

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 Judiciary Committee

BILL: SB 426

INTRODUCER: Senator Latvala

SUBJECT: Residential Tenancies

DATE: February 7, 2011

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------|----------------|-----------|--------------------|
| 1. | Treadwell | Maclure | JU | Pre-meeting |
| 2. | _____ | _____ | CA | _____ |
| 3. | _____ | _____ | RC | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill authorizes certified process servers to serve writs of possession in actions for possession of residential property. More specifically, upon the entry of a judgment in favor of a landlord in a possession action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ rather than the sheriff.

This bill substantially amends sections 48.27 and 83.62, Florida Statutes.

II. Present Situation:

Florida Residential Landlord and Tenant Act

Part II of chapter 83, F.S., titled the "Florida Residential Landlord and Tenant Act" (act), governs the relationship between landlords and tenants under a residential lease agreement.¹ A rental agreement includes any written or oral agreement regarding the duration and conditions of a tenant's occupation of a dwelling unit.² The provisions of this act specifically address the

¹ Part II of ch. 83, F.S.

² Section 83.43(7), F.S. (A rental agreement "means any written agreement, ... or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises.")

payment of rent,³ duration of leases,⁴ security deposits,⁵ landlord maintenance obligations,⁶ termination of rental agreements,⁷ and landlord remedies.⁸

Landlord Remedies for Breach of Lease

Current law provides the landlord with choices of remedies for breaches of the rental agreement by the tenant.⁹ The remedies provided in statute apply to the following situations:

- The tenant has breached the lease for the dwelling unit and the landlord has obtained a writ of possession;
- The tenant has surrendered possession of the dwelling unit to the landlord; or
- The tenant has abandoned the dwelling unit.

The statute permits the landlord to:

- Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or
- Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rent stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or
- Stand by and do nothing, holding the lessee liable for the rent as it comes due.¹⁰

Right of Action for Possession

A landlord may recover possession of a dwelling unit if the tenant does not vacate the premises after the rental agreement is terminated.¹¹ However, under current law, a landlord is not authorized to recover possession except under the following circumstances:

- In an action for possession, in which the landlord, the landlord's attorney, or agent files a specified complaint alleging certain facts authorizing recovery in the proper county court where the dwelling unit is located;¹²
- In other civil actions in which right of possession is to be determined;
- Possession of the dwelling unit has been surrendered by the tenant to the landlord;
- The dwelling unit has been abandoned by the tenant; or
- The only remaining tenant in the dwelling unit has been deceased for at least 60 days with his or her personal property still remaining on the premises and rent remains unpaid,

³ Section 83.46, F.S.

⁴ *Id.*

⁵ Section 83.49, F.S.

⁶ Section 83.51, F.S.

⁷ *See* ss. 83.56 and 83.575, F.S.

⁸ *See* ss. 83.58 and 83.595, F.S.

⁹ Section 83.595, F.S.

¹⁰ *Id.*

¹¹ Section 83.59(1), F. S.

¹² Section 83.59(2), F.S.

and the landlord has not received notice of a probate estate or personal representative thereof.¹³

Writs of Possession

After judgment is awarded in favor of the landlord in an action for possession of the property, the clerk must issue a writ of possession to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises.¹⁴ After the 24-hour period elapses from the posting of the writ, the landlord or the landlord's agent may remove any personal property found on the premises.¹⁵ The landlord may request that the sheriff stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises.¹⁶ Neither the sheriff nor the landlord is liable to the tenant or any other party for the loss, destruction, or damage to the property after it has been removed.¹⁷

Overview of Service of Process

Service of process is the formal delivery of a writ, summons, or other legal process or notice.¹⁸ As a general rule, "statutes governing service of process are to be strictly construed to insure that a defendant receives notice of the proceedings."¹⁹ 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"), or a certified process server appointed by the chief judge of the circuit court.²⁰ All process must be served by the sheriff of the county where the person to be served is found, except initial nonenforceable civil process, criminal witness subpoenas, and criminal summonses, which may be served by a special or certified process server.²¹ Any person authorized by the Florida Rules of Procedure may also serve civil witness subpoenas.²² 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 writs of possession in actions for possession of real property.

¹³ Section 83.59(3), F.S.

¹⁴ Section 83.62(1), F.S.

¹⁵ Section 83.62(2), F.S.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ "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 (9th ed. 2009). Thus, service of process may trigger the constitutional issue of procedural due process, which requires notice and the opportunity to be heard. *See, e.g., 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)).

¹⁹ *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)).

²⁰ *Id.*

²¹ 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 (Aug. 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.*

²² 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.

Certified Process Servers

A certified process server must be appointed by the chief judge of the judicial circuit in which he or she shall be allowed to serve process.²³ The chief judge of each circuit has discretion as to whether or not to appoint certified process servers. According to s. 48.29(3), F.S., a person applying with the chief judge to become a certified process server must:

- Be at least 18 years of age;
- Have no mental or legal disability;
- Be a permanent resident of the state;
- Submit to a background investigation;
- Certify that he or she has no pending criminal case, no record of any felony conviction, nor a record of conviction of a misdemeanor involving moral turpitude of dishonesty within the past 5 years;
- If prescribed by the chief judge of the circuit, submit to an examination testing his or her knowledge of the laws and rules regarding the service of process;
- Execute a bond in the amount of \$5,000, which shall be renewable annually, for the benefit of any person injured by any malfeasance, misfeasance, neglect of duty, or incompetence of the applicant, in connection with his or her duties as a process server; and
- Take an oath that he or she will honestly, diligently, and faithfully exercise the duties of a certified process server.²⁴

Once the process server is certified, he or she may serve nonenforceable civil process, as well as criminal witness subpoenas and criminal summonses, on a person found within the circuit where the server is certified.²⁵ Florida law does not provide a fee schedule establishing the fees allowed to be charged by certified process servers. Rather, current law generally provides that a “certified process server may charge a fee for his or her services.”²⁶

Fees and Costs Associated with Writs of Possession

Under Florida law, county sheriffs of the state must charge fixed, nonrefundable fees for the service of process in civil actions as established by a statutory schedule.²⁷ All fees collected under the statutory provisions for sheriffs’ fees for service of process are to be paid monthly into the county’s fine and forfeiture fund.²⁸ Current law provides that the sheriff’s office may charge \$40 for docketing and indexing each writ of execution, regardless of the number of persons involved, and \$50 for each levy.²⁹ In addition to these fees, the sheriff is authorized to charge a

²³ Section 48.27, F.S.

²⁴ Section 48.29(3), F.S.

²⁵ Section 48.27(2), F.S.

²⁶ Section 48.29(8), F.S.

²⁷ Section 30.231(1), F.S.

²⁸ Section 30.231(5), F.S.

²⁹ Section 30.231(1)(d), F.S. A levy is considered made when any property or any portion of the property listed or unlisted in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure.

reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace in an action for possession of property is responsible for paying the hourly rate.³⁰

III. Effect of Proposed Changes:

The bill authorizes certified process servers to serve writs of possession in actions for possession of real property. Currently, there is no statute or rule that allows anyone other than a sheriff or deputy to serve writs of possession in possession actions. The bill specifies that, upon the entry of a judgment in favor of a landlord in an eviction action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ. The bill also makes conforming changes in the Florida Residential Landlord and Tenant Act (specifically s. 83.62, F.S.) to authorize service of the writ of possession by certified process servers.

The bill provides that “a *person* may select from the list for the circuit where the process is to be served one or more certified process servers.” It may be unclear by use of the term “person” whether the clerk or the landlord selects the process server from the list. If it is the intent of the Legislature to authorize the landlord to select the process server, it may wish to substitute the term “landlord” for the term “person.”

Under current statute and practice, the clerk issues the writ of possession to the sheriff, and the sheriff serves the writ by conspicuously posting the writ on the premises. After 24 hours have passed from the posting of the writ, the landlord may take possession of the property with the sheriff standing by to keep the peace.³¹ Under the bill, it appears that if the landlord elects to use a certified process server, the writ is issued to the process server rather than the sheriff. Because the sheriff will remain under the obligation to stand by to keep the peace after the 24-hour period has passed, the Legislature may wish to consider providing some form of notice from either the clerk or the private process server to the sheriff. The clerk could provide a copy of the writ directly to the sheriff’s office, or the private process server could be required to provide written notice to the sheriff’s office indicating the date and time that the writ of possession was posted.

Section 48.021, F.S., generally governs service of process and provides that all process must be served by the sheriff except for those types of process expressly referenced within the statute. The Legislature may wish to consider expressly providing that writs of possession may be served by certified process servers in this statute to ensure that it is consistent with the bill’s grant of authority to certified process servers in s. 48.27, F.S.

³⁰ Section 83.62(2), F.S.

³¹ Section 83.62(1), F.S.

Other Potential Implications:

It is the long-standing practice of Florida that enforceable civil process is served by the sheriff. Allowing a certified process server to serve the writ of possession is a significant departure from this practice.

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

Section 18(b), Art. VII, State Constitution, provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989. Because sheriffs retain the authority to serve writs of possession under the bill, it does not appear that the authority of the local government to raise revenues has been affected by the provisions of the bill.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

See "Government Sector Impact" below.

B. Private Sector Impact:

In counties experiencing high volumes of cases involving possession of real property, landlords who elect to use a certified process server to deliver the writ of possession may experience a reduction in the amount of time that elapses between court approval of the writ and the actual service of the writ. Dependent upon the actual fee charged by certified process servers for serving the writ of possession, landlords could experience higher costs associated with the execution of the writ if they elect to use a certified process server.

C. Government Sector Impact:

The bill will allow landlords in successful eviction actions to elect to use certified process servers rather than the sheriff's office to serve writs of possession. All fees collected under the statutory provisions for sheriffs' fees for service of process are paid monthly into the county's fine and forfeiture fund. County revenues could be decreased contingent upon the number of landlords who elect to use certified process servers rather than the

sheriff to serve the writs. However, sheriffs will continue to receive fees for assisting with repossession of the property 24 hours after the posting of the writ.

Clerks of court may experience some expense associated with revisions to the writ of possession form if changes are necessary as a result of allowing certified process servers to serve the writ.

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.)

None.

B. Amendments:

None.