

**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.)

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Prepared By: The Professional Staff of the Appropriations Committee on Criminal and Civil Justice

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BILL: CS/SB 48

INTRODUCER: Judiciary Committee and Senator Garcia

SUBJECT: Alternative Judicial Procedures

DATE: March 17, 2025

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Kolich</u>	<u>Harkness</u>	<u>ACJ</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 48 mandates use of the statutory real property foreclosure sales procedures, extends the time for conducting a foreclosure sale, and allows specified alternate judicial sales procedures to be used when appropriate.

The bill extends the time for conducting a foreclosure sale from the current time of between 20 and 35 days after the final judgment to between 45 and 60 days after the final judgment.

The bill requires that the plaintiff request the use of an alternative foreclosure sale procedure by separate motion. A deviation from the standard procedures that favors one bidder over another, gives the plaintiff a credit bid in excess of the amount owed, allows a bidder to post less than a five percent deposit, provides for a final payment more than 30 days from the date of the sale, or allows a sale outside of the county without consent of all parties, is prohibited.

If a deviation from standard foreclosure sale procedures proposes the use of an escrow agent or auctioneer other than the clerk of court, the escrow agent must be approved by the trial court and the auctioneer must be a state licensed auctioneer, real estate broker, attorney, or title agent. The bill creates a civil cause of action that may be filed against a private escrow agent or auctioneer who violates the foreclosure law or the requirements of the final judgment of foreclosure. The bill also creates a third degree felony for intentional violations of the foreclosure law or the requirements of the final judgment by a private escrow agent or auctioneer.

The bill may generate additional workload for the Clerks of Court and the state court system. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2025.

## II. Present Situation:

### Foreclosure

Foreclosure is the legal process for forced sale at auction of real property to satisfy, in part or in whole, an unpaid lawful debt owed by the owner of the property. If the winning bidder is a third-party bidder, the proceeds of the sale first pay the costs of the foreclosure, then the rest of the proceeds are applied to the debt owed to the judgment creditor. Some foreclosure auctions yield a surplus because the final bid exceeds the debt. A foreclosure surplus is paid to or for the benefit of the foreclosed former owner.

In most foreclosures, however, there is no surplus after the foreclosure sale. Commonly, the plaintiff is the winning bidder and takes title to the property. Foreclosure is most often used in the context of a mortgage where the property owner has agreed to the debt. Foreclosures also result from construction liens, certain tax liens, association liens, and judgment liens.

Current law does not require a certain sale procedure, a trial judge entering a final judgment in a foreclosure case may use any procedure that conforms to constitutional due process. However, a foreclosure procedure is created by statute<sup>1</sup> and embodied in court-created final judgment forms.<sup>2</sup> The statutory and rule procedures are followed by most courts in most foreclosure cases.<sup>3</sup> Under the default procedures:

- The trial court directs the clerk of court to auction the property on a specific date that is not less than 20 days or more than 35 days after the date of judgment.<sup>4</sup>
- Certain notices regarding the possibility of a foreclosure surplus that may be claimed by the foreclosed owner must be included in the final judgment.<sup>5</sup>
- The clerk must furnish every defendant with a copy of the final judgment setting the sale date.<sup>6</sup>
- Notice of the sale must be published for two consecutive weeks on a publicly available website or once a week for two consecutive weeks in a newspaper of general circulation. The requirements for information that must be in the notice are listed in statute.<sup>7</sup>
- The clerk must be paid a service charge of \$70.<sup>8</sup>

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<sup>1</sup> Section 45.031, F.S.

<sup>2</sup> Form 1.996(a), F.R.C.P.

<sup>3</sup> A 2012 appellate decision implies that the statutory procedure should be followed unless there is reason not to. *Royal Palm Corp. Ctr. Ass'n, Ltd. v. PNC Bank, NA*, 89 So. 3d 923, 927 (Fla. 4<sup>th</sup> DCA 2012). The statute is not a “procedural straightjacket” and a trial court has reasonable discretion to change the procedure in a case. *Id.* at 28, *LR5A–JV v. Little House, LLC*, 50 So. 3d 691 (Fla. 5<sup>th</sup> DCA 2010).

<sup>4</sup> Section 45.031(1)(a), F.S.

<sup>5</sup> Section 45.031(1)(b), F.S.

<sup>6</sup> Section 45.031(1)(c), F.S. In practice, the foreclosing plaintiff must furnish the copies, addressed envelopes, and postage. The clerk merely certifies that the mailing was completed and that the clerk gave the mailing to the Postal Service.

<sup>7</sup> Section 45.031(2), F.S.

<sup>8</sup> Sections 45.031(3) and 45.035, F.S.

- The sale must be by public auction.<sup>9</sup> The statute does not specify a time or place; it merely requires that the time and place be in final judgment and in the public notice. Historically, sales were conducted on a porch, patio, or exterior staircase of the courthouse, at a time and place set locally by longstanding tradition.<sup>10</sup> Currently, most foreclosure sales are conducted through an internet-based auction system selected by the clerk.<sup>11</sup>
- At a traditional auction sale, custom and practice is that the foreclosing plaintiff makes the first bid at \$100.<sup>12</sup> Often, there is no other bidder. If other bidders participate, the clerk must allow the foreclosing plaintiff a credit bid of any amount up to the amount of the judgment. The plaintiff's credit bid is not specified in statute but was created by custom and use because "no useful purpose [is] served in requiring a bondholder or a mortgagor to pay cash to a court officer conducting a judicial sale when he would be entitled to immediately have it paid back to him under the decree authorizing the sale."<sup>13</sup> Note that the plaintiff's credit bid is limited to the amount of the judgment. A plaintiff bidding more than the amount of the judgment must pay the overage to the clerk.
- A successful third-party bidder (one other than the foreclosing plaintiff) must immediately post a deposit of five percent of the winning bid. If the winning bidder does not pay the remaining amount of his or her bid plus service charges and taxes by the stated deadline, the deposit is forfeited and is applied against the outstanding judgment.<sup>14</sup> If the winning bidder fails to pay the full bid timely, the case file goes back to the trial court to set a new sale date. The statutory process does not specify the deadline for full payment. It appears that the deadlines are set by local custom. A review of eight counties showed that half required full payment on the day of the sale and the latest deadline required full payment by 4:00 p.m. on the day after the auction.<sup>15</sup>
- Whether the winning bidder is the plaintiff or a third-party bidder, the parties to the foreclosure have 10 days to object to the sale. If no timely objection is filed, the clerk issues a Certificate of Title to the winning bidder<sup>16</sup> and the person named in the certificate is deemed the owner free and clear of any real property interest foreclosed.<sup>17</sup> If a third party is the winning bidder and has paid the clerk the winning bid amount, the clerk, after deducting any outstanding costs, service charges, and taxes pays the remaining sum to the plaintiff, up to the amount of the outstanding judgment. If there are funds then remaining, known as a surplus, the clerk disburses the funds accordingly.<sup>18</sup>

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<sup>9</sup> Section 45.031(3), F.S.

<sup>10</sup> For instance, Leon County historically conducted sales weekdays starting at 11:00 am on the west exterior patio of the courthouse. The west side of the building was still in the shade at that time, summer rainstorms usually did not start until after 2:00 pm., and the midday sale time gave the deputy clerk time before and after the sale to complete paperwork.

<sup>11</sup> Section 45.031(10), F.S.

<sup>12</sup> The customary first bid of \$100 likely comes from the calculation of the documentary stamp tax of \$0.70 for every \$100 or portion thereof, making \$0.70 the minimum tax imposed. The documentary stamp tax is due on all documents transferring title to real property, including the clerk's Certificate of Title.

<sup>13</sup> *Branch Banking & Tr. Co. v. Tomblin*, 163 So. 3d 1229, 1230 (Fla. 5<sup>th</sup> DCA 2015), *Grable v. Nunez*, 66 So. 2d 675, 677 (Fla.1953).

<sup>14</sup> Section 45.031(3), F.S.

<sup>15</sup> Surveyed counties were Broward, Duval, Escambia, Hillsborough, Leon, Miami-Dade, Orange, Palm Beach, Pinellas, and Sarasota.

<sup>16</sup> Section 45.035(5), F.S.

<sup>17</sup> Section 45.035(6), F.S.

<sup>18</sup> The distribution of the surplus from a foreclosure sale is not affected by this bill.

- The clerk of court may retain a vendor to conduct foreclosure auctions through the internet.<sup>19</sup> It appears that most of the clerks use this option.<sup>20</sup>

### **Current Concerns related to Foreclosure Sales**

In practice, trial court judges do not prepare ordinary final judgments. Instead, they require the attorney for the prevailing party to prepare the judgment form, subject to the court's supervision. Recently, some attorneys have requested that courts allow procedures that differ from the suggested statutory procedure and trial court judges have allowed those differences.<sup>21</sup> Examples of questionable differences include:

- An auctioneer other than a clerk or the clerk's selected internet sales vendor is used. In some cases, the auctioneer has been the foreclosing plaintiff's attorney.
- Auctions have been conducted on or near the foreclosed property, sometimes in places with little public access, little to no reasonable parking, or access that might not reasonably accommodate the disabled.
- In some auctions, the final judgment provided that the foreclosing plaintiff would take title should the winning bidder fail to timely pay the bid. A sham bidder would appear and would drive up the bids to where all others would drop out. Later, the sham bidder would not pay, leaving the plaintiff to be deemed the winning bidder.<sup>22</sup>
- A bidder for the plaintiff was given an unlimited credit bid (i.e., was allowed to bid in excess of the judgment), but was not required to pay the excess of the bid that should have been paid as surplus to the former owner.

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

This bill makes the existing statutory procedures for foreclosure sales mandatory and allows a trial court to use alternatives to those procedures, with certain limits.

The existing statutory procedures are not modified but for a change to the time between entry of a final judgment and the date of sale. The bill provides that a sale must be scheduled no sooner than 45 days after the final judgment and no later than 60 days after the final judgment.

The bill creates the Transparency in Alternative Judicial Sales Procedures Act in s. 45.0311, F.S. The stated purposes of this act are to:

- Recognize that alternatives to the statutory foreclosure sales procedures are beneficial in certain proceedings due to the nature of the real property to be sold under an order or a judgment, to maximize the potential sales proceeds, including the net proceeds thereof, for the benefit of all parties including the property owner.

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<sup>19</sup> Section 45.031(10), F.S.

<sup>20</sup> Forty-four of the state's 67 counties (including the 8 sample counties) use the same vendor. See RealAuction: Our Client site, <https://www.realauction.com/clients/index>.

<sup>21</sup> Ben Weider and Brittany Wallman, *RIGGED. Florida lawyer writes rules to win condo auctions for \$100. Judges let him do it.* MIAMI HERALD, April 2, 2024, updated January 23, 2025, <https://www.miamiherald.com/news/business/real-estate-news/article285934076.html>.

<sup>22</sup> Motion to Vacate Amended Final Judgment (November 3, 2021), *Emerald Tower Assoc. v. Celano*, Broward County Circuit Court case CACE202112603.

- Recognize that transparency is necessary for all alternative procedures to prevent overreach by any party, avoid fraud, and maximize the sales price while minimizing expenses and delays.
- Recognize that persons facilitating alternative sales and handling deposits and sales proceeds, including surplus proceeds, must be qualified, independent, and not related to any party or the attorneys for a party and must be subject to the jurisdiction of the court.

A request to use an alternative sales procedure must be made by separate motion and thus cannot be slipped into a proposed final judgment of foreclosure. The motion must be made by, or agreed to, by the property owner, and must be filed at least 20 days prior to hearing the motion. The motion must include:

- A description of the property.
- An explanation of why the court should use the proposed alternative, including how the alternative may lead to higher net proceeds.
- A description of the proposed alternative.
- A statement as to whether the clerk of court or another person will handle the proceeds.
- A declaration under penalty of perjury that the person to conduct the foreclosure sale satisfies the statutory qualifications and is free of conflicts of interest, if the person is not the clerk of court.
- The form of the notice for publication of the sale and bidding procedures.

The following minimum requirements of the sale cannot be modified by the court:

- Bidding procedures must be uniform among all bidders.
- The published notice of sale must include at a minimum the information required in the standard procedures.
- The credit bid of a plaintiff may not exceed the amount set by the final judgment.
- The winning bidder must post at least five percent of the bid at or before the time of the sale.
- The time to pay the winning bid may not exceed 30 days.
- The sale may not be sooner than 45 days after the entry of the final judgment.
- The sale must be in the county that the property lies in, except that a sale may be conducted outside of the county if the plaintiff and property owner agree and if the location of the sale is open to the public and has internet access.
- The winning bidder must pay all clerk's fees.

If someone other than the clerk of court is holding funds, the funds must be held in an authorized trust account.

The bill creates relevant forms.

The bill provides that the existing 10-day limit for filing an objection to sale applies to any sale under an alternative procedure.

The alternative procedure may provide for recognition of a backup bidder in lieu of conducting a new sale. If there is a surplus, it must be distributed pursuant to current law.

The bill also creates s. 45.0312, F.S. to govern the appointment of private sector professionals to perform some of the functions related to a foreclosure sale. A private auctioneer for a foreclosure sale must be licensed by the state as an auctioneer, real estate broker, attorney, or title insurer.<sup>23</sup> A private auctioneer must have errors and omissions coverage of at least \$250,000 with no more than a \$10,000 deductible or must post a fidelity bond in an amount set by the court but no less than \$50,000. A private auctioneer must file a declaration under oath that the auctioneer meets the requirements in statute.

Appointment of a private escrow agent for the foreclosure deposits and sales proceeds must be approved by the trial court. The motion must be filed at least 20 days prior to the hearing. The following individuals and entities may be appointed:

- A qualified public depository.
- A title insurance agency or title insurer whose accounts are in a qualified public depository.
- An attorney licensed in Florida whose trust account is in a qualified public depository and who has errors and omissions coverage of at least \$250,000 with no more than a \$10,000 deductible, or who posts a fidelity bond in an amount set by the court but no less than \$50,000.

A private auctioneer or private escrow agent must be independent. The bill provides that the following persons and entities are not independent and thus may not be appointed:

- A party to the action, an attorney representing a party in the action, or an employee of a party or the attorney of a party in the action.
- A relative of a party to the action, or an employee, an officer, a director, an affiliate, or a subsidiary thereof; or an attorney representing a party in the action, or a relative, an employee, an officer, a director, or an affiliate or an associate thereof.
- Any person or entity that has any financial relationship to the action, to the real or personal property being sold, or to a party or attorney or a relative as described above. Payment to the private auctioneer or escrow agent of fees authorized by the court is not a disqualifying financial relationship.

The bill creates a private cause of action available to any party to the foreclosure proceeding for damages resulting from failure to follow the requirements of a final judgment of foreclosure using alternative procedures. The bill also creates a third degree felony<sup>24</sup> for intentional violation of the alternative procedures statute or the requirements of the final judgment of foreclosure. The offense only applies to a private auctioneer or private escrow agent appointed by the trial court.

The bill takes effect July 1, 2025.

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

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

None.

<sup>23</sup> Sections 468.385, 475.01(1)(a), and 454.021, F.S.

<sup>24</sup> A third degree felony is punishable by imprisonment of up to 5 years and a fine of no more than \$5,000. Sections 775.082 and 775.083, F.S.

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

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

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

None.

**B. Private Sector Impact:**

The change in the allowable time period for conducting a foreclosure sale will delay the plaintiff's recovery, which may lessen a plaintiff's net recovery in foreclosures where the debt already exceeds the value of the real property. The potential losses include property depreciation, the common risks related to real property (vandalism and natural disaster), and the time value of money.

**C. Government Sector Impact:**

The bill may increase the Clerks of Court workload and staffing needs. Additionally, the bill will provide fee predictability to the Clerk by prohibiting the court from waiving the statutory fee in s. 45.035(1), F.S.<sup>25</sup>

The Office of the State Courts Administrator estimated that the bill's provisions would result in a minimal increase in workload to the state court system considering the additional processes required for a judicial sale to proceed, reauctioning conditions, and court audits and orders prolonging the handling of the matter in court.<sup>26</sup>

**VI. Technical Deficiencies:**

None.

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<sup>25</sup> Florida Court Clerks and Comptrollers, and the Florida Clerk of Court Operations Corporation, 2025 Agency Analysis of SB 48 (February 11, 2025).

<sup>26</sup> Office of the State Courts Administrator, 2025 Judicial Impact Statement, SB 48 (February 6, 2025).

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 45.031 of the Florida Statutes.

This bill creates the following sections of the Florida Statutes: 45.0311 and 45.0312.

**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.