

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 Criminal Justice Committee

BILL: CS/CS/SB 1730

INTRODUCER: Criminal Justice Committee; Judiciary Committee; and Senator Oelrich

SUBJECT: Service of Process

DATE: April 16, 2008 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Fav/CS
2.	Cellon	Cannon	CJ	Fav/CS
3.			JA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|-----------------------------------------|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill permits special process servers and certified process servers to serve criminal witness subpoenas and criminal summonses. In addition, the bill:

- Allows sheriffs to return to the clerk unserved writs that have been on a docket prior to October 1, 2001;
- Specifies that the sheriff will provide notice of an execution sale prior to the advertisement of the sale to the judgment debtor;
- Requires creditors to identify in an affidavit provided to a sheriff the liens recorded on real property subject to an execution sale;
- Clarifies that the sheriff's distribution of the surplus from the sale to lienholders on real property is based on the date the lien was acquired; and
- Permits sheriffs to serve facsimile copies of protective injunctions instead of certified copies of protective injunctions.

This bill substantially amends the following sections of the Florida Statutes: 48.021, 48.27, 56.041, 56.21, 56.27, 741.30, and 784.046.

II. Present Situation:

Service of Process

Service of process is the formal delivery of a writ, summons, or other legal process or notice.¹ As a general rule, “statutes governing service of process are to be strictly construed to insure that a defendant receives notice of the proceedings.”² Currently, under Florida law process may be served by a sheriff, a person appointed by the sheriff in the sheriff’s county (“special process server”), and a certified process server appointed by the chief judge of the circuit court.³ All process must be served by the sheriff of the county where the person to be served is found, except initial nonenforceable process.⁴ Initial nonenforceable process may be served by a special or certified process server.⁵ Any person authorized by the Florida Rules of Procedure may also serve witness subpoenas.⁶ However, at present, there is no statutory authority or rule of procedure that allows anyone other than a sheriff or a sheriff’s deputy to serve criminal subpoenas.

Unsatisfied Executions

In 2001, Florida established a statewide docketing system for civil writs of execution. Prior to that date, a writ of execution was filed with the sheriff in the county where the assets were actually located. This system was flawed because a debtor could avoid judgment liens by moving personal property from county to county. Thus, a lienholder would have to withdraw the writ of execution from one county and file it with a new county whenever property was transferred from one county to another. The date of the writ was the most recent filing, which in turn affected the priority of the liens.

Effective October 21, 2001, a system was adopted in which a judgment lien was obtained on personal property by filing a judgment lien certificate with the Department of State.⁷ Under the new system, priority among creditors statewide was based upon the date of lien filing, rather than requiring a race from county to county in search of property to levy.

Under current law, if an execution is unsatisfied, a sheriff is required to wait to return a writ to the clerk of the court until the expiration of 20 years after the date of issuance of final judgment upon which the execution was issued.⁸

¹ “The term ‘process’ is not limited to ‘summons.’ In its broadest sense[,] it is equivalent to, or synonymous with, ‘procedure,’ or ‘proceeding.’” BLACK’S LAW DICTIONARY (8th ed. 2004). Thus, service of process may trigger the constitutional issue of procedural due process, which requires notice and the opportunity to be heard. *See Minda v. Ponce*, 918 So. 2d 417, 422 (Fla. 2d DCA 2006) (citing *Schnicke v. Schnicke*, 533 So. 2d 337, 337-38 (Fla. 5th DCA 1988)).

² *Abbate v. Provident Nat’l Bank*, 631 So. 2d 312, 313 (Fla. 5th DCA 1994) (citing *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992)).

³ *Id.*

⁴ Section 48.021(1), F.S. Service of process may be categorized as enforceable or nonenforceable. *See* Florida Senate, Committee on Justice Appropriations, *Sheriff Costs – Service of Process*, Interim Project Report 2006-144, at 1 (August 2005). “Enforceable service of process involves a court order requiring the sheriff to take action (i.e., eviction, seizure of property).” *Id.* On the other hand, “[n]onenforceable service of process is designed to place another party on notice that he or she must take action (i.e., summons to appear, witness subpoena).” *Id.*

⁵ Section 48.021, F.S.

⁶ Section 48.021(1), F.S. Rule 1.070, Florida Rules of Civil Procedure, provides that service of process may be made by a person appointed by court order, known as an elisor.

⁷ Sections 55.201-55.209, F.S.

⁸ Section 56.041(2), F.S.

Execution Sales and Payment of Lienholders

Under existing law, notice of all sales under execution must be advertised weekly for four successive weeks in a newspaper published in the county in which the sale is to take place.⁹ On or before the date of the first publication or posting of the notice of sale, a copy of the notice of sale is to be furnished to the judgment debtor, although s. 56.21, F.S., does not specify who is to furnish the notice. When personal property is levied upon, notice of the levy and execution sale and a copy of an affidavit required by statute must be sent by the sheriff to all judgment creditors.¹⁰ When real property is levied upon, the notice of the levy and execution sale must be given to the property owner of record in the same manner as notice is made to the debtor.¹¹

Florida law also specifies the order of payment when money is received by execution in the following manner:

the sheriff, for costs; the levying creditor in the amount of \$500 as liquidated expenses; if the levy is upon real property, the first priority lienholder under s. 55.10; and if the levy is upon personal property, the first priority lienholder under s. 55.202, s. 55.204(3), or s. 55.208(2), as set forth in an affidavit required by [law] or his or her attorney, in satisfaction of the judgment lien, provided that the judgment lien has not lapsed at the time of the levy.¹²

Florida law delineates the order of payment for lienholders when personal property that is sold under execution results in a surplus. Under the law, “the surplus shall be paid in the order of priority to any judgment lienholders whose judgment liens have not lapsed.”¹³ Florida law also requires a levying creditor in the personal property context to deliver an affidavit to the sheriff with information about a judgment debtor and property lien before the first publication or posting of notice of the sale.¹⁴ Currently, there is no levying creditor affidavit requirement in the real property context.

Service of Process in Domestic Violence and Sexual Violence Cases

In domestic violence cases, a county clerk is required to furnish:

a copy of the petition [for injunction], financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit, if any, notice of hearing, and temporary injunction, if any, to the sheriff or a law enforcement agency of the county where the respondent resides or can be found, who shall serve it upon the respondent as soon thereafter as possible on any day of the week and at any time of the day or night.¹⁵

⁹ Section 56.21, F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 56.27(1), F.S.

¹³ Section 56.27(2), F.S.

¹⁴ Section 56.27(4), F.S.

¹⁵ Section 741.30(8)(a)1., F.S.

The clerk of the court is also responsible for furnishing the sheriff with information on the respondent's physical description and location.¹⁶ In a similar fashion, the sexual violence statute requires the clerk to furnish a sheriff or county law enforcement agency with a copy of the petition, notice of hearing, and temporary injunction to be served as soon thereafter as possible.¹⁷ The clerk must also furnish the sheriff information on the respondent's physical description and location.¹⁸

III. Effect of Proposed Changes:

The bill allows criminal witness subpoenas and criminal summonses to be served by special process servers and certified process servers in addition to a sheriff. Currently, there is no statute or rule that allows anyone other than a sheriff or deputy to serve criminal witness subpoenas and criminal summonses. The bill also amends s. 48.27(2), F.S., to ensure that the statute is consistent with the authority provided to certified process servers in s. 48.021, F.S.

The bill also amends s. 56.041, F.S., to allow sheriffs to return to the clerk unserved writs that have been on a docket prior to October 1, 2001. This change takes into account the system that was adopted on October 1, 2001, in which a judgment lien is obtained on personal property by filing a judgment lien certificate with the Department of State. Under the bill, sheriffs may dispose of writs of execution within their possession that were deposited before the statewide docketing system created in 2001.

In conjunction with these changes, the bill requires creditors attempting to levy on real property to supply an affidavit to the sheriff similar to the affidavit required for levying on personal property, as indicated in the proposed changes to s. 56.27, F.S., discussed below. The sheriff also is to provide notice of the execution sale, in addition to the notice of levy, to the property owner, judgment creditors, and lienholders.

Section 56.27, F.S., is revised to require an affidavit, used in connection with the levy on real property, to state that the creditor has reviewed the property and lien records for real property subject to the execution sale. Additionally, the affidavit must identify the liens recorded on the real property subject to an execution sale. The required affidavit does not change the legal priority of liens established under Florida law, and solely governs the sheriff's distribution of the surplus to lienholders. The bill clarifies that, for the purpose of the sheriff's distribution of the surplus to lienholders, the priority of judgment liens on real property is based on the date the lien was acquired. The bill also clarifies that any remaining surplus must be paid to the "owner of the property sold" rather than to the "defendant," to properly account for those limited scenarios in which the defendant and the property owner might be two different people.

The bill also assures that all such lienholders disclosed in the title search affidavit will receive notice of the pending execution sale and an opportunity to be heard. If the title search affidavit discloses only judgment liens that are junior to the executing creditor's judgment lien, then the distribution of any surplus proceeds from the sale of the property will be distributed by the sheriff to the judgment lien creditors in order of their record priority, with any remaining funds

¹⁶ *Id.*

¹⁷ Section 784.046(8)(a)1., F.S.

¹⁸ *Id.*

going to the former owner of the property. This is the same basic rule under the existing statute for personal property execution sales.

On the other hand, if the search affidavit discloses that there are other junior lienholders, such as holders of mortgages, security interests, tax warrants, or other liens, then the sheriff is not required to determine which liens are valid and enforceable or which party is entitled to receive any surplus sales proceeds. Rather, any surplus sales proceeds (after satisfaction of the first judgment creditor's lien) are returned to the court that issued the execution order so that all persons claiming a junior recorded interest in the property will have a fair opportunity for the court to determine the distribution of the proceeds.

Finally, the bill allows sheriffs to serve a facsimile or an electronic copy of a protective injunction instead of a certified copy in domestic violence and sexual violence cases. Thus, faster service of process could be accomplished in these cases.

The bill provides an effective date of July 1, 2008.

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:

Special and certified process servers will likely experience increased revenue as a result of the expansion of their services to include service of criminal witness subpoenas and criminal summonses.

C. Government Sector Impact:

The provision allowing special and certified process servers to serve criminal witness subpoenas and criminal summonses may cause sheriffs to experience a decrease in revenue related to service of process.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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

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

CS by Criminal Justice on April 16, 2008:

The committee substitute:

- Allows the clerk to transmit injunctions for protection to the sheriff by electronic means and allows the sheriff to serve it in the same manner as if it were a certified copy.
- Clarifies that lienholders disclosed by a title search shall receive notice for execution sales of real property.
- Clarifies sheriff's responsibilities in the distribution of any surplus sales proceeds to lienholders.
- Makes technical revisions to take into account the differences in the way that liens are recorded and enforced against real property interests, in contrast to personal property.

CS by Judiciary on March 18, 2008:

The committee substitute:

- Amends an additional statutory provision governing the authority of certified process servers to include service of criminal witness subpoenas and criminal summonses.
- Clarifies that the bill governs the priority of the sheriff's disbursements of any surplus from an execution sale to lienholders, and that the affidavit submitted by creditors for property levies does not alter the legal priority of liens established under Florida law.
- Clarifies that any remaining surplus from property sold under execution must be paid to the "owner of the property sold" rather than to the "defendant."

B. Amendments:

None.