial circuit may establish  
66 a Military Veterans and Servicemembers Court Program under which  
67 veterans, as defined in s. 1.01, including veterans who were  
68 discharged or released under a general discharge, and  
69 servicemembers, as defined in s. 250.01, who are charged or  
70 convicted of a criminal offense and who suffer from a military-  
71 related mental illness, traumatic brain injury, substance abuse  
72 disorder, or psychological problem can be sentenced in  
73 accordance with chapter 921 in a manner that appropriately  
74 addresses the severity of the mental illness, traumatic brain  
75 injury, substance abuse disorder, or psychological problem  
76 through services tailored to the individual needs of the  
77 participant. Entry into any Military Veterans and Servicemembers  
78 Court Program must be based upon the sentencing court's  
79 assessment of the defendant's criminal history, military  
80 service, substance abuse treatment needs, mental health  
81 treatment needs, amenability to the services of the program, the  
82 recommendation of the state attorney and the victim, if any, and  
83 the defendant's agreement to enter the program.

84 Section 2. Section 394.47892, Florida Statutes, is created  
85 to read:

86 394.47892 Treatment-based mental health court programs.—

87 (1) Each county may fund a treatment-based mental health

40-00444-16

2016604\_\_

88 court program under which defendants in the justice system  
89 assessed with a mental illness shall be processed in such a  
90 manner as to appropriately address the severity of the  
91 identified mental illness through treatment services tailored to  
92 the individual needs of the participant. The Legislature intends  
93 to encourage the department, the Department of Corrections, the  
94 Department of Juvenile Justice, the Department of Health, the  
95 Department of Law Enforcement, the Department of Education, and  
96 other such agencies, local governments, law enforcement  
97 agencies, interested public or private entities, and individuals  
98 to support the creation and establishment of problem-solving  
99 court programs. Participation in a treatment-based mental health  
100 court program does not relieve a public or private agency of its  
101 responsibility for a child or an adult, but enables such agency  
102 to better meet the child's or adult's needs through shared  
103 responsibility and resources.

104 (2) Treatment-based mental health court programs may  
105 include pretrial intervention programs as provided in ss.  
106 948.08, 948.16, and 985.345, postadjudicatory treatment-based  
107 mental health court programs as provided in ss. 948.01 and  
108 948.06, and review of the status of compliance or noncompliance  
109 of sentenced defendants through a treatment-based mental health  
110 court program.

111 (3) Entry into a pretrial treatment-based mental health  
112 court program is voluntary.

113 (4) (a) Entry into a postadjudicatory treatment-based mental  
114 health court program as a condition of probation or community  
115 control pursuant to s. 948.01 or s. 948.06 must be based upon  
116 the sentencing court's assessment of the defendant's criminal



40-00444-16

2016604

117 history, mental health screening outcome, amenability to the  
 118 services of the program, and total sentence points; the  
 119 recommendation of the state attorney and the victim, if any; and  
 120 the defendant's agreement to enter the program.

121 (b) A defendant who is sentenced to a postadjudicatory  
 122 mental health court program and who, while a mental health court  
 123 participant, is the subject of a violation of probation or  
 124 community control under s. 948.06 shall have the violation of  
 125 probation or community control heard by the judge presiding over  
 126 the postadjudicatory mental health court program. After a  
 127 hearing on or admission of the violation, the judge shall  
 128 dispose of any such violation as he or she deems appropriate if  
 129 the resulting sentence or conditions are lawful.

130 (5) (a) Contingent upon an annual appropriation by the  
 131 Legislature, each judicial circuit shall establish, at a  
 132 minimum, one coordinator position for the treatment-based mental  
 133 health court program within the state courts system to  
 134 coordinate the responsibilities of the participating agencies  
 135 and service providers. Each coordinator shall provide direct  
 136 support to the treatment-based mental health court program by  
 137 providing coordination between the multidisciplinary team and  
 138 the judiciary, providing case management, monitoring compliance  
 139 of the participants in the treatment-based mental health court  
 140 program with court requirements, and providing program  
 141 evaluation and accountability.

142 (b) Each circuit shall report sufficient client-level and  
 143 programmatic data to the Office of the State Courts  
 144 Administrator annually for purposes of program evaluation.  
 145 Client-level data include primary offenses that resulted in the

40-00444-16

2016604

146 mental health court referral or sentence, treatment compliance,  
 147 completion status and reasons for failure to complete, offenses  
 148 committed during treatment and the sanctions imposed, frequency  
 149 of court appearances, and units of service. Programmatic data  
 150 include referral and screening procedures, eligibility criteria,  
 151 type and duration of treatment offered, and residential  
 152 treatment resources.

153 (6) If a county chooses to fund a treatment-based mental  
 154 health court program, the county must secure funding from  
 155 sources other than the state for those costs not otherwise  
 156 assumed by the state pursuant to s. 29.004. However, this  
 157 subsection does not preclude counties from using funds for  
 158 treatment and other services provided through state executive  
 159 branch agencies. Counties may provide, by interlocal agreement,  
 160 for the collective funding of these programs.

161 (7) The chief judge of each judicial circuit may appoint an  
 162 advisory committee for the treatment-based mental health court  
 163 program. The committee shall be composed of the chief judge, or  
 164 his or her designee, who shall serve as chair; the judge of the  
 165 treatment-based mental health court program, if not otherwise  
 166 designated by the chief judge as his or her designee; the state  
 167 attorney, or his or her designee; the public defender, or his or  
 168 her designee; the treatment-based mental health court program  
 169 coordinators; community representatives; treatment  
 170 representatives; and any other persons who the chair deems  
 171 appropriate.

172 Section 3. Paragraph (a) of subsection (5) of section  
 173 910.035, Florida Statutes, is amended to read:

174 910.035 Transfer from county for plea, sentence, or

40-00444-16

2016604\_\_

175 participation in a problem-solving court.-

176 (5) TRANSFER FOR PARTICIPATION IN A PROBLEM-SOLVING COURT.-

177 (a) For purposes of this subsection, the term "problem-  
178 solving court" means a drug court pursuant to s. 948.01, s.  
179 948.06, s. 948.08, s. 948.16, or s. 948.20; a military veterans'  
180 and servicemembers' court pursuant to s. 394.47891, s. 948.08,  
181 s. 948.16, or s. 948.21; ~~or~~ a mental health court pursuant to s.  
182 394.47892, s. 948.01, s. 948.06, s. 948.08, or s. 948.16; or a  
183 delinquency pretrial intervention court program pursuant to s.  
184 985.345.

185 Section 4. Subsection (5) of section 916.106, Florida  
186 Statutes, is amended to read:

187 916.106 Definitions.-For the purposes of this chapter, the  
188 term:

189 (5) "Court" means the circuit court and includes a county  
190 court ordering the conditional release of a defendant as  
191 provided in s. 916.17.

192 Section 5. Subsection (1) of section 916.17, Florida  
193 Statutes, is amended to read:

194 916.17 Conditional release.-

195 (1) Except for an inmate currently serving a prison  
196 sentence, the committing court may order a conditional release  
197 of any defendant in lieu of an involuntary commitment to a  
198 facility pursuant to s. 916.13 or s. 916.15 based upon an  
199 approved plan for providing appropriate outpatient care and  
200 treatment. A county court may order the conditional release of a  
201 defendant for purposes of the provision of outpatient care and  
202 treatment only. Upon a recommendation that outpatient treatment  
203 of the defendant is appropriate, a written plan for outpatient

40-00444-16

2016604\_\_

204 treatment, including recommendations from qualified  
205 professionals, must be filed with the court, with copies to all  
206 parties. Such a plan may also be submitted by the defendant and  
207 filed with the court with copies to all parties. The plan shall  
208 include:

209 (a) Special provisions for residential care or adequate  
210 supervision of the defendant.

211 (b) Provisions for outpatient mental health services.

212 (c) If appropriate, recommendations for auxiliary services  
213 such as vocational training, educational services, or special  
214 medical care.

215  
216 In its order of conditional release, the court shall specify the  
217 conditions of release based upon the release plan and shall  
218 direct the appropriate agencies or persons to submit periodic  
219 reports to the court regarding the defendant's compliance with  
220 the conditions of the release and progress in treatment, with  
221 copies to all parties.

222 Section 6. Section 916.185, Florida Statutes, is created to  
223 read:

224 916.185 Forensic Hospital Diversion Pilot Program.-

225 (1) LEGISLATIVE FINDINGS AND INTENT.-The Legislature finds  
226 that many jail inmates who have serious mental illnesses and who  
227 are committed to state forensic mental health treatment  
228 facilities for restoration of competency to proceed could be  
229 served more effectively and at less cost in community-based  
230 alternative programs. The Legislature further finds that many  
231 people who have serious mental illnesses and who have been  
232 discharged from state forensic mental health treatment

40-00444-16

2016604\_\_

233 facilities could avoid returning to the criminal justice and  
 234 forensic mental health systems if they received specialized  
 235 treatment in the community. Therefore, it is the intent of the  
 236 Legislature to create the Forensic Hospital Diversion Pilot  
 237 Program to serve offenders who have mental illnesses or co-  
 238 occurring mental illnesses and substance use disorders and who  
 239 are involved in or at risk of entering state forensic mental  
 240 health treatment facilities, prisons, jails, or state civil  
 241 mental health treatment facilities.

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

243 (a) “Best practices” means treatment services that  
 244 incorporate the most effective and acceptable interventions  
 245 available in the care and treatment of offenders who are  
 246 diagnosed as having mental illnesses or co-occurring mental  
 247 illnesses and substance use disorders.

248 (b) “Community forensic system” means the community mental  
 249 health and substance use forensic treatment system, including  
 250 the comprehensive set of services and supports provided to  
 251 offenders involved in or at risk of becoming involved in the  
 252 criminal justice system.

253 (c) “Evidence-based practices” means interventions and  
 254 strategies that, based on the best available empirical research,  
 255 demonstrate effective and efficient outcomes in the care and  
 256 treatment of offenders who are diagnosed as having mental  
 257 illnesses or co-occurring mental illnesses and substance use  
 258 disorders.

259 (3) CREATION.—There is created a Forensic Hospital  
 260 Diversion Pilot Program to provide competency-restoration and  
 261 community-reintegration services in either a locked residential

40-00444-16

2016604\_\_

262 treatment facility when appropriate or a community-based  
 263 facility based on considerations of public safety, the needs of  
 264 the individual, and available resources.

265 (a) The department may implement a Forensic Hospital  
 266 Diversion Pilot Program modeled after the Miami-Dade Forensic  
 267 Alternative Center, taking into account local needs and  
 268 resources, in Escambia County, in conjunction with the First  
 269 Judicial Circuit in Escambia County; in Hillsborough County, in  
 270 conjunction with the Thirteenth Judicial Circuit in Hillsborough  
 271 County; and in Miami-Dade County, in conjunction with the  
 272 Eleventh Judicial Circuit in Miami-Dade County.

273 (b) If the department elects to create and implement the  
 274 program, the department shall include a comprehensive continuum  
 275 of care and services that use evidence-based practices and best  
 276 practices to treat offenders who have mental health and co-  
 277 occurring substance use disorders.

278 (c) The department and the corresponding judicial circuits  
 279 may implement this section if existing resources are available  
 280 to do so on a recurring basis. The department may request budget  
 281 amendments pursuant to chapter 216 to realign funds between  
 282 mental health services and community substance abuse and mental  
 283 health services in order to implement this pilot program.

284 (4) ELIGIBILITY.—Participation in the Forensic Hospital  
 285 Diversion Pilot Program is limited to offenders who:

286 (a) Are 18 years of age or older.

287 (b) Are charged with a felony of the second degree or a  
 288 felony of the third degree.

289 (c) Do not have a significant history of violent criminal  
 290 offenses.

40-00444-16

2016604

291 (d) Are adjudicated incompetent to proceed to trial or not  
 292 guilty by reason of insanity pursuant to this part.

293 (e) Meet public safety and treatment criteria established  
 294 by the department for placement in a community setting.

295 (f) Otherwise would be admitted to a state mental health  
 296 treatment facility.

297 (5) TRAINING.—The Legislature encourages the Florida  
 298 Supreme Court, in consultation and cooperation with the Florida  
 299 Supreme Court Task Force on Substance Abuse and Mental Health  
 300 Issues in the Courts, to develop educational training for judges  
 301 in the pilot program areas which focuses on the community  
 302 forensic system.

303 (6) RULEMAKING.—The department may adopt rules to  
 304 administer this section.

305 Section 7. Subsection (8) is added to section 948.01,  
 306 Florida Statutes, to read:

307 948.01 When court may place defendant on probation or into  
 308 community control.—

309 (8) (a) Notwithstanding s. 921.0024 and effective for  
 310 offenses committed on or after July 1, 2016, the sentencing  
 311 court may place the defendant into a postadjudicatory treatment-  
 312 based mental health court program if the offense is a nonviolent  
 313 felony, the defendant is amenable to mental health treatment,  
 314 including taking prescribed medications, and the defendant is  
 315 otherwise qualified under s. 394.47892(4). The satisfactory  
 316 completion of the program must be a condition of the defendant's  
 317 probation or community control. As used in this subsection, the  
 318 term "nonviolent felony" means a third degree felony violation  
 319 under chapter 810 or any other felony offense that is not a

40-00444-16

2016604

320 forcible felony as defined in s. 776.08. Defendants charged with  
 321 resisting an officer with violence under s. 843.01, battery on a  
 322 law enforcement officer under s. 784.07, or aggravated assault  
 323 may participate in the mental health court program if the court  
 324 so orders after the victim is given his or her right to provide  
 325 testimony or written statement to the court as provided in s.  
 326 921.143.

327 (b) The defendant must be fully advised of the purpose of  
 328 the program and the defendant must agree to enter the program.  
 329 The original sentencing court shall relinquish jurisdiction of  
 330 the defendant's case to the postadjudicatory treatment-based  
 331 mental health court program until the defendant is no longer  
 332 active in the program, the case is returned to the sentencing  
 333 court due to the defendant's termination from the program for  
 334 failure to comply with the terms thereof, or the defendant's  
 335 sentence is completed.

336 (c) The Department of Corrections may establish designated  
 337 mental health probation officers to support individuals under  
 338 supervision of the mental health court.

339 Section 8. Paragraph (j) is added to subsection (2) of  
 340 section 948.06, Florida Statutes, to read:

341 948.06 Violation of probation or community control;  
 342 revocation; modification; continuance; failure to pay  
 343 restitution or cost of supervision.—

344 (2)

345 (j)1. Notwithstanding s. 921.0024 and effective for  
 346 offenses committed on or after July 1, 2016, the court may order  
 347 the offender to successfully complete a postadjudicatory  
 348 treatment-based mental health court program under s. 394.47892

40-00444-16 2016604\_\_

349 or a military veterans and servicemembers court program under s.  
 350 394.47891 if:

351 a. The court finds or the offender admits that the offender  
 352 has violated his or her community control or probation.

353 b. The underlying offense is a nonviolent felony. As used  
 354 in this subsection, the term "nonviolent felony" means a third  
 355 degree felony violation under chapter 810 or any other felony  
 356 offense that is not a forcible felony as defined in s. 776.08.  
 357 Offenders charged with resisting an officer with violence under  
 358 s. 843.01, battery on a law enforcement officer under s. 784.07,  
 359 or aggravated assault may participate in the mental health court  
 360 program if the court so orders after the victim is given his or  
 361 her right to provide testimony or written statement to the court  
 362 as provided in s. 921.143.

363 c. The court determines that the offender is amenable to  
 364 the services of a postadjudicatory treatment-based mental health  
 365 court program, including taking prescribed medications, or a  
 366 military veterans and servicemembers court program.

367 d. The court explains the purpose of the program to the  
 368 offender and the offender agrees to participate.

369 e. The offender is otherwise qualified to participate in a  
 370 postadjudicatory treatment-based mental health court program  
 371 under s. 394.47892(4) or a military veterans and servicemembers  
 372 court program under s. 394.47891.

373 2. After the court orders the modification of community  
 374 control or probation, the original sentencing court shall  
 375 relinquish jurisdiction of the offender's case to the  
 376 postadjudicatory treatment-based mental health court program  
 377 until the offender is no longer active in the program, the case

40-00444-16 2016604\_\_

378 is returned to the sentencing court due to the offender's  
 379 termination from the program for failure to comply with the  
 380 terms thereof, or the offender's sentence is completed.

381 Section 9. Present subsection (8) of section 948.08,  
 382 Florida Statutes, is renumbered as subsection (9), paragraph (a)  
 383 of subsection (7) is amended, and a new subsection (8) is added  
 384 to that section, to read:

385 948.08 Pretrial intervention program.—

386 (7) (a) Notwithstanding any provision of this section, a  
 387 person who is charged with a felony, other than a felony listed  
 388 in s. 948.06(8) (c), and identified as a veteran, as defined in  
 389 s. 1.01, including veterans who were discharged or released  
 390 under a general discharge, or servicemember, as defined in s.  
 391 250.01, who suffers from a military service-related mental  
 392 illness, traumatic brain injury, substance abuse disorder, or  
 393 psychological problem, is eligible for voluntary admission into  
 394 a pretrial veterans' treatment intervention program approved by  
 395 the chief judge of the circuit, upon motion of either party or  
 396 the court's own motion, except:

397 1. If a defendant was previously offered admission to a  
 398 pretrial veterans' treatment intervention program at any time  
 399 before trial and the defendant rejected that offer on the  
 400 record, the court may deny the defendant's admission to such a  
 401 program.

402 2. If a defendant previously entered a court-ordered  
 403 veterans' treatment program, the court may deny the defendant's  
 404 admission into the pretrial veterans' treatment program.

405 (8) (a) Notwithstanding any provision of this section, a  
 406 defendant is eligible for voluntary admission into a pretrial

40-00444-16 2016604\_\_

407 mental health court program, established pursuant to s.  
 408 394.47892, and approved by the chief judge of the circuit, for a  
 409 period to be determined by the risk and needs assessment of the  
 410 defendant, upon motion of either party or the court's own motion  
 411 if:

412 1. The defendant is identified as having a mental illness;  
 413 2. The defendant has not been convicted of a felony; and  
 414 3. The defendant is charged with:

415 a. A nonviolent felony that includes a third degree felony  
 416 violation of chapter 810 or any other felony offense that is not  
 417 a forcible felony as defined in s. 776.08;

418 b. Resisting an officer with violence under s. 843.01, if  
 419 the law enforcement officer and state attorney consent to the  
 420 defendant's participation;

421 c. Battery on a law enforcement officer under s. 784.07, if  
 422 the law enforcement officer and state attorney consent to the  
 423 defendant's participation; or

424 d. Aggravated assault where the victim and state attorney  
 425 consent to the defendant's participation.

426 (b) At the end of the pretrial intervention period, the  
 427 court shall consider the recommendation of the treatment  
 428 provider and the recommendation of the state attorney as to  
 429 disposition of the pending charges. The court shall determine,  
 430 by written finding, whether the defendant has successfully  
 431 completed the pretrial intervention program. If the court finds  
 432 that the defendant has not successfully completed the pretrial  
 433 intervention program, the court may order the person to continue  
 434 in education and treatment, which may include a mental health  
 435 program offered by a licensed service provider, as defined in s.

40-00444-16 2016604\_\_

436 394.455, or order that the charges revert to normal channels for  
 437 prosecution. The court shall dismiss the charges upon a finding  
 438 that the defendant has successfully completed the pretrial  
 439 intervention program.

440 Section 10. Present subsection (3) of section 948.16,  
 441 Florida Statutes, is renumbered as subsection (4), paragraph (a)  
 442 of subsection (2) and subsection (4) of that section are  
 443 amended, and a new subsection (3) is added to that section, to  
 444 read:

445 948.16 Misdemeanor pretrial substance abuse education and  
 446 treatment intervention program; misdemeanor pretrial veterans'  
 447 treatment intervention program; misdemeanor pretrial mental  
 448 health court program.-

449 (2) (a) A veteran, as defined in s. 1.01, including veterans  
 450 who were discharged or released under a general discharge, or  
 451 servicemember, as defined in s. 250.01, who suffers from a  
 452 military service-related mental illness, traumatic brain injury,  
 453 substance abuse disorder, or psychological problem, and who is  
 454 charged with a misdemeanor is eligible for voluntary admission  
 455 into a misdemeanor pretrial veterans' treatment intervention  
 456 program approved by the chief judge of the circuit, for a period  
 457 based on the program's requirements and the treatment plan for  
 458 the offender, upon motion of either party or the court's own  
 459 motion. However, the court may deny the defendant admission into  
 460 a misdemeanor pretrial veterans' treatment intervention program  
 461 if the defendant has previously entered a court-ordered  
 462 veterans' treatment program.

463 (3) A defendant who is charged with a misdemeanor and  
 464 identified as having a mental illness is eligible for voluntary

40-00444-16

2016604\_\_

465 admission into a misdemeanor pretrial mental health court  
 466 program established pursuant to s. 394.47892, approved by the  
 467 chief judge of the circuit, for a period to be determined by the  
 468 risk and needs assessment of the defendant, upon motion of  
 469 either party or the court's own motion.

470 (5)(4) Any public or private entity providing a pretrial  
 471 substance abuse education and treatment program or mental health  
 472 program under this section shall contract with the county or  
 473 appropriate governmental entity. The terms of the contract shall  
 474 include, but not be limited to, the requirements established for  
 475 private entities under s. 948.15(3). This requirement does not  
 476 apply to services provided by the Department of Veterans'  
 477 Affairs or the United States Department of Veterans Affairs.

478 Section 11. Section 948.21, Florida Statutes, is amended to  
 479 read:

480 948.21 Condition of probation or community control;  
 481 military servicemembers and veterans.—

482 (1) Effective for a probationer or community controllee  
 483 whose crime was committed on or after July 1, 2012, and who is a  
 484 veteran, as defined in s. 1.01, or servicemember, as defined in  
 485 s. 250.01, who suffers from a military service-related mental  
 486 illness, traumatic brain injury, substance abuse disorder, or  
 487 psychological problem, the court may, in addition to any other  
 488 conditions imposed, impose a condition requiring the probationer  
 489 or community controllee to participate in a treatment program  
 490 capable of treating the probationer or community controllee's  
 491 mental illness, traumatic brain injury, substance abuse  
 492 disorder, or psychological problem.

493 (2) Effective for a probationer or community controllee

40-00444-16

2016604\_\_

494 whose crime is committed on or after July 1, 2016, and who is a  
 495 veteran, as defined in s. 1.01, including veterans who were  
 496 discharged or released under a general discharge, or  
 497 servicemember, as defined in s. 250.01, who suffers from a  
 498 military service-related mental illness, traumatic brain injury,  
 499 substance abuse disorder, or psychological problem, the court  
 500 may, in addition to any other conditions imposed, impose a  
 501 condition requiring the probationer or community controllee to  
 502 participate in a treatment program capable of treating the  
 503 probationer or community controllee's mental illness, traumatic  
 504 brain injury, substance abuse disorder, or psychological  
 505 problem.

506 (3) The court shall give preference to treatment programs  
 507 for which the probationer or community controllee is eligible  
 508 through the United States Department of Veterans Affairs or the  
 509 Florida Department of Veterans' Affairs. The Department of  
 510 Corrections is not required to spend state funds to implement  
 511 this section.

512 Section 12. Present subsection (4) of section 985.345,  
 513 Florida Statutes, is renumbered as subsection (7) and amended,  
 514 and new subsections (4) through (6) are added to that section,  
 515 to read:

516 985.345 Delinquency pretrial intervention program.—

517 (4) Notwithstanding any other provision of law, a child who  
 518 has been identified as having a mental illness and who has not  
 519 been previously adjudicated for a felony is eligible for  
 520 voluntary admission into a delinquency pretrial mental health  
 521 court program, established pursuant to s. 394.47892, approved by  
 522 the chief judge of the circuit, for a period based on the

40-00444-16

2016604\_\_

523 program requirements and the treatment services that are  
 524 suitable for the child, upon motion of either party or the  
 525 court's own motion if the child is charged with:  
 526 (a) A misdemeanor;  
 527 (b) A nonviolent felony; for purposes of this paragraph,  
 528 the term "nonviolent felony" means a third degree felony  
 529 violation of chapter 810 or any other felony offense that is not  
 530 a forcible felony as defined in s. 776.08;  
 531 (c) Resisting an officer with violence under s. 843.01, if  
 532 the law enforcement officer and state attorney consent to the  
 533 child's participation;  
 534 (d) Battery on a law enforcement officer under s. 784.07,  
 535 if the law enforcement officer and state attorney consent to the  
 536 child's participation; or  
 537 (e) Aggravated assault, if the victim and state attorney  
 538 consent to the child's participation.  
 539 (5) At the end of the delinquency pretrial intervention  
 540 period, the court shall consider the recommendation of the state  
 541 attorney and the program administrator as to disposition of the  
 542 pending charges. The court shall determine, by written finding,  
 543 whether the child has successfully completed the delinquency  
 544 pretrial intervention program. If the court finds that the child  
 545 has not successfully completed the delinquency pretrial  
 546 intervention program, the court may order the child to continue  
 547 in an education, treatment, or monitoring program if resources  
 548 and funding are available or order that the charges revert to  
 549 normal channels for prosecution. The court may dismiss the  
 550 charges upon a finding that the child has successfully completed  
 551 the delinquency pretrial intervention program.

Page 19 of 24

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

40-00444-16

2016604\_\_

552 (6) A child whose charges are dismissed after successful  
 553 completion of the mental health court program, if otherwise  
 554 eligible, may have his or her arrest record and plea of nolo  
 555 contendere to the dismissed charges expunged under s. 943.0585.  
 556 (7) ~~(4)~~ Any entity, whether public or private, providing  
 557 pretrial substance abuse education, treatment intervention, and  
 558 a urine monitoring program or a mental health program under this  
 559 section must contract with the county or appropriate  
 560 governmental entity, and the terms of the contract must include,  
 561 but need not be limited to, the requirements established for  
 562 private entities under s. 948.15(3). It is the intent of the  
 563 Legislature that public or private entities providing substance  
 564 abuse education and treatment intervention programs involve the  
 565 active participation of parents, schools, churches, businesses,  
 566 law enforcement agencies, and the department or its contract  
 567 providers.  
 568 Section 13. For the purpose of incorporating the amendment  
 569 made by this act to section 916.17, Florida Statutes, in a  
 570 reference thereto, paragraph (a) of subsection (1) of section  
 571 394.658, Florida Statutes, is reenacted to read:  
 572 394.658 Criminal Justice, Mental Health, and Substance  
 573 Abuse Reinvestment Grant Program requirements.—  
 574 (1) The Criminal Justice, Mental Health, and Substance  
 575 Abuse Statewide Grant Review Committee, in collaboration with  
 576 the Department of Children and Families, the Department of  
 577 Corrections, the Department of Juvenile Justice, the Department  
 578 of Elderly Affairs, and the Office of the State Courts  
 579 Administrator, shall establish criteria to be used to review  
 580 submitted applications and to select the county that will be

Page 20 of 24

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



40-00444-16

2016604

581 awarded a 1-year planning grant or a 3-year implementation or  
 582 expansion grant. A planning, implementation, or expansion grant  
 583 may not be awarded unless the application of the county meets  
 584 the established criteria.

585 (a) The application criteria for a 1-year planning grant  
 586 must include a requirement that the applicant county or counties  
 587 have a strategic plan to initiate systemic change to identify  
 588 and treat individuals who have a mental illness, substance abuse  
 589 disorder, or co-occurring mental health and substance abuse  
 590 disorders who are in, or at risk of entering, the criminal or  
 591 juvenile justice systems. The 1-year planning grant must be used  
 592 to develop effective collaboration efforts among participants in  
 593 affected governmental agencies, including the criminal,  
 594 juvenile, and civil justice systems, mental health and substance  
 595 abuse treatment service providers, transportation programs, and  
 596 housing assistance programs. The collaboration efforts shall be  
 597 the basis for developing a problem-solving model and strategic  
 598 plan for treating adults and juveniles who are in, or at risk of  
 599 entering, the criminal or juvenile justice system and doing so  
 600 at the earliest point of contact, taking into consideration  
 601 public safety. The planning grant shall include strategies to  
 602 divert individuals from judicial commitment to community-based  
 603 service programs offered by the Department of Children and  
 604 Families in accordance with ss. 916.13 and 916.17.

605 Section 14. For the purpose of incorporating the amendment  
 606 made by this act to section 916.17, Florida Statutes, in a  
 607 reference thereto, subsection (2) of section 916.16, Florida  
 608 Statutes, is reenacted to read:

609 916.16 Jurisdiction of committing court.-

Page 21 of 24

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

40-00444-16

2016604

610 (2) The committing court shall retain jurisdiction in the  
 611 case of any defendant placed on conditional release pursuant to  
 612 s. 916.17. Such defendant may not be released from the  
 613 conditions of release except by order of the committing court.

614 Section 15. For the purpose of incorporating the amendments  
 615 made by this act to sections 948.01 and 948.06, Florida  
 616 Statutes, in a reference thereto, paragraph (a) of subsection  
 617 (3) and subsection (5) of section 397.334, Florida Statutes, are  
 618 reenacted to read:

619 397.334 Treatment-based drug court programs.-

620 (3) (a) Entry into any postadjudicatory treatment-based drug  
 621 court program as a condition of probation or community control  
 622 pursuant to s. 948.01, s. 948.06, or s. 948.20 must be based  
 623 upon the sentencing court's assessment of the defendant's  
 624 criminal history, substance abuse screening outcome, amenability  
 625 to the services of the program, total sentence points, the  
 626 recommendation of the state attorney and the victim, if any, and  
 627 the defendant's agreement to enter the program.

628 (5) Treatment-based drug court programs may include  
 629 pretrial intervention programs as provided in ss. 948.08,  
 630 948.16, and 985.345, treatment-based drug court programs  
 631 authorized in chapter 39, postadjudicatory programs as provided  
 632 in ss. 948.01, 948.06, and 948.20, and review of the status of  
 633 compliance or noncompliance of sentenced offenders through a  
 634 treatment-based drug court program. While enrolled in a  
 635 treatment-based drug court program, the participant is subject  
 636 to a coordinated strategy developed by a drug court team under  
 637 subsection (4). The coordinated strategy may include a protocol  
 638 of sanctions that may be imposed upon the participant for

Page 22 of 24

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

40-00444-16

2016604\_\_

639 noncompliance with program rules. The protocol of sanctions may  
 640 include, but is not limited to, placement in a substance abuse  
 641 treatment program offered by a licensed service provider as  
 642 defined in s. 397.311 or in a jail-based treatment program or  
 643 serving a period of secure detention under chapter 985 if a  
 644 child or a period of incarceration within the time limits  
 645 established for contempt of court if an adult. The coordinated  
 646 strategy must be provided in writing to the participant before  
 647 the participant agrees to enter into a treatment-based drug  
 648 court program.

649 Section 16. For the purpose of incorporating the amendment  
 650 made by this act to section 948.06, Florida Statutes, in a  
 651 reference thereto, paragraph (b) of subsection (2) of section  
 652 948.012, Florida Statutes, is reenacted to read:

653 948.012 Split sentence of probation or community control  
 654 and imprisonment.—

655 (2) The court may also impose a split sentence whereby the  
 656 defendant is sentenced to a term of probation which may be  
 657 followed by a period of incarceration or, with respect to a  
 658 felony, into community control, as follows:

659 (b) If the offender does not meet the terms and conditions  
 660 of probation or community control, the court may revoke, modify,  
 661 or continue the probation or community control as provided in s.  
 662 948.06. If the probation or community control is revoked, the  
 663 court may impose any sentence that it could have imposed at the  
 664 time the offender was placed on probation or community control.  
 665 The court may not provide credit for time served for any portion  
 666 of a probation or community control term toward a subsequent  
 667 term of probation or community control. However, the court may

40-00444-16

2016604\_\_

668 not impose a subsequent term of probation or community control  
 669 which, when combined with any amount of time served on preceding  
 670 terms of probation or community control for offenses pending  
 671 before the court for sentencing, would exceed the maximum  
 672 penalty allowable as provided in s. 775.082. Such term of  
 673 incarceration shall be served under applicable law or county  
 674 ordinance governing service of sentences in state or county  
 675 jurisdiction. This paragraph does not prohibit any other  
 676 sanction provided by law.

677 Section 17. This act shall take effect July 1, 2016.

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/2015  
Meeting Date

604  
Bill Number (if applicable)

Topic Mental Health Services in Criminal Justice System

Amendment Barcode (if applicable)

Name Col. Washington Sanchez

Job Title Chairman, Florida Veterans Foundation

Address 400 S. Monroe St  
Street

Phone 850-488-4181

Tallahassee  
City

FL  
State

32399  
Zip

Email SANCHEZ W@FDVA.State.fl.us

Speaking:  For  Against  Information

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

Representing FLORIDA VETERANS FOUNDATION

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

This form is part of the public record for this meeting

CS-001 (10/14/11)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15

Meeting Date

604

Bill Number (if applicable)

Topic Mental Health

Amendment Barcode (if applicable)

Name Greg Pound

Job Title \_\_\_\_\_

Address 9166 Sunrise Dr.

Phone \_\_\_\_\_

Street

Largo

City

Fla.

State

33773

Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing Pineellas County Florida Government Corruption.

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

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

November 17, 2015

*Meeting Date*

604

*Bill Number (if applicable)*

Topic Mental Health Services in Criminal Justice System

*Amendment Barcode (if applicable)*

Name Honorable Nancy Daniels

Job Title Public Defender, 2nd Judicial Circuit

Address 301 South Monroe Street

Phone 850.606.1000

*Street*

Tallahassee

Florida

32301

Email nancy.daniels@fldpd2.com

*City*

*State*

*Zip*

Speaking:  For  Against  Information

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

Representing Florida Public Defender Association, Inc.

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015  
Meeting Date

604  
Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name BORAN PITTS

Job Title Trustee

Address 1119 Newton Ave S  
Street

Phone 727/897-9291

St Petersburg FL 33705  
City State Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing Justice-2-Jesus

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

17 Nov 15

Meeting Date

SB 604

Bill Number (if applicable)

Topic Mental Health Services

Amendment Barcode (if applicable)

Name Barney Bishop III

Job Title President & CEO

Address 204 S. Monroe St., Ste. 201

Phone 577-3032

Street

Tall

City

FL

State

32301

Zip

Email barney@smart  
justicealliance.org

Speaking:  For  Against  Information

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

Representing Fla. Smart Justice Alliance

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

604  
Bill Number (if applicable)

Topic Mental Health Services in the Criminal

542820  
Amendment Barcode (if applicable)

Name Sarah Naf

Justice System

Job Title Intergovernmental Relations Director, Office of the State Courts  
Administrator

Address 500 S. Duval St.  
Street

Phone 850-922-5692

Tallahassee FL 32399  
City State Zip

Email naf.s@flcourts.org

Speaking:  For  Against  Information

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

Representing Supreme Court Task Force on Substance Abuse and  
Mental Health Issues in the Courts

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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



**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: CS/SB 642

INTRODUCER: Judiciary Committee and Senator Diaz de la Portilla

SUBJECT: Drones

DATE: November 18, 2015      REVISED: \_\_\_\_\_

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

**Please see Section IX. for Additional Information:**  
COMMITTEE SUBSTITUTE - Substantial Changes

**I. Summary:**

CS/SB 642 expands the circumstances under which a person may be held vicariously liable for the negligence of another person. Specifically, the bill imposes joint and several liability on the owner of a drone for damages caused by the negligence of the operator of a drone. The application of joint and several liability was generally abolished by the Legislature in 2006. Under the current comparative fault statute, a person’s liability for negligence is generally limited to his or her percentage of fault for an injury or damage.

**II. Present Situation:**

**Drones**

A drone is defined in the Freedom from Unwarranted Surveillance Act<sup>1</sup> as a powered, aerial vehicle that:

- Does not carry a human operator;
- Uses aerodynamic forces to provide vehicle lift;
- Can fly autonomously or be piloted remotely;
- Can be expendable or recoverable; and
- Can carry a lethal or nonlethal payload.

---

<sup>1</sup> Section 934.50, F.S.

Drones come in a variety of sizes, from as small as insects to as large as commercial planes. They can be equipped with a variety of options which include high-power cameras, license plate readers, moving target indicators, thermal scanners, and facial recognition software. Some drones are used for crop dusting, mapping, environmental protection, tracking wildlife, search and rescue missions, delivering packages, and many other purposes.<sup>2</sup>

### *History*

Since 1990 the Federal Aviation Administration, (FAA), has authorized limited use of drones for public missions that include firefighting, law enforcement, search and rescue, disaster relief, border patrol, scientific research, and testing.<sup>3</sup> As technology has advanced and drones have become more affordable, members of the public have begun purchasing them for commercial and recreational uses. According to the FAA, flying model aircraft and unmanned aircraft systems as a hobby or for a recreational purpose does not require approval by the FAA. Non-recreational drone operations are prohibited unless authorized by the FAA on a case-by-case basis.<sup>4</sup>

### *Close Encounters*

As an increasing number of drones fly about in American airspace, several rogue drone incidents have been reported. Between 2012 and 2014, the FAA notes that pilots have reported 15 incidents of close calls involving small drones near airports. In May 2014, a commercial airline pilot descending to LaGuardia Airport reported seeing a black drone with a 10 to 15 foot wing span flying above Manhattan. On the same day, two planes approaching Los Angeles International Airport reported seeing a drone or remotely controlled aircraft as large as a trash can flying in the vicinity. In May 2014, a pilot descending into Atlanta reported a small drone in close proximity to his plane. On March 22, 2014, a U.S. Airways pilot reported a near-collision with a drone or remotely controlled aircraft over Tallahassee.<sup>5</sup>

Incidents of wayward drones and injuries have also been reported at the U.S. Open, a parade in Seattle, and a restaurant in New York City. A quadcopter drone crashed on the White House lawn in January of this year, but no injuries were reported. An errant drone collided with Seattle's giant Ferris wheel this week. As drone-related accidents occur, the field of drone liability is emerging as a new practice area for personal injury lawyers<sup>6</sup> who are already setting up websites for potential clients.<sup>7</sup>

Civilian drones operated with permission of the FAA and under its watch have reported crashes. Registered users that include law enforcement agencies, universities, and other organizations have reported 23 accidents and 236 unsafe incidents between November 2009 and 2014. FAA

---

<sup>2</sup> Taly Matiteyahu, *Drone Regulations and Fourth Amendment Rights: The Interaction of State Drone Statutes and the Reasonable Expectation of Privacy*, 48 COLUM. J. L. & SOC. PROBS., 265, 1 (2015).

<sup>3</sup> Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)* (Feb. 15, 2015), [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsid=18297](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsid=18297).

<sup>4</sup> *Id.* For additional information see Federal Aviation Administration, *Civil Operations (Non-Governmental)*, [http://www.faa.gov/uas/civil\\_operations/](http://www.faa.gov/uas/civil_operations/) (Page last modified Mar. 4, 2015).

<sup>5</sup> Craig Whitlock, *Close Encounters on Rise as Small Drones Gain in Popularity*, The Washington Post, June 23, 2014,

<sup>6</sup> *Seattle's Ferris Wheel Hit by Drone*, BBC News Nov. 12, 2015 available at <http://www.bbc.com/news/technology-34797182>.

<sup>7</sup> See *Drone Injury Lawyer Blog*, <http://www.droneinjurieslawyer.com/drone-injury-lawyer> (last visited Nov. 11, 2015).

accident investigation reports reveal that 47 military drones have crashed in the United States during the period between 2001 and 2013.<sup>8</sup>

### ***Registry Process***

In October the U.S. Department of Transportation announced the creation of a task force that will develop recommendations for a registry process for Unmanned Aircraft Systems. The report is expected to be completed by November 20.<sup>9</sup> The registry should be operational by mid-December, in advance of the holiday season in which nearly 1 million recreational drones are projected to be purchased.<sup>10</sup>

### **Causes of Action for a Drone Injury**

It appears that, under current law, a person might be liable for damages caused by a drone under the theories of:

- General negligence;
- Vicarious liability, including an employer being liable for the negligence of an employee, agency as it relates to respondeat superior, and dangerous instrumentality; and
- Products liability.

### **Negligence**

#### ***Definition***

Negligence, in tort law, is the failure to use reasonable care, or the care that a reasonably careful person would use under like circumstances. Negligence means doing something, under like circumstances, that a reasonably careful person would not do, or failing to do something that a reasonably careful person would do.<sup>11</sup>

#### ***Elements***

For a claimant to successfully recover damages for an injury, he or she must prove four essential elements in the cause of action:

- Duty - The defendant owed the claimant a duty of care;
- Breach of that duty - The duty of care was breached by the defendant's failure to conform to the required standard;
- Causation - A proximate cause or a reasonably close causal connection exists between the defendant's alleged wrong and the claimant's resulting injury; and
- Damages - The claimant suffered actual damages or loss.<sup>12</sup>

---

<sup>8</sup> *Supra* at 5.

<sup>9</sup> United States Department of Transportation, *U.S. Transportation Secretary Anthony Foxx Announces Unmanned Aircraft Registration Requirement: New Task Force to Develop Recommendations by November 20*, <https://www.transportation.gov/briefing-room/us-transportation-secretary-anthony-foxx-announces-unmanned-aircraft-registration>.

<sup>10</sup> Allison Grande, *Drone Registry Lands Hobbyists Within Reach of Regulators*, Law 360, available at <http://www.law360.com/articles/719552/drone-registry-lands-hobbyists-within-reach-of-regulators>.

<sup>11</sup> Florida Standard Jury Instructions, s. 401.4 Negligence.

<sup>12</sup> Thomas D. Sawaya, *FLORIDA PERSONAL INJURY LAW AND PRACTICE WITH WRONGFUL DEATH ACTIONS*, s. 3:1 (2015-2016 edition).

### **Comparative Negligence**

Before 1973, a plaintiff who was partially at fault for an accident was barred from recovering damages under the doctrine of contributory negligence. In 1973, however, the Florida Supreme Court determined that the doctrine of contributory negligence was too harsh on partially-at-fault plaintiffs and replaced it with the comparative negligence doctrine.<sup>13</sup> Under the doctrine of comparative negligence, when a plaintiff and defendant are both at fault, a plaintiff may recover damages proportionate with the negligence of a defendant. This doctrine is now codified in s. 768.81(2), F.S.

### **Joint and Several Liability**

The courts have often struggled with the complexities of having multiple defendants and determining the degree of liability of each and properly apportioning damages among them. In an effort to resolve these complex issues at common law, courts developed the doctrine of joint and several liability. Joint and several liability provides that when multiple tortfeasors act together to cause the plaintiff's damages, all tortfeasors are jointly and severally liable. The plaintiff may join all of the tortfeasors in one lawsuit and look to any of them to satisfy the full judgment award, regardless of the proportion each defendant contributed to the claimant's injuries or damages. Later, the courts limited this rule to lawsuits where the tortfeasors acted with a common purpose and mutual assistance in carrying out the tort.<sup>14</sup>

Florida courts adopted the doctrine of joint and several liability but expanded it to cover many additional situations. As the doctrine of comparative negligence developed, the courts found it increasingly difficult to mesh the two concepts. The Legislature intervened and through the passage of the Tort Reform Acts of 1986, 1988, and 1999 substantially modified joint and several liability and abolished it in 2006.

### **Vicarious Liability or Imputed Negligence**

Although general tort law is based upon the premise of "actual fault" such that someone who engages in wrongful conduct that results in injury to someone else is held legally accountable for his or her own acts, there are exceptions to this general premise.<sup>15</sup> Vicarious liability, or imputed negligence, is the liability that a supervisory party, often an employer, bears for the negligence of a subordinate, often an employee or associate, because of the relationship between the two.<sup>16</sup> Accordingly, under the theory of vicarious liability, a person may be liable for an injury to a third party, even though he or she did not cause the injury.

---

<sup>13</sup> *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

<sup>14</sup> *Sawaya*, *supra* note 12 at s. 7:2.

<sup>15</sup> *Sawaya*, *supra* note 12 at s. 15:15.

<sup>16</sup> BLACK'S LAW DICTIONARY 927 (7th ed. 1999).

### ***Respondeat Superior***

The doctrine of respondeat superior, or “let the superior make answer” is also called the master-servant rule. Under this concept, an employer or principal may be liable for an employee’s or agent’s wrongful acts that are committed within the scope of employment or agency.<sup>17</sup>

### ***Agency Relationship***

“Agency” is the relationship that exists between one person, generally called the principal, who authorizes another person, generally referred to as the agent, to act on his or her behalf with discretionary power when dealing with a third person.<sup>18</sup> Although the principal does exercise some degree of control over the agent, it is often not to the same extent that an employer exercises control over an employee. For a principal to be held liable for the torts of an agent, a plaintiff must prove that an agency relationship exists between the two and that the agent acted within the scope of real or apparent authority.<sup>19</sup>

### ***Dangerous Instrumentality***

The dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts the vehicle to another person who then operates the vehicle negligently and injures a third person.<sup>20</sup> This doctrine has been expanded by the courts to cover airplanes, buses, trucks, golf carts, tow-motors, farm tractors, and construction hoists and cranes.<sup>21</sup> Although drones have some similarities to recognized dangerous instrumentalities, staff is not aware of any court opinion that has considered whether a drone is a dangerous instrumentality.

### **Products Liability Law**

Products liability is the area of negligence law in which manufacturers or sellers who provide products to the public are held legally responsible for damages or injuries caused by those products.<sup>22</sup> The legal theories under which an injured person may recover are negligence, strict liability, and breach of warranty.<sup>23</sup> To recover damages, the plaintiff must prove that the product contained a defect, that the defect caused the injuries, and that the defect existed when the manufacturer, supplier, or retailer gave up possession of the product.<sup>24</sup>

## **III. Effect of Proposed Changes:**

This bill expands the circumstances under which a person may be held vicariously liable for the negligence of another person. Specifically, the bill imposes joint and several liability on the owner of a drone for the negligence of the operator of a drone. The Legislature generally abolished joint and several liability in 2006. Because joint and several liability was broadly

---

<sup>17</sup> BLACK’S LAW DICTIONARY 1313 (7th ed. 1999).

<sup>18</sup> Sawaya, *supra* note 12 at s. 4:4.

<sup>19</sup> *Id.*

<sup>20</sup> Sawaya, *supra* note 12 at s. 4:10.

<sup>21</sup> *Id.*

<sup>22</sup> BLACK’S LAW DICTIONARY 1225 (7th ed. 1999).

<sup>23</sup> Sawaya, *supra* note 12 at s. 13:1.

<sup>24</sup> Sawaya, *supra* note 12 at s. 13:3.

abolished, a person's liability is generally limited to his or her percentage of fault for an injury or damage and no more. By specifying that the owner and operator may be held jointly liable, even though each was hypothetically equally at fault, either party may be held 100 percent liable for the damages caused by the other. Under the current comparative fault statute, s. 768.81, F.S., the liability of owner and operator is based on the percentage of fault attributed to them.

The bill takes effect on July 1, 2016.

**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:

Vicarious liability increases the pool of potential defendants to a lawsuit and increases the sources available to pay damages to a plaintiff. As a result, the bill may increase the potential for an injured plaintiff to be made whole.

C. Government Sector Impact:

The bill may reduce dependency on government aid to the extent that a person is able to recover damages for injuries caused by a drone from other sources.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 768.38 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 November 17, 2015:**

The committee substitute narrows the scope of the bill by removing the portion of the bill which would have made the owner and operator of a drone liable for damages caused by a manufacturing or design defect. The committee substitute moves this provision from chapter 934, F.S., which deals with the security of communications and surveillance, and places it in chapter 768, F.S., which relates to negligence.

- B. **Amendments:**

None.



548218

LEGISLATIVE ACTION

Senate	.	House
Comm: RCS	.	
11/17/2015	.	
	.	
	.	
	.	

---

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. Section 768.38, Florida Statutes, is created to  
read:

768.38 Liability arising out of drone use.—Notwithstanding  
s. 768.81, if a person suffers an injury or property damage  
caused by the negligent operation of a drone, the owner and  
operator of the drone are liable for damages on the basis of the





548218

11 doctrine of joint and several liability. As used in this  
12 section, the term "drone" has the same meaning as in s. 934.50.

13 Section 2. This act shall take effect July 1, 2016.

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 everything before the enacting clause  
18 and insert:

19

A bill to be entitled

20

An act relating to drones; creating s. 768.38, F.S.;

21

providing for liability for damage to person or

22

property in this state for the operation of a drone;

23

defining a term; providing an effective date.

By Senator Diaz de la Portilla

40-00910-16

2016642\_\_

1 A bill to be entitled

2 An act relating to drones; amending s. 934.50, F.S.;  
3 providing for liability for damage to person or  
4 property in this state for which operation of a drone  
5 was a substantial contributing factor; providing an  
6 effective date.

7  
8 Be It Enacted by the Legislature of the State of Florida:

9  
10 Section 1. Subsections (5) and (6) of section 934.50,  
11 Florida Statutes, are renumbered as subsections (6) and (7),  
12 respectively, and a new subsection (5) is added to that section,  
13 to read:

14 934.50 Searches and seizure using a drone.-

15 (5) LIABILITY ARISING OUT OF DRONE USE.-

16 (a) Except as provided in paragraph (b), a person who  
17 suffers an injury to person or property in this state for which  
18 the operation of a drone was a substantial contributing factor  
19 is entitled to recover all damages arising from the operation of  
20 the drone from the owner and operator of the drone, jointly.

21 (b) Injury to person or property in this state for which  
22 the operation of a drone was a substantial contributing factor  
23 that arises out of or is caused in substantial part by a defect  
24 in the manufacture or design of a drone may be recovered from  
25 the manufacturer, distributor, owner, and operator of the drone,  
26 jointly.

27 Section 2. This act shall take effect July 1, 2016.

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11.17.15

Meeting Date

Topic Drones

Bill Number 642

Name William Large

Amendment Barcode 548218  
(if applicable)

Job Title President

(if applicable)

Address 210 S. Monroe Street

Phone 850.222.0170

Street

Tallahassee FL 32301

E-mail William@Justice.org

City

State

Zip

Speaking:  For  Against  Information

Representing Florida Justice Reform Institute

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/20/11)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15

Meeting Date

642

Bill Number (if applicable)

548 218

Amendment Barcode (if applicable)

Topic Drones

Name Samantha Padgett

Job Title General Counsel

Address 227 S. Adams St.

Street

Phone 222-4082

Tallahassee FL 32301

City

State

Zip

Email samantha@fif.org

Speaking:  For  Against  Information

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

Representing FRF

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

THE FLORIDA SENATE  
**APPEARANCE RECORD**

642

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

11/17/15

Meeting Date

Bill Number (if applicable)

548218

Amendment Barcode (if applicable)

Amendment Only

Topic Drones

Name Tim Nungesser

Job Title Legislative Director

Address 110 E. Jefferson St.

Street

Phone 850-445-5367

Tallahassee FL 32301

City

State

Zip

Email tim.nungesser@nfib.org

Speaking:  For  Against  Information

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

Representing NFIB - National Federation of Independent Business

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11-17-2015

Meeting Date

642

Bill Number (if applicable)

Topic \_\_\_\_\_

Amendment Barcode (if applicable)

Name BRIAN PITTS

Job Title Trustee

Address 1119 Newton Ave S  
Street

Phone 727/897-9291

St Petersburg FL 33705  
City State Zip

Email \_\_\_\_\_

Speaking:  For  Against  Information

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

Representing Justice-2-Jesus

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

THE FLORIDA SENATE

APPEARANCE RECORD

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

11/19/15  
Meeting Date

SB 642  
Bill Number (if applicable)

548218  
Amendment Barcode (if applicable)

Topic Drone Liability

Name Dale Swopes

Job Title Attorney

Address 1234 5th Ave.

Phone 813 273 0017

Tampa Fl. 33605  
City State Zip

Email Dale@Swopes.com

Speaking:  For  Against  Information

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

Representing Florida Justice Association

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

THE FLORIDA SENATE  
**APPEARANCE RECORD**

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

11/17/15  
Meeting Date

642  
Bill Number (if applicable)

Topic Drones

Amendment Barcode (if applicable)

Name Samantha Padgett

Job Title General Counsel

Address 227 S. Adams St.

Phone 272-4082

Street

Tallahassee

City

FL

State

32301

Zip

Email Samantha@fir.org

Speaking:  For  Against  Information

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

Representing Florida Retail Federation

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)



**THE FLORIDA SENATE**  
**APPEARANCE RECORD**

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

11/17/2015

Meeting Date

642  
624

Bill Number (if applicable)

548218

Amendment Barcode (if applicable)

Topic liability

Name Tammy Perdue

Job Title General Counsel

Address 516 N. Adams Street

Street

Tallahassee

City

FL

State

32301

Zip

Phone 8502247173

Email tperdue@aif.com

Speaking:  For  Against  Information

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

Representing Associated Industries of Florida

Appearing at request of Chair:  Yes  No

Lobbyist registered with Legislature:  Yes  No

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

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

S-001 (10/14/14)

# CourtSmart Tag Report

Room: EL 110  
Caption: Senate Judiciary Committee

Case No.:  
Judge:

Type:

Started: 11/17/2015 3:38:31 PM

Ends: 11/17/2015 5:14:50 PM Length: 01:36:20

3:46:29 PM Senator Bradley responds  
3:46:51 PM Followup by Senator Soto  
3:47:02 PM Amendment 512352  
3:47:44 PM Kevin Earl Wood to speak  
3:48:18 PM Kevin Earl Wood to speak  
3:53:49 PM Pete Dunbar to speak  
3:55:28 PM Brian Pitts to speak  
3:57:22 PM Debate on amendment  
3:58:23 PM Amendment adopted  
3:58:30 PM On the bill as amended  
3:58:40 PM Senator Bradley to close on SB 352  
3:59:38 PM Vote on SB 352 as amended  
3:59:48 PM Take up SB 396 by Senator Bradley  
4:00:55 PM Alice Vickers to speak (Florida Bar)  
4:02:04 PM Senator Soto to ask question  
4:03:32 PM Alice Vickers responds  
4:03:45 PM Question by Senator Joyner  
4:04:06 PM Alice Vickers responds  
4:04:36 PM Brian Pitts to speak  
4:05:16 PM Pete Dunbar to speak on SB 396  
4:07:15 PM Senator Soto to ask question to Pete Dunbar  
4:08:19 PM Senator Simmons to ask question to Pete Dunbar regarding other states  
4:09:12 PM Senator Joyner ask a question to Pete Dunbar  
4:09:58 PM Senator Soto to ask question to Pete Dunbar  
4:10:10 PM Pete Dunbar responds  
4:10:59 PM Vote on SB 396  
4:12:01 PM Tab 5 SB 372 by Senator Lee to be presented by Representative Atkins  
4:12:35 PM Senator Joyner to ask questions  
4:13:28 PM Rep. Atkins responds  
4:13:45 PM Senator Soto to ask question  
4:14:27 PM Amendment 138148 by Brandes WD  
4:15:23 PM Amendment 231816 by Senator Stargel  
4:15:51 PM Bob Cohen waives in support  
4:16:28 PM Question by Senator Soto to Judge Cohen  
4:16:51 PM Representative Atkins to close  
4:17:26 PM Vote on SB 372 as amended  
4:17:36 PM Tab 1 Sb 80 by Senator Richter (Michael Nacheff to present)  
4:18:16 PM Senator Joyner to ask question  
4:19:27 PM Appearance cards waive in support  
4:19:57 PM Close on SB 80  
4:20:07 PM Vote on SB 80  
4:20:13 PM Tab 2 SB 458 by Senator Richter  
4:20:44 PM Senator Joyner to ask questions  
4:21:37 PM Senator Soto to ask question to Michael Nacheff  
4:22:37 PM Appearance cards waive in support  
4:23:31 PM Senator Joyner to debate on the bill  
4:23:43 PM Waive close  
4:23:50 PM Vote on SB 458  
4:23:59 PM SB 458 reported favorable  
4:24:16 PM Tab 7 SB 540 by Senator Hukill  
4:25:04 PM Senator Soto to ask question  
4:26:05 PM Eric Virgil RPPTL Section of the Fla. Bar to responds to question

4:27:00 PM Follow up by Senator Soto  
4:27:29 PM Eric Virgil to respond  
4:28:15 PM Amendment 454764 by Senator Bean  
4:28:58 PM Amendment adopted  
4:29:16 PM Waive close  
4:29:35 PM Vote on SB 540 as amended  
4:30:00 PM SB 540 reported favorable  
4:30:19 PM Tab 8 SB 7008 by Senator Ring  
4:31:04 PM Senator Ring waives close  
4:31:40 PM Vote on SB 7008  
4:31:45 PM SB 7008 is reported favorable  
4:32:06 PM Tab 6 SB 494 by Senator Hukill (Senator DLP to present)  
4:32:44 PM Gavel turned over to Senator Ring  
4:33:04 PM Senator Soto asks question  
4:33:58 PM Senator Joyner to ask question  
4:34:41 PM Senator Soto to ask question  
4:35:31 PM Senator DLP to respond  
4:35:54 PM Amendment 147100 by Senator DLP  
4:36:52 PM Amendment adopted  
4:37:22 PM Appearance records waive in support  
4:37:36 PM Brian Pitts (Justice to Jesus) to speak  
4:40:41 PM Jeff Novak representing AOL to speak  
4:42:13 PM Senator Ring to ask question  
4:42:50 PM Greg Pound Government Correction to speak (Pinellas County)  
4:43:52 PM Senator DLP to waive close  
4:44:48 PM Vote on Sb 494 reported favorably  
4:45:18 PM Tab 9 SB 604 by Senator DLP  
4:46:12 PM Amendment 548820  
4:47:14 PM Amendment adopted  
4:47:26 PM Barney Bishop Fla. Smart Justice Alliance to speak  
4:48:23 PM Brian Pitts Justice to Jesus to speak  
4:51:33 PM Honorable Nancy Daniels waives in support  
4:52:34 PM Greg Pound Pinellas County to speak  
4:53:04 PM Debate on bill  
4:54:00 PM Senator DLP waives close  
4:54:07 PM SB 604 will be reported favorably  
4:54:42 PM Tab 10 SB 642 by Senator DLP  
4:55:07 PM Amendment 548218 by Senator DLP (strike all)  
4:56:22 PM Appearance cards  
4:57:59 PM Senator Brandes to ask question  
4:59:29 PM Senator Brandes asking question relating to Drones  
5:00:28 PM Senator Soto to clarify  
5:00:37 PM Tammy Purdue General Counsel AIF  
5:01:13 PM Senator Bean ask questions to AIF  
5:02:20 PM Tammy Purdue responds to strike all amendment  
5:03:20 PM William Large Florida Justice Reform Institute  
5:05:51 PM Senator Soto to ask question of William Large  
5:07:43 PM Appearance cards waive in support  
5:08:42 PM Brian Pitts Justice to Jesus to speak  
5:10:34 PM debate on the bill  
5:11:33 PM Senator Brandes to speak  
5:11:43 PM Senator DLP to close  
5:12:40 PM Vote on SB 642 as amended  
5:13:39 PM SB 642 will be reported favorably  
5:14:15 PM Senator Brandes moves we rise