

**STORAGE NAME:** h1569z.rpp  
**DATE:** June 21, 2000

**\*\*AS PASSED BY THE LEGISLATURE\*\***  
**CHAPTER #:** 2000-298, Laws of Florida

**HOUSE OF REPRESENTATIVES  
AS FURTHER REVISED BY THE COMMITTEE ON  
REAL PROPERTY AND PROBATE  
FINAL ANALYSIS**

**BILL #:** HB 1569 (PCB RPP 00-02) (substantially similar provisions passed in CS/SB 2190, 2nd Engrossed)

**RELATING TO:** Business Entities/Merger/Conversion

**SPONSOR(S):** Committee on Real Property and Probate and Representative Goodlette

**TIED BILL(S):** none

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) REAL PROPERTY AND PROBATE YEAS 7 NAYS 0
- (2) FINANCIAL SERVICES YEAS 7 NAYS 0
- (3) FINANCE & TAXATION YEAS 15 NAYS 0
- (4) GENERAL GOVERNMENT APPROPRIATIONS (W/D)
- (5)

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**I. SUMMARY:**

This act eliminates the requirement that title to real property held by certain business entities merging with other business entities, or held by a partnership converting between a general partnership and a limited partnership, be conveyed by recordation of a deed. Accordingly, title to real property owned by the merging or converting entity would, upon filing of the applicable documents with the Florida Department of State, pass by operation of law to the surviving entity, without recording a deed and paying the applicable documentary stamp tax required when recording a deed. The merging or converting entity must, however, record a copy of the documents that were filed with the Florida Department of State in any county where real property is affected by the merger or conversion.

This act further provides that title to real property owned by a business entity that merged or converted prior to the effective date of the act is vested in the surviving entity. This act also provides that a fictitious name registered under the provisions of s. 865.09, F.S., is not required to contain the designation of the type of legal entity of the business that owns the fictitious name.

This act may have an insignificant negative fiscal impact on state revenues. See "Fiscal Analysis & Economic Impact Statement."

**On May 5, 2000, HB 1569 died on the House calendar. Substantially similar provisions passed in CS/SB 2190, 2nd Engrossed, which became law on June 15, 2000, as Chapter 2000-298, Laws of Florida (the "act"). The effective date of the act is June 15, 2000.**

**This analysis, with certain exceptions, is of Chapter 2000-298, Laws of Florida. The exceptions are those sections that address the House bill, which are clearly identified.**

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |                             |   |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. <u>Lower Taxes</u>             | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 3. <u>Individual Freedom</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

**Mergers**

Sections 607.1101 and 607.1107, F.S., allow the merger of corporations, both domestic and foreign.<sup>1</sup> Under these sections, title to real property owned by the merging entity will transfer to the surviving entity by operation of law, which does not require recordation of a deed. The act of filing the articles of merger with the Department of State is sufficient to transfer title to real property from the merging entity to the surviving entity.<sup>2</sup>

Sections 607.11101 (merger of a corporation with another business entity<sup>3</sup>), 608.4383(2) (merger of a limited liability company with another or with any other business entity<sup>4</sup>), and 620.204(1)(b) (merger of a limited partnership with another or with any other business entity<sup>5</sup>), F.S., which became law in 1998 pursuant to Chapter 98-101, L.O.F., require recordation of a deed and payment of documentary stamp taxes thereon in order to transfer title to real property pursuant to a merger.

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<sup>1</sup> "Domestic" means a business entity formed under the laws of this state. "Foreign" means a business entity formed under the laws of any other government.

<sup>2</sup> Title Note 11.07.01. In order to help future title examiners, many attorneys will record a certified copy of the articles of merger with the clerk of the circuit court in any county where the merging corporation owned real property. There is no documentary stamp tax liability under current law for recording corporate articles of merger, the recording fee is nominal.

<sup>3</sup> Section 607.1108(1), F.S., provides that "the term 'other business entity' means a limited liability company, a foreign corporation, a not-for-profit corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, or any other entity that is formed pursuant to the requirements of applicable law."

<sup>4</sup> Section 608.438(1), F.S., provides that "the term 'other business entity' includes a corporation, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership, a limited partnership, a limited liability company other than a limited liability company organized under the laws of this chapter, or any other entity that is formed pursuant to the requirements of applicable law."

<sup>5</sup> Section 620.201(1), F.S., provides that "the term 'other business entity' includes a corporation, a limited liability company, a business trust or association, a real estate investment trust, a common law trust, an unincorporated business, a general partnership or a limited partnership but excluding a domestic limited partnership, or any other entity that is formed pursuant to the requirements of applicable law."

Section 620.8906(1)(b), F.S., which became law in 1995 pursuant to Chapter 95-242, L.O.F., requires recordation of a deed<sup>6</sup> in order to transfer title to real property pursuant to a merger of partnerships. Section 620.8904(2)(a), F.S., also created by the same act, requires a partnership or limited partnership that is converting from one type of partnership to the other to transfer title to real property by deed to the converted entity.

The original filed bills that created these five sections of law regarding the effect of a merger of business entities were apparently based on the merger provisions of the Uniform Limited Liability Company Act (1996) and the Uniform Partnership Act (1997).<sup>7</sup> The Uniform Limited Liability Act provides: "When a merger takes effect . . . all property owned by each of the limited liability companies and other entities that are party to the merger vests in the surviving entity . . ." The wording of the Uniform Partnership Act is nearly the same. The Uniform Limited Partnership Act, last modified in 1985, does not have a section on mergers. The current working draft of the Uniform Limited Partnership Act provides: "[A]ll property owned, and every contract and other right possessed by, each constituent business organization that ceases to exist is vested in the surviving business organization without reversion or impairment." There is no uniform corporations act.

Prior to the enactment of ss. 607.11101, 608.4383(2), 620.204(1)(b), and 620.8906, F.S., there was no specific statutory authority for the merger of entities other than a merger of corporations pursuant to ss. 607.1101 or 607.1107, F.S. A true merger of other entities could not occur under Florida law, although an effective merger could be accomplished by several means. If one of the entities was a corporation and the other not a corporation, the non-corporation could dissolve and reform itself as a corporation, and then a merger could occur. Another possibility was that the entities would withdraw their Florida registration and register in another jurisdiction that allows cross-entity merger, and then merge with one another. Under either of these scenarios, title to real property would pass by operation of law, without the requirement that a deed be recorded; thus no associated documentary stamp tax would be required. The merging entity could also sell all of its assets and goodwill to the surviving entity, and then dissolve. However, that form of "merger" requires recordation of a deed in order to transfer title to real estate owned by the merging entity,<sup>8</sup> and thus payment of the documentary stamp tax.

### **Fictitious Names**

Section 865.09, F.S., governs fictitious name registration. A fictitious name is "any name under which a person transacts business in this state, other than the person's legal name."<sup>9</sup> A person may not engage in business using a fictitious name unless the name is registered

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<sup>6</sup> Unlike the other sections referenced in this paragraph, this section omits the phrase "and payment of applicable taxes thereon." However, a documentary stamp tax is required on all deeds. Section 201.02, F.S.

<sup>7</sup> Uniform Acts are proposed legislation drafted for the purpose of encouraging state governments to adopt uniform acts on a subject. "The National Conference of Commissioners on Uniform State Laws (NCCUSL) is now in its 108th year. The organization is comprised of more than 300 lawyers, judges, and law professors, appointed by the states as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft proposals for uniform and model laws and work toward their enactment in legislatures. Since its inception in 1892, the group has promulgated more than 200 acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act." From <http://www.nccusl.org/>

<sup>8</sup> Title Note 11.01.03.

<sup>9</sup> Section 865.09(2)(a), F.S. For instance, "Bennigan's" is a fictitious name owned by Steak and Ale of Florida, Inc. A fictitious name may be owned by an individual or by any form of legal entity.

with the Florida Department of State.<sup>10</sup> "The purpose of the fictitious name statute is to provide notice to one dealing with a business of the real party in interest."<sup>11</sup> A business formed by a business entity registered with the Department of State is not required to register its name as a fictitious name unless the name under which the business is to be conducted differs from the name as licensed or registered.<sup>12</sup> Any person who fails to comply with the requirement to register a fictitious name commits a second degree misdemeanor, and neither the business nor its owner may maintain or defend any lawsuit until registered.<sup>13</sup>

There is nothing in s. 865.09, F.S., that expressly provides or implies that when an entity registers its fictitious name the entity must use the designation required when registering its legal name. Legal name registrations are governed, for example, by the following naming conventions:

Section 607.0401, F.S., provides that the legal name of a corporation (as opposed to a fictitious name owned by that corporation) must contain the word "corporation", "company", or "incorporated", or the abbreviation "corp.", "inc.", or "co."

Section 608.406, F.S., provides that the legal name of a limited liability company must end with the words "limited liability company", or "limited company", with the abbreviations "L.L.C." or "L.C.", or with the designation "LLC" or "LC".

Section 620.103, F.S., provides that the legal name of a limited partnership must contain the word "limited" or the abbreviation "Ltd."

These provisions do not require that a fictitious name owned by a corporation, limited liability company, or limited partnership, include the naming conventions required for legal name registrations.

### C. EFFECT OF PROPOSED CHANGES:

This act eliminates the requirement that title to real property held by certain business entities merging with other business entities, or held by a partnership converting between a general partnership and a limited partnership, be conveyed by recordation of a deed. Accordingly, title to real property owned by the merging or converting entity would, upon filing of the applicable documents with the Florida Department of State, pass by operation of law to the surviving entity without recording a deed and paying the applicable documentary stamp tax required. The merging or converting entity must, however, record a copy of the documents that were filed with the Florida Department of State in any county where real property is affected by the merger or conversion.<sup>14</sup>

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<sup>10</sup> Section 865.09(3), F.S.

<sup>11</sup> *Royal Atlantic Health Spa, Inc. v. B.L.N., Inc.*, 677 So.2d 1385, 1387 (Fla. 4th DCA 1996).

<sup>12</sup> Section 865.09(7), F.S.

<sup>13</sup> Section 865.09(9), F.S.

<sup>14</sup> There is no documentary stamp tax required for recording articles of merger, a certificate of limited partnership, or a revocation of certificate of limited partnership. There is a charge of \$6 for the first page, and \$4.50 for each subsequent page, for recording any document.

This act echos language which was removed from the bills that created ss. 607.11101, 608.4383(2), 620.204(1)(b), and 620.8906, F.S.,<sup>15</sup> with minor grammatical and technical changes. This act makes the law regarding business entity mergers uniform across all types of business entities, and follows the general theory regarding property of merging entities as set forth in the applicable uniform acts; more particularly, that title to property owned by a merging entity vests in the surviving entity without the necessity of filing a deed or other document representing a conveyance of property.

This act also echos language which was removed from the bill that created s. 620.8904, F.S., regarding conversion of a partnership,<sup>16</sup> with minor grammatical and technical changes, to conform to the changes made in business entity mergers by this act. Accordingly, title to real property owned by a converting partnership vests in the surviving partnership without the necessity of filing a deed or other document representing a conveyance of the real property.

This act also creates s. 694.16, which provides that title to all real estate, or any interest therein, owned by a business entity that was a party to a merger or conversion is vested in the surviving entity without reversion or impairment, even if a deed was not recorded, as was required by previous law. This provision addresses the concern that there may be unmarketable titles to real property as a result of the current law on mergers and conversions, if a deed was not recorded.

This act also clarifies current law to specifically provide that a fictitious name registered under the provisions of s. 865.09, F.S., is not required to contain the designation of the type of legal entity of the business that owns the fictitious name.<sup>17</sup>

**D. SECTION-BY-SECTION ANALYSIS:**

See "Present Situation" and "Effect of Proposed Changes."

**III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

This act has an insignificant negative impact on revenues.

**2. Expenditures:**

none

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<sup>15</sup> SB 704, Chapter 98-101, L.O.F.; SB 704, Chapter 98-101, L.O.F.; SB 704, Chapter 98-101, L.O.F.; and SB 2296, Chapter 95-242, L.O.F., respectively.

<sup>16</sup> SB 2296, Chapter 95-242, L.O.F.

<sup>17</sup> For example, "Bennigan's" need not register "Bennigan's, Inc." as a fictitious name.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This act may have an insignificant negative fiscal impact on local governments as a result of eliminating the recordation of certain deeds. The county comptroller, or, the clerk of the court if there is no county comptroller, receives a collections commission of 0.5 percent of documentary stamp tax collected.<sup>18</sup> The clerk of court also receives \$6 for the first page, and \$4.50 for each subsequent page, for any recorded document.<sup>19</sup>

2. Expenditures:

none

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This act may result in an economic benefit to business entities that merge under Florida law by not requiring the payment of documentary stamp tax on the transfer of real property incident to the merger.

D. FISCAL COMMENTS:

The Revenue Estimating Conference determined that this act results in an insignificant loss to state revenues.<sup>20</sup>

The Florida Department of State advises<sup>21</sup> that during fiscal year 1998-99 there were 101 total cross-entity mergers under ss. 607.11101, 608.4383(2), and 620.204(1)(b), F.S. There have been 47 such mergers from July 1, 1999, through November 19, 1999.

A proponent of HB 1569 advises that it is possible under current law to avoid the requirement of a deed, and thereby the requirement of paying documentary stamp tax. The bill proponent asserts that, because tax avoidance is possible, this act has little fiscal impact:

Florida's present merger statutes require deeds and stamp taxes in some cases but not in others, create title marketability problems, and create disincentives against using Florida business entities for transactions involving Florida real property. Under the existing statutes, unwary taxpayers are the only merger parties who . . . pay documentary stamp transfer taxes.<sup>22</sup>

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<sup>18</sup> Section 201.11(2), F.S.

<sup>19</sup> Section 28.24, F.S.

<sup>20</sup> Revenue Estimating Conference Report on HB 1569, March 2, 2000.

<sup>21</sup> Telephone conference with Ben McKay, legislative liaison for the Florida Department of State, on November 19, 1999.

<sup>22</sup> Letter from Burt Bruton, Esquire, February 9, 2000.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that manipulates or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

none

B. RULE-MAKING AUTHORITY:

none

C. OTHER COMMENTS:

The Florida Department of State supports HB 1569, stating:

In view of the fact that this legislation will reduce both paperwork and taxes on Florida business entities, the Secretary of State wholeheartedly supports its adoption.<sup>23</sup>

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

**HB 1569**

On February 21, 2000, the Committee on Real Property and Probate adopted one amendment to the proposed committee bill. That amendment changes s. 620.8906, F.S., to delete the requirement of a deed to transfer title to real property pursuant to conversion of a partnership. That amendment also changes the section of the proposed committee bill that creates a curative statute by adding conversion to the provisions regarding mergers. The proposed committee bill, as amended, was then reported favorably.

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<sup>23</sup> Letter from Benjamin J. McKay, January 18, 2000.

**SB 2190**

On March 28, 2000, the Senate Committee on Judiciary adopted one amendment to SB 2190, which provides that a fictitious name registered under the provisions of s. 865.09, F.S., is not required to contain the designation of the type of legal entity of the business that owns the fictitious name. The Senate Committee on Judiciary reported the bill favorably as a committee substitute.

On April 12, 2000, the Senate, on second reading, adopted three amendments to CS/SB 2190. The first makes grammatical changes to the language regarding fictitious name registrations. The second and third amendments require a merging or converting entity to record a "notice of merger" or "notice of conversion", respectively.

On April 26, 2000, the Senate, on third reading, adopted two amendments to CS/SB 2190, 1st Engrossed, which change the requirement to record a "notice of merger" to a requirement to record the "articles of merger" and change the requirement to record a "notice of conversion" to a requirement to record the certificate of limited partnership or revocation of limited partnership (which are the documents that convert a partnership).

**VII. SIGNATURES:**

**COMMITTEE ON REAL PROPERTY AND PROBATE:**

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

J. Marleen Ahearn, Ph.D, J.D.

**AS REVISED BY THE COMMITTEE ON FINANCIAL SERVICES:**

Prepared by:

Staff Director:

Susan F. Cutchins

Susan F. Cutchins

**AS FURTHER REVISED BY THE COMMITTEE ON FINANCE & TAXATION:**

Prepared by:

Staff Director:

Kama D.S. Monroe

Alan Johansen

**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON REAL PROPERTY AND PROBATE:**

Prepared by:

Staff Director:

Nathan L. Bond, J.D.

J. Marleen Ahearn, Ph.D, J.D.