

## **WRONGFUL INCARCERATION**

### **CS/CS/CS/SB 756 — Wrongful Incarceration Compensation**

by Criminal and Civil Justice Appropriations Committee; Criminal Justice Committee; Judiciary Committee; and Senators Joyner, Webster, Dockery, Lynn, and Wilson

This bill creates a program under which a person who was convicted and incarcerated for a felony of which he or she was actually innocent may apply for compensation from the state.

#### ***Petition for a Finding of Wrongful Incarceration and Eligibility for Compensation***

Upon an order vacating a felony conviction and sentence becoming final, a person may petition the original sentencing court for a determination whether he or she qualifies as a "wrongfully incarcerated person." The petition must set forth with particularity verifiable and substantial evidence of actual innocence. Additionally, the petitioner must state that:

- Prior to the person's wrongful incarceration, he or she was never convicted of any felony offense, or a crime committed in another jurisdiction the elements of which would constitute a felony in this state, or a crime committed against the United States which is designated a felony, excluding any juvenile delinquency disposition;
- During the person's wrongful incarceration, he or she was not convicted of any felony offense; and
- During the person's wrongful incarceration, he or she was not also serving a concurrent sentence for another felony for which the person was not wrongfully convicted.

The petition must be filed within 90 days of the order vacating a conviction and sentence, if the person's conviction and sentence is vacated on or after July 1, 2008. For those persons whose convictions and sentences were vacated by an order that became final prior to July 1, 2008, the petition must be filed by July 1, 2010.

#### ***Prosecutor's Response to Petition***

The prosecuting authority in the underlying felony must be provided proper notice of the filing of the petition. The prosecutor has 30 days to respond to the petition by either:

- Certifying to the court that no further criminal proceedings in the case can or will take place, that no questions of fact remain as to the petitioner's wrongful incarceration, and that the petitioner is not disqualified from seeking compensation; or

- By contesting the evidence of actual innocence, the related facts, or the petitioner's eligibility for compensation.

### ***Uncontested Petitions***

If the prosecutor does not contest the petition and the original sentencing court finds by clear and convincing evidence that the petitioner is a wrongfully incarcerated person, the court may certify to the Department of Legal Affairs (department) that the petitioner is also eligible for compensation.

### ***Contested Petitions***

If the prosecutor contests the petition, the court will make a determination of eligibility, limited to the issues of prior felonies and concurrent sentences. If, based on those factors, the court finds by a preponderance of the evidence that the petitioner is ineligible, the court must dismiss the petition.

However, if the petitioner is eligible under those criteria (no prior or concurrent felonies), but the prosecutor contests the evidence of actual innocence or the related facts, the court shall set forth its findings and transfer the petition to the Division of Administrative Hearings (DOAH) for findings of fact and a recommendation to the court.

### ***DOAH Hearing for Contested Petitions***

The petitioner must establish, by clear and convincing evidence before an administrative law judge, his or her status as a wrongfully convicted person who is eligible for compensation. The hearing must be conducted no later than 120 days after the petition is transferred from the court. The prosecutor may appear to contest factual matters, or matters related to the nature, significance, and effect of the evidence of actual innocence. The administrative law judge must enter his or her findings of fact and recommendations to the court within 45 days of the hearing.

The court shall consider the order from the administrative law judge and enter its own order within 60 days. The court may adopt or decline to adopt the findings of the administrative law judge. If the court finds that the petitioner has met his or her burden of proof – based upon the administrative law judge's findings and the court's own assessment of the findings and recommendations – the court's own order shall include a certification to the department that the petitioner is a wrongfully incarcerated person who is eligible for compensation.

### ***Application for Compensation***

Within two years of the original sentencing court's order finding the person to be a wrongfully incarcerated person who is eligible for compensation, the person must initiate an application for compensation with the department. The bill sets forth the required documentation that must

accompany the application and allows the department to adopt rules as necessary to carry out the program. It also provides time limitations for each step of the review, approval, and payment process.

### ***Purchase of an Annuity***

Upon determination that the requirements of the program are satisfied, the department is directed to notify the Chief Financial Officer to draw a warrant from the General Revenue Fund or another source designated by the Legislature for the purchase of annuity based on the total amount of compensation determined by the department. The annuity must:

- Be for a term of not less than 10 years;
- Provide that the annuity may not be sold, discounted, or used as security for a loan or mortgage by the applicant; and
- Contain beneficiary provisions for the continued disbursement of the annuity upon the wrongfully incarcerated person's death.

### ***Compensation for Wrongful Incarceration***

A person who is found to be a wrongfully incarcerated person who is eligible for compensation is entitled to receive:

- Monetary compensation in the amount of \$50,000 for each year of wrongful incarceration. This amount will be prorated as necessary to account for a portion of a year. For those persons found to be wrongfully incarcerated after December 31, 2008, the Chief Financial Officer may adjust the annual rate of compensation for inflation.
- A tuition and fee waiver for up to 120 hours of instruction at any career center, community college, or state university.
- Immediate administrative expunction of the criminal record resulting from the wrongful incarceration.
- Fines, costs, and attorney's fees imposed and paid by the wrongfully incarcerated person and associated with the wrongful conviction and incarceration.

The cap on total compensation under the program is \$2 million.

Prior to receiving the first payment, the claimant must execute a release and waiver releasing the state or any agency, or any political subdivision, from any and all liability for present and future claims arising out of the factual situation in connection with the person's wrongful incarceration.

### ***Limitations on Relief for Wrongful Incarceration***

A wrongfully incarcerated person may not submit an application for compensation under this program if the person has a lawsuit pending against the state or any agency in state or federal court arising out of the facts in connection with the person's wrongful incarceration. The person may not submit an application for compensation under this program if the person is the subject of a pending claim bill. Conversely, the person may not pursue recovery under a claim bill once an application is filed. The bill expresses that the program is intended to be the sole redress for the person's wrongful incarceration.

### ***Waiver of Sovereign Immunity***

The bill includes a statement declaring that any compensation paid under the act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of s. 768.28, F.S.

If approved by the Governor, these provisions take effect July 1, 2008.

*Vote: Senate 37-1; House 116-0*

## **FAMILY LAW**

### **CS/SB 1474 — Dissolution of Marriage**

by Judiciary Committee and Senators Joyner and Wilson

This bill allows a court to enter an interim order during the pendency of a dissolution of marriage proceeding to allow an interim partial distribution of marital assets and liabilities if good cause is shown. The bill defines "good cause" as "extraordinary circumstances that require an interim partial distribution."

The bill provides that all real *or personal* property titled jointly by the parties as tenants by the entirety is presumed to be a marital asset. Under current law only real property held by the parties as tenants by the entirety is considered a marital asset. The bill provides that this presumption can be overcome by clear and convincing evidence that the property is nonmarital.

The bill abolishes special equity claims and provides that such claims are to be asserted as claims for unequal distribution of marital property or claims of enhancement in value or appreciation of nonmarital property. Special equity is a vested interest that a spouse acquires because of contributions made by that spouse which are more than the normal marital duties, and, according to some practitioners, the term special equity is synonymous with unequal distribution.

If approved by the Governor, these provisions take effect July 1, 2008.

*Vote: Senate 40-0; House 117-0*

## **REAL PROPERTY, PROBATE, AND TRUST LAW**

### **CS/SB 464 — Transfer Fee Covenants/Real Property**

by Judiciary Committee and Senator Aronberg

The bill creates a section of the Florida Statutes to reflect legislative intent regarding Florida's public policy against transfer fee covenants. It provides that Florida's public policy favors the marketability of real property and the transferability of interests in real property free of title defects and unreasonable restraints on alienation.

The bill prohibits transfer fee covenants recorded on or after July 1, 2008. Transfer fee covenants are defined as the payment of a transfer fee to the person declared in the covenant or their successors or assigns upon a transfer of interest in real property. The bill also describes 10 exceptions to the definition.

The bill clarifies s. 689.01, F.S., to provide that corporations may execute real estate conveyance contracts using the corporation's lawfully authorized agent. The bill makes conforming changes to s. 692.01, F.S.

This bill is a product of the Real Property, Probate, and Trust Law Section of The Florida Bar (RPPTL) in response to a "transfer fee rights" scenario described and analyzed in a May/June 2007 issue of *Probate and Property*, by the Real Property and Trust and Estate Law Section of the American Bar Association. The scenario described allows property owners to reserve a future interest in the appreciation of the value of the real property. The scenario begins with an agreement that purports to attach to title to the land and burdens future owners for 99 years. Future sales of the property provide for 1 percent of the sale price to be divided among the original covenantor, the company that licensed the use of the system of transfer fee rights, and the real estate broker. These scenarios are sometimes referred to as "transfer fee covenants."

If approved by the Governor, these provisions take effect July 1, 2008.

*Vote: Senate 39-0; House 116-0*

### **CS/HB 435 — Trust Administration**

by Safety and Security Council and Rep. Hukill and others (CS/SB 2164 by Judiciary Committee and Senator Jones)

The bill amends s. 736.0703, F.S., to allow a person to create a trust and allocate various responsibilities among more than one trustee. It provides that except in cases of willful misconduct by the directed trustee of which the excluded trustee has actual knowledge, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. The excluded trustees are relieved from any obligation to review, inquire, investigate, or make recommendations or evaluations with respect

to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power.

The bill amends s. 736.0802(10), F.S., to remove the requirement on a trustee to seek prior court approval to pay costs or attorney's fees to defend against an allegation of breach of trust. It also requires a trustee to provide written notice to qualified beneficiaries that attorney's fees and costs may be paid from the trust.

The bill revises time limitations for the bringing of legal claims by a beneficiary against a trustee for breach of trust. The bill provides that all claims by a beneficiary against a trustee are barred upon the later of:

- Ten years after the date that the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust during the 10-year period; or
- Twenty years after the date of the act or omission of the trustee that is the basis of the complaint; or
- Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

Statutes of repose can be extended by 30 years upon a showing of clear and convincing evidence by the beneficiary that a trustee actively concealed facts supporting a cause of action. The failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose.

If approved by the Governor, these provisions take effect July 1, 2008.

*Vote: Senate 39-0; House 108-0*

## **JUDICIAL SALES**

### **CS/HB 773 — Judicial Sales/Real or Personal Property**

by Safety and Security Council and Rep. Dorworth and others (CS/SB 2248 by Finance and Tax Committee and Senator Baker)

The bill permits the clerk of court to conduct judicial sales of real or personal property by electronic means. The clerk of court shall provide public access to the sale by computer terminals at a designated location, and must accept an advance proxy bid from the plaintiff of any amount up to the plaintiff's maximum allowable credit. The bill gives the clerk of court authority to receive electronic deposits and payments related to the property sale. If the clerk requires

advance electronic deposits, these deposits are not subject to the fee under s. 28.24(10), F.S.; however, the required portion of an advanced deposit for a winning bid is subject to that fee.

The bill permits any clerk of court to conduct electronic tax deed sales in lieu of public outcry. All other procedures provided for such sales in ch. 197, F.S., must be complied with, and the clerk must provide access to the sale by computer terminals open to the public at a designated location. The clerk may require bidders to advance sufficient funds to pay the deposit required in s. 197.542(2), F.S., and the required advance deposit made by the winning bidder is subject to the fee under s. 28.24(10), F.S., upon acceptance of the bid.

The bill specifies that the language of the bill shall not be construed to prevent a charter county from conducting electronic tax deed sales.

If approved by the Governor, these provisions take effect July 1, 2008

*Vote: Senate 39-0; House 113-1*

## **PUBLIC RECORDS**

### **CS/CS/SB 766 — Public Records/Judicial and Administrative Officials**

by Governmental Operations Committee; Judiciary Committee; and Senators Rich, Joyner, Deutch, Lawson, Dean, and Wilson

The bill expands the agency personnel information exempt from disclosure under the public records law to include the home addresses and telephone numbers of special magistrates, general magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers. Under current law, this information is exempt for district, circuit, and county court judges and justices of the Florida Supreme Court. The bill also exempts the home addresses, telephone numbers, and places of employment of the spouses and children of special magistrates, general magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers, as well as the names and locations of schools and day care facilities attended by their children. The bill also requires that special magistrates, general magistrates, judges of compensation claims, administrative law judges of the Division of Administrative Hearings, and child support enforcement hearing officers make reasonable efforts to protect the information from being accessible through other means available to the public.

If approved by the Governor, these provisions take effect July 1, 2008.

*Vote: Senate 40-0; House 117-0*

## **HB 7033 — Public Records/Complaint of Discrimination**

by Government Efficiency and Accountability Council and Rep. Gardiner (CS/SB 2484 by Judiciary Committee and Senator Posey)

This bill revises an existing public-records exemption for complaints and related records held by agencies in the executive branch which concern allegations of discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status in connection with hiring and other personnel practices. The bill expands the exemption to provide the same confidential-and-exempt status to discrimination complaints and related records held by *any* agency as defined under ch. 119, F.S. In this manner, the bill applies the public-records exemption for discrimination complaints to the broad array of governmental and quasi-governmental organizations, as well as private corporations acting on behalf of public agencies, which are currently governed by the public records law but are not within the executive branch of state government. The bill retains the qualification in existing law that the discrimination-complaint records are confidential and exempt until a probable cause finding is made, the investigation is no longer active, or the record becomes part of the official record of any hearing or court proceeding.

Because the definition of "agency" under s. 119.011(2), F.S., includes units of local government, this bill would apply the exemption for discrimination complaints and related records to them. The revised public-records exemption – which relates to discrimination in hiring and other personnel practices – would, therefore, be supplemental to a public-records exemption that currently applies to local government under s. 119.0713(1), F.S., and appears to cover discrimination complaints generally, as well as discrimination in housing rentals or sales, brokerage services, and housing finance.

If approved by the Governor, these provisions take effect upon becoming law.

*Vote: Senate 38-0; House 114-0*



