Criminal & Civil Justice Policy Council

Monday April 12, 2010

1:00 PM

404 HOB

Larry Cretul
Speaker

William Snyder
Chair

Council Meeting Notice

HOUSE OF REPRESENTATIVES

Criminal & Civil Justice Policy Council

Start Date and Time: Monday, April 12, 2010 01:00 pm

End Date and Time: Monday, April 12, 2010 03:15 pm

Location: 404 HOB
Duration: 2.25 hrs

Consideration of the following bill(s):

CS/HB 59 Athletic Coaches by Policy Council, Gibbons
CS/HB 187 Retail Sales of Smoking Pipes and Smoking Devices by Finance & Tax Council, Rouson
CS/HB 203 Community Corrections Assistance to Counties or County Consortiums by Criminal & Civil Justice Appropriations Committee, Reed
CS/HB 277 Alimony by Civil Justice & Courts Policy Committee, Frishe
HB 369 Murder by Snyder
CS/CS/HB 409 Garnishment by Policy Council, Civil Justice & Courts Policy Committee, Brisé
CS/HB 445 Pretrial Detention and Release by Criminal & Civil Justice Appropriations Committee, Dorworth
CS/CS/HB 621 Fraudulently Taking or Using a Credit Card by Criminal & Civil Justice Appropriations Committee, Public Safety & Domestic Security Policy Committee, Brandenburg
HB 833 Reports and Functions of the Department of Juvenile Justice by Thurston
CS/HB 907 Child Support Guidelines by Civil Justice & Courts Policy Committee, Flores
HB 1179 Electronic Documents Recorded in the Official Records by Grimsley
HB 1383 (IF RECEIVED) Pregnant Children and Youth in Out-of-Home Care by Weinstein
CS/HB 1493 Career Offenders by Public Safety & Domestic Security Policy Committee, Cruz
CS/CS/HB 1523 Homeowner Relief by Insurance, Business & Financial Affairs Policy Committee, Civil Justice & Courts Policy Committee, Grady
HJR 1553 Basic Rights by Rader
HB 7125 Criminal Penalties for Violations of Tax Statutes by Finance & Tax Council, Fresen
HB 7181 Juvenile Justice by Public Safety & Domestic Security Policy Committee, Ambler

NOTICE FINALIZED on 04/08/2010 16:25 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 59 Athletic Coaches
SPONSOR(S): Policy Council; Gibbons and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 150

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	13 Y, 0 N	Padgett	Cunningham
2)	Policy Council	15 Y, 0 N, As CS	Varn	Ciccone
3)	Criminal & Civil Justice Policy Council		Billmeier LMB	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

CS/HB 59 requires an independent sanctioning authority to screen each current and prospective athletic coach of an independent youth athletic team against state and federal sexual offender databases. The background screening consists of a search of the sexual offenders and sexual predators public website of the Florida Department of Law Enforcement and the website of the United States Department of Justice. In the alternative, a background screening conducted by a commercial consumer reporting agency in compliance with the federal Fair Credit Reporting Act which includes searches of the sexual predators and sexual offenders databases will comply with the bill's requirements.

The sanctioning authority must disqualify any athletic coach applicant appearing in either registry. It is the applicant's appearance in the state or national sex offender registry, rather than a conviction for any particular sexual offense, that disqualifies him or her as an athletic coach.

The bill requires the sanctioning authority to provide, within 7 business days following the background screening, written notice to the person disqualified advising of the results of the background check and of disqualification. The independent sanctioning authority must maintain documentation of the results of each person screened, and the written notice of disqualification provided to each person disqualified.

In any civil suit brought against an independent sanctioning authority for harm caused by the intentional tort of an athletic coach that relates to alleged sexual misconduct, a rebuttable presumption is created that the independent sanctioning authority was not negligent in authorizing the athletic coach if the sanctioning authority complied with the bill prior to authorizing a person to act as such.

Finally, this bill encourages sanctioning authorities to participate in the Volunteer and Employee Criminal History System (VECHS) program authorized under the National Child Protection Act and s. 943.0542, F.S.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Criminal History Screenings

According to information received from the Florida Department of Law Enforcement (FDLE), there is currently no Florida law that requires athletic coaches for independent youth athletic teams to be screened against state or national sex offender registries. However, other state laws may suggest that such background screenings must occur, or may prohibit or limit a convicted sexual predator's contact with minors altogether.

Background Screenings for Employment at Parks, Playgrounds, and Daycare Centers

Current law provides that a state agency or governmental subdivision, prior to making any decision to appoint or employ a person to work, whether for compensation or as a volunteer, at any park, playground, day care center, or other place where children regularly congregate, must conduct a search of that person's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by the FDLE.[1] The screening requirements of the bill are similar to the screening requirements of s. 943.04351, F.S., insofar as both require a search of the state sex offender registry, but different in that the bill also requires a national sex offender registry search.

Prohibited Employment for Registered Sexual Predators

Existing law provides that it is a third-degree felony for a registered sexual predator who has been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any specified sexual offense to work, whether for compensation or as a volunteer, at any business, school, daycare center, park, playground, or other place where children regularly congregate.[2] Notwithstanding the bill, it appears that a person would be precluded from acting as a athletic coach of an independent youth athletic team (at least to the extent of contact with children) if the person is a registered sexual predator as described in s. 775.21(10)(b), F.S.

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[1] Section 943.04351, F.S.

[2] Section 775.21(10)(b), F.S.

Volunteer and Employee Criminal History System (VECHS)

Pertinent to the bill, the FDLE has described the Volunteer and Employee Criminal History System (VECHS) as follows:

> Through the VECHS program, FDLE and the Federal Bureau of Investigation (FBI) provide to qualified organizations (not individuals) in Florida state and national criminal history record information on applicants, employees, and volunteers. With this criminal history information, the organizations can more effectively screen out those current and prospective volunteers and employees who are not suitable for contact with children, the elderly, or the disabled.
>
> Generally, to be qualified to participate in the VECHS program, an organization (public, private, profit, or non-profit) must provide "care"[3] or "care placement services" ... to children, the elderly, or the disabled.
>
> The VECHS program is not available to organizations currently required to obtain criminal history record checks on their employees and/or volunteers under other statutory provisions, such as day care centers. Those organizations must continue to follow the statutory mandates that specifically apply to them. If, however, an organization is required to obtain state and national checks on only specific types of employees or volunteers, the VECHS program may be able to process requests for state and national checks on the organization's other employees or volunteers.[4]

To become a qualified organization and to obtain criminal history record information through the VECHS program at FDLE, an organization will need to do the following:

- Submit an application to FDLE explaining what functions the organization performs that serve children, elderly, or disabled persons;
- Sign an agreement that the criminal history information would be used only to screen employees and volunteers of that organization for employment purposes;
- Submit $54.25 for each employee or $33.25 for each volunteer fingerprint card submission; and
- Submit $43.25 for each employee or $33.25 for each volunteer electronic submission.

If an organization becomes qualified and provides the required information for criminal history record requests, FDLE, with the assistance of the FBI, will provide the organization with the following:

- An indication that the person has no criminal history, i.e., no serious arrests in state or national databases, if there are none;
- The criminal history record (RAP sheet) that shows arrests and/or convictions for Florida and other states, if any; and
- Notification of any warrants or domestic violence injunctions that the person may have.[5]

Sexual Predator and Offender Information

The FDLE compiles information regarding sex offenders and makes that information available to the public. The information on the FDLE's public website of sexual offenders and sexual predators comes from the following sources: the Florida Department of Corrections, the Florida Department of Highway Safety and Motor Vehicles, and various law enforcement officials.[6] The Dru Sjodin National Sex Offender Public Website of the United States Department of Justice allows the public to search participating state websites for public information "regarding the presence or location of offenders who,

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[3] The word "care" is defined in s. 943.0542, F.S. (access to criminal history information provided by FDLE to qualified entities), to include the provision of recreation to children.

[4] Florida Department of Law Enforcement, *Volunteer And Employee Background Checks:* http://www.fdle.state.fl.us/content/getdoc/9023f5ac-2c0c-465c-995c-f949db57d0dd/VECHS.aspx (last visited April 8, 2010).

[5] *Id.*

[6] *See* Florida Department of Law Enforcement, http://offender.fdle.state.fl.us (last visited April 5, 2010).

in most cases, have been convicted of sexually violent offenses against adults and children and certain sexual contact and other crimes against victims who are minors."[7]

Liability for Negligent Hiring

In civil actions premised upon the death or injury of a third person as a result of intentional conduct of an employee, the employer is presumed not to have been negligent in hiring the employee if, prior to hiring, the employer conducted a background check on the employee which revealed no information that would cause an employer to conclude that the employee was unfit for work.[8] Pursuant to statute, the background investigation must include:

- A criminal background check obtained from the Department of Law Enforcement (FDLE);[9]
- Reasonable efforts to contact references and former employers;
- A job application form that includes questions requesting detailed information regarding previous criminal convictions;
- A written authorization allowing a check of the applicant's driver's license record if relevant to the work to be performed; or
- An interview of the prospective employee.[10]

If the employer elects not to conduct an investigation prior to hiring, there is no presumption that the employer failed to use reasonable care in hiring an employee.[11]

PROPOSED CHANGES

The bill requires an independent sanctioning authority to screen each current and prospective athletic coach of an independent youth athletic team against state and federal sexual offender databases. The background screening consists of a search of the sexual offenders and sexual predators public website of the Florida Department of Law Enforcement and the website of the United States Department of Justice. In the alternative, a background screening conducted by a commercial consumer reporting agency in compliance with the federal Fair Credit Reporting Act which includes searches of the sexual predators and sexual offenders databases will comply with the bill's requirements.

The sanctioning authority must disqualify any athletic coach applicant appearing in either registry. It is the applicant's appearance in the state or national sex offender registry, rather than a conviction for any particular sexual offense, that disqualifies him or her as an athletic coach. Background screenings must be conducted on all athletic coaches working on or after July 1, 2010, and must be conducted annually.

Definitions

CS/HB 59 defines an "independent sanctioning authority" as a private, nongovernmental entity that organizes, operates, or coordinates a youth athletic team in this state if the team includes one or more minors and is not affiliated with a private school as defined in s. 1002.01, F.S. The team must be based in this state.

Under the bill, an "athletic coach" means a person who is authorized by an independent sanctioning authority to work for 20 or more hours within a calendar year, whether for compensation or as a volunteer, for a youth athletic team based in this state and has direct contact with one or more minors on then youth athletic team.

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[7] *See* United States Department of Justice, http://www.nsopr.gov/ (last visited April 5, 2010).

[8] Section 768.096(1), F.S.

[9] The employer must request and obtain from FDLE a check of the information as reported in the Florida Crime Information Center system as of the date of the request. Section 768.096(2), F.S.

[10] Section 768.096(1)(a)-(e).

[11] Section 768.096(3), F.S.

Notification of Screening Process

The bill requires the sanctioning authority to provide, within 7 business days following the background screening, written notice to the person disqualified advising of the results of the background check and of disqualification. The independent sanctioning authority must maintain documentation of the results of each person screened, and the written notice of disqualification provided to each person disqualified.

Civil Liability

In any civil suit brought against an independent sanctioning authority for harm caused by the intentional tort of an athletic coach that relates to alleged sexual misconduct, a rebuttable presumption[12] is created that the independent sanctioning authority was not negligent in authorizing the athletic coach if the sanctioning authority complied with the requirements of the bill.

Use of the VECHS Program

CS/HB 59 encourages sanctioning authorities to participate in the VECHS program authorized under the National Child Protection Act and s. 943.0542, F.S.

B. SECTION DIRECTORY:

Section 1: Creates an unnumbered section relating to athletic coaches for independent sanctioning authorities.

Section 2: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The sex offender registry screening requirements of the bill should have a nominal impact on the sanctioning authorities. The state and national registries are public websites that can be accessed by persons with minimal computer skills, and searches can be conducted relatively quickly. Those sanctioning authorities electing to perform searches via a commercial consumer reporting agency may incur moderate expenses for the screening.

[12] Once evidence rebutting a presumption is introduced, "the presumption does not automatically disappear; it remains in effect even after evidence rebutting the presumption has been introduced. The jury must decide if the evidence is sufficient to overcome the presumption, that is, it is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." 23 FLA. JUR 2D *Evidence and Witnesses* s. 100.

D. FISCAL COMMENTS:

The state and federal sexual offender and sexual predator registries are available to the public via the Internet. There are no fees associated with accessing or searching the registries.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On January 21, 2010, the Policy Council adopted an amendment specifying that a background screening conducted by a commercial consumer reporting agency in compliance with the federal Fair Credit Reporting Act in conjunction with a search of the sexual offenders and predators websites of the FDLE and the United States Department of Justice, complies with the requirements of the bill.

The bill was reported favorably with a Council Substitute. The analysis reflects the Council Substitute.

A bill to be entitled

An act relating to athletic coaches; defining the terms "athletic coach" and "independent sanctioning authority"; requiring the independent sanctioning authority of a youth athletic team to screen the background of current and prospective athletic coaches through designated state and federal sex offender registries; providing that a commercial consumer reporting agency screening that meets specified requirements complies with screening requirements; requiring the independent sanctioning authority to disqualify any athletic coach appearing on a registry; requiring the independent sanctioning authority to provide a disqualified athletic coach with written notice; requiring the independent sanctioning authority to maintain documentation of screening results and disqualification notices; providing a rebuttable presumption that an independent sanctioning authority did not negligently authorize an athletic coach for purposes of a civil action for an intentional tort relating to alleged sexual misconduct by the athletic coach if the authority complied with the screening and disqualification requirements; encouraging independent sanctioning authorities for youth athletic teams to participate in the Volunteer and Employee Criminal History System; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Athletic coaches for independent sanctioning authorities.—

(1) As used in this section, the term:

(a) "Athletic coach" means a person who:

1. Is authorized by an independent sanctioning authority to work for 20 or more hours within a calendar year, whether for compensation or as a volunteer, for a youth athletic team based in this state; and

2. Has direct contact with one or more minors on the youth athletic team.

(b) "Independent sanctioning authority" means a private, nongovernmental entity that organizes, operates, or coordinates a youth athletic team in this state if the team includes one or more minors and is not affiliated with a private school as defined in s. 1002.01, Florida Statutes.

(2) An independent sanctioning authority shall:

(a)1. Conduct a background screening of each current and prospective athletic coach. No person shall be authorized by the independent sanctioning authority to act as an athletic coach after July 1, 2010, unless a background screening has been conducted and did not result in disqualification under paragraph (b). Background screenings shall be conducted annually for each athletic coach. For purposes of this section, a background screening shall be conducted with a search of the athletic coach's name or other identifying information against state and federal registries of sexual predators and sexual offenders, which are available to the public on Internet sites provided by:

a. The Department of Law Enforcement under s. 943.043,

Florida Statutes; and

b. The Attorney General of the United States under 42 U.S.C. s. 16920.

2. For purposes of this section, a background screening conducted by a commercial consumer reporting agency in compliance with the federal Fair Credit Reporting Act using the identifying information referenced in subparagraph 1. and that includes searching that information against the sexual predator and sexual offender Internet sites listed in sub-subparagraphs 1.a. and b. shall be deemed in compliance with the requirements of this section.

(b) Disqualify any person from acting as an athletic coach if he or she is identified on a registry described in paragraph (a).

(c) Provide, within 7 business days following the background screening under paragraph (a), written notice to a person disqualified under this section advising the person of the results and of his or her disqualification.

(d) Maintain documentation of:

1. The results for each person screened under paragraph (a); and

2. The written notice of disqualification provided to each person under paragraph (c).

(3) In a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an athletic coach that relates to alleged sexual misconduct by the athletic coach, there is a rebuttable presumption that the independent sanctioning authority was not negligent in

authorizing the athletic coach if the authority complied with the background screening and disqualification requirements of subsection (2) prior to such authorization.

(4) The Legislature encourages independent sanctioning authorities for youth athletic teams to participate in the Volunteer and Employee Criminal History System, as authorized by the National Child Protection Act of 1993 and s. 943.0542, Florida Statutes.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 187 Tax on Sales, Use, and Other Transactions
SPONSOR(S): Finance & Tax Council; Rouson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 366

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Finance & Tax Council	16 Y, 0 N, As CS	Aldridge	Langston
2)	Criminal & Civil Justice Policy Council		Thomas	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

Florida law currently defines drug paraphernalia and includes an element of intent whereby a court, jury, or other authority, must consider specific factors identified in statute when determining in a criminal case whether an object constitutes drug paraphernalia. In Florida, it is currently unlawful to:

- Use or possess drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body.
- Advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of such objects for use as drug paraphernalia.
- Deliver, manufacture with intent to deliver, or possess with intent to deliver drug paraphernalia when it is known or reasonable to know that it will be used to produce a controlled substance or introduce a controlled substance into the body.
- Use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia when it is known or reasonable to know that it will be used to transport a controlled substance or contraband as defined in s. 932.701(2)(a)1, F.S.
- Deliver drug paraphernalia to a minor when it is known or reasonable to know that it will be used to produce or introduce into the body a controlled substance.

The bill provides that it is unlawful for any person to offer for sale any of the smoking pipes and devices listed below unless the person:

- Has a retail tobacco products dealer permit under s. 569.003, F.S.
- Derives at least 75 percent of its annual gross revenues from the sale of cigarettes, cigars and other tobacco products.
- Derives no more than 25 percent of its annual gross revenues from the sale of the following items:
  - Metal, wooden, acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens, or punctured metal bowls
  - Water pipes
  - Carburetion tubes and devices
  - Chamber pipes
  - Carburetor pipes
  - Electric pipes
  - Air-driven pipes
  - Chillums
  - Bongs
  - Ice pipes or chillers

The bill has an effective date of July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

CURRENT SITUATION

Drug Paraphernalia

Federal Law

Federal law defines "drug paraphernalia" as any "equipment, product, or material of any kind which is primarily intended or designed for use in . . . injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful . . . . [Drug paraphernalia] includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, [etc.] into the body."[1]

The statute lists items that constitute drug paraphernalia, including items listed in the bill, and more.[2] The same section makes it illegal for any person to sell or offer for sale drug paraphernalia.[3] It does not apply to any person authorized by local, state, or federal law to manufacture, possess, or distribute such items.[4] It also does not apply to any item that is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.[5]

Florida Law

In Florida, the definition of "drug paraphernalia" also provides an example list of items that constitute drug paraphernalia.[6] Florida law also similarly includes an element of intent whereby a court, jury, or other authority, must consider specific factors identified in statute when determining in a criminal case whether an object constitutes drug paraphernalia. Such factors include proximity of the object in time

[1] 21 U.S.C. § 863(d) (2002).
[2] *See* id.
[3] 21 U.S.C. § 863(a) (2002).
[4] 21 U.S.C. § 863(f) (2002).
[5] *See* id.
[6] See s. 893.145, F.S.

and space to a controlled substance, the existence of residue of controlled substances on the object, and expert testimony concerning its use.[7]

In Florida, it is a first-degree misdemeanor to use or possess drug paraphernalia to produce a controlled substance or introduce a controlled substance into the body[8], or to advertise objects in a publication when it is known or reasonable to know that the purpose is to promote the sale of such objects for use as drug paraphernalia.[9]

It is a third-degree felony to deliver, manufacture with intent to deliver, or possess with intent to deliver drug paraphernalia when it is known or reasonable to know that it will be used to produce a controlled substance or introduce a controlled substance into the body.[10] It is also a third-degree felony to use, possess with the intent to use, or manufacture with the intent to use drug paraphernalia when it is known or reasonable to know that it will be used to transport a controlled substance or contraband as defined in s. 932.701(2)(a)1, F.S.[11]

It is a second-degree felony to deliver drug paraphernalia to a minor when it is known or reasonable to know that it will be used to produce or introduce into the body a controlled substance.[12]

The Florida Department of Corrections provides substance abuse treatment services to prison inmates and individuals subject to supervision and correctional programs who struggle with drug addiction.[13] These services are funded by recurring general appropriation funds and grant money through the Florida Department of Law Enforcement.

PROPOSED CHANGES

The bill provides that it is unlawful for any person to offer for sale any of the smoking pipes and devices listed below unless the person:

- Has a retail tobacco products dealer permit under s. 569.003, F.S.
- Derives at least 75 percent of its annual gross revenues from the sale of cigarettes, cigars and other tobacco products.
- Derives no more than 25 percent of its annual gross revenues from the sale of the following items:
    - Metal, wooden, acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens, or punctured metal bowls
    - Water pipes
    - Carburetion tubes and devices
    - Chamber pipes
    - Carburetor pipes
    - Electric pipes
    - Air-driven pipes
    - Chillums
    - Bongs
    - Ice pipes or chillers

The bill provides that any person who violates the new law is guilty of a first degree misdemeanor, punishable as provided in s. 775.082 or s. 775.083, F.S.

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[7] See s. 893.146, F.S.
[8] See s. 893.147(1), F.S.
[9] See s. 893.147(5), F.S.
[10] See s. 893.147(2), F.S.
[11] See s. 893.147(4), F.S.
[12] See s. 893.147 (3), F.S.
[13] FLA. DEP'T OF CORR., SUBSTANCE ABUSE REPORT (2009) (as accessed at http://www.dc.state.fl.us/pub/subabuse/inmates/07-08/index.html).

B. SECTION DIRECTORY:

Section 1: Creates s. 569.0073, F.S., limiting the circumstances under which a person may lawfully sell specified smoking pipes and devices.

Section 2: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   This bill creates a 1st degree misdemeanor, which could impact county jails.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill prohibits sales of certain items and will impact sellers of these items accordingly.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   The sex offender registry screening requirements of the bill should have a nominal impact on the sanctioning authorities. The state and national registries are public websites that can be accessed by persons with minimal computer skills, and searches can be conducted relatively quickly. Those sanctioning authorities electing to perform searches via a commercial consumer reporting agency may incur moderate expenses for the screening.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 11, 2010, the Finance and Tax Council adopted a strike-all amendment removing the surtax provision contained in the bill as filed. The amendment does the following:

- Provides that it is unlawful for any person to offer for sale specified smoking pipes and devices unless the person:
    - Has a retail tobacco products dealer permit under s. 569.003, F.S.
    - Derives at least 75 percent of its annual gross revenues from the sale of cigarettes, cigars and other tobacco products.
    - Derives no more than 25 percent of its annual gross revenues from the sale of specified smoking pipes and devices.
- Provides that any person who violates the new law is guilty of a first degree misdemeanor, punishable as provided in s. 775.082 or s. 775.083, F.S.

The analysis has been updated to reflect the council substitute.

A bill to be entitled

An act relating to retail sales of smoking pipes and smoking devices; creating s. 569.0073, F.S.; prohibiting retail sales of certain smoking pipes and smoking devices under certain circumstances; specifying criteria for the lawful sales of such items; providing a criminal penalty for unlawful sales of such items; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 569.0073, Florida Statutes, is created to read:

569.0073 Special provisions; smoking pipes and smoking devices.-

(1) It is unlawful for any person to offer for sale at retail any of the items listed in subsection (2) unless such person:

(a) Has a retail tobacco products dealer permit under s. 569.003. The provisions of this chapter apply to any person that offers for retail sale any of the items listed in subsection (2).

(b) Derives at least 75 percent of its annual gross revenues from the retail sale of cigarettes, cigars, and other tobacco products.

(c) Derives no more than 25 percent of its annual gross revenues from the retail sale of the items listed in subsection (2).

(2) The following smoking pipes and smoking devices are subject to the provisions of this section:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic smoking pipes, with or without screens, permanent screens, or punctured metal bowls.

(b) Water pipes.

(c) Carburetion tubes and devices.

(d) Chamber pipes.

(e) Carburetor pipes.

(f) Electric pipes.

(g) Air-driven pipes.

(h) Chillums.

(i) Bongs.

(j) Ice pipes or chillers.

(3) Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 203 Community Corrections Assistance to Counties or County Consortiums
SPONSOR(S): Criminal & Civil Justice Appropriations Committee; Reed
TIED BILLS: **IDEN./SIM. BILLS:** SB 370

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	12 Y, 0 N	Krol	Cunningham
2)	Criminal & Civil Justice Appropriations Committee	11 Y, 0 N, As CS	McAuliffe	Davis
3)	Criminal & Civil Justice Policy Council		Krol TK	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

Section 948.51(4), F.S., lists ten types of programs, services, or facilities for which the Secretary of the Department of Corrections may contract for the issuance of community corrections assistance funds to the counties if funds are appropriated by the Legislature.

This bill adds "rehabilitative community reentry programs" to the list of programs that are specified as being eligible for community corrections funds.

This bill does not have a fiscal impact on state or local government.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Section 948.51, F.S., provides for community corrections assistance to counties and consortiums of counties through the distribution of funds administered by the Department of Corrections (department). It creates a framework for disbursing funds to counties for the purpose of building and operating corrections and public safety programs. The purposes of the community corrections funds are to:

- Provide community-based corrections programs within county-owned or county-contracted residential probation programs;
- Provide nonincarcerative diversionary programs, such as pretrial release programs for juvenile or adult offenders who would otherwise be housed in a county or state detention facility or a state correctional institute;
- Provide community-based drug treatment programs;
- Provide funds to enhance programs within county detention facilities; and to
- Provide funds to enhance public safety and crime prevention programs.[1]

No funds have been distributed through this funding mechanism in recent years.

In order to enter into a community corrections partnership contract with the department, a county or consortium of counties must have established a public safety coordinating council under the provisions of s. 951.26, F.S. In turn, the public safety coordinating council must develop a public safety plan that is approved by the governing board of the county or counties and by the Secretary of Corrections in order to be eligible for community corrections funds. The plan must cover at least a five-year program and include specific information about the programs to be offered, the target population for the programs, measurable goals and objectives, and projected costs and sources of funds. Section 948.51(4), F.S., lists ten types of programs, services, or facilities for which the Secretary may contract for the issuance of community corrections assistance funds to the counties if funds are appropriated by the Legislature.

Eligibility for funding is not restricted to the items on the list, which are:

- Programs providing pretrial services.
- Specialized divisions within the circuit or county court established for the purpose of hearing specific types of cases, such as drug cases or domestic violence cases.
- Work camps.
- Programs providing intensive probation supervision.

[1] Section 948.51(4)(a)1.-5., F.S.

- Military-style boot camps.
- Work-release facilities.
- Centers to which offenders report during the day.
- Restitution centers.
- Inpatient or outpatient programs for substance abuse treatment and counseling.
- Vocational and educational programs.

Funds may not be used for fixed capital outlay to construct, add to, renovate, or operate a secure juvenile detention facility; for construction, addition to, renovation, or operation of any state facility; or for state probation officer salaries.

CS/HB 203 adds "rehabilitative community reentry programs" to the list of programs that are specified as being eligible for funding with community corrections funds. However, the term "rehabilitative community reentry programs" is not defined in the bill.

B. SECTION DIRECTORY:

Section 1. Amends s. 948.51, F.S., relating to community corrections assistance to counties or county consortiums.

Section 2. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See "Fiscal Comments."

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

CS/HB 203 does not have a fiscal impact on state or local government. Distribution of community assistance funds under s. 948.51, F.S., is subject to appropriation of funds, and the department does not currently receive funding under this section.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 26, 2010, the Criminal and Civil Justice Appropriations Committee adopted an amendment that restores "military style boot camps" to the list of programs that are specified as being eligible for community corrections funds if an appropriation is made.

The bill was reported favorably as a Committee Substitute. This analysis reflects the committee substitute.

A bill to be entitled

An act relating to community corrections assistance to counties or county consortiums; amending s. 948.51, F.S.; adding rehabilitative community reentry programs to the list of programs, services, and facilities that may be funded using community corrections funds; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (4) of section 948.51, Florida Statutes, is amended to read:

948.51 Community corrections assistance to counties or county consortiums.—

(4) PURPOSES OF COMMUNITY CORRECTIONS FUNDS.—

(b) Programs, services, and facilities that may be funded under this section include, but are not limited to:

1. Programs providing pretrial services.

2. Specialized divisions within the circuit or county court established for the purpose of hearing specific types of cases, such as drug cases or domestic violence cases.

3. Work camps.

4. Programs providing intensive probation supervision.

5. Military-style boot camps.

6. Work-release facilities.

7. Centers to which offenders report during the day.

8. Restitution centers.

9. Inpatient or outpatient programs for substance abuse

treatment and counseling.

10. Vocational and educational programs.

11. Rehabilitative community reentry programs.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 277 Alimony
SPONSOR(S): Civil Justice & Courts Policy Committee; Frishe
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1194

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N, As CS	DeZego	De La Paz
2)	Policy Council	17 Y, 1 N	Liepshutz	Ciccone
3)	Criminal & Civil Justice Policy Council		Bond	Havlicak
4)				
5)				

SUMMARY ANALYSIS

Alimony is a form of financial support paid to a financially dependent former spouse. Current law provides factors that a court must consider in awarding alimony in a dissolution of marriage case. The trial court is also given broad discretion to consider any other factor necessary to do equity and justice between the parties.

There are three basic types of alimony: permanent periodic, rehabilitative, and bridge-the-gap. Florida statutes expressly provide for permanent and rehabilitative alimony, and Florida courts have consistently recognized bridge-the-gap alimony. Permanent periodic alimony is usually awarded to meet the needs of a dependent former spouse and is permanent in nature. Rehabilitative alimony is non-permanent alimony used to establish self support in the receiving spouse by redeveloping previous skills or training to obtain necessary new skills. Bridge-the-gap alimony is short-term alimony that is intended to ease the transition from married life to single.

A trial court has the discretion to modify alimony, giving due regard to the changed circumstances or the financial ability of the parties. In addition, a court may reduce or terminate alimony upon specific written findings that a supportive relationship exists between the receiving spouse and another person.

This bill provides statutory guidelines for when and what type of alimony may be used in dissolution of marriage cases. Specifically, this bill adds to the statute two more types of alimony that a court may award: bridge-the-gap alimony, which is currently recognized in Florida case law although not in statute, and durational alimony, which has never been recognized in Florida. According to the bill, durational alimony is intended for use when permanent periodic alimony is inappropriate. A court may make an award of durational alimony for a set period of time following a marriage of short or moderate duration. This bill also adds more factors to a list of factors to be considered when determining an award of alimony.

This bill provides that all alimony awards, except for rehabilitative alimony, end upon the death of either party or the remarriage of the receiving spouse. In addition, this bill provides specifics regarding when each type of alimony may be modified or terminated.

This bill appears to have an indeterminate minimal fiscal impact on court revenues and expenditures.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS
I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law

Alimony is used to provide financial support to a financially dependent former spouse.[1] In Florida, the primary basis for determining alimony is whether there is need and ability to pay; alimony is not appropriate when the requesting spouse has no need for support or when the other spouse does not have the ability to pay.[2] Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.[3]

Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony in a dissolution of marriage case. These factors include:

- The standard of living established during the marriage;
- The duration of the marriage;
- The age, physical, and emotional condition of each party;
- The financial resources of each party, both marital and nonmarital, and the liabilities of each of them;
- If applicable, the time necessary for either party to acquire the education or training necessary for the party to find employment;
- Each party's contribution to the marriage, including, but not limited to, homemaking services, child care, education, and career building of the other party; and
- All sources of income available to either party.

In addition, the trial court is given broad discretion to consider any other factor necessary to do equity and justice between the parties.[4] A court may also consider the adultery of either party and the circumstances surrounding that adultery in determining an award of alimony.[5]

There are three basic types of alimony: permanent periodic, rehabilitative, and bridge-the-gap. Florida statutes provide expressly for permanent and rehabilitative alimony,[6] and Florida courts have

[1] Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).
[2] *Id.*
[3] *Id.*
[4] Section 61.08(2), F.S.
[5] Section 61.08(1), F.S.
[6] *Id.*

recognized bridge-the-gap alimony in addition to these. The court may order periodic payments, lump sum payments or both for these types of alimony.

Section 61.14, F.S., provides that the court may modify an alimony award by increasing or decreasing the amount, giving due regard to the changed circumstances or the financial ability of the parties. In addition, the court "may reduce or terminate an award of alimony upon specific written findings by the court that since the granting of a divorce and the award of alimony a supportive relationship has existed between the obligee and a person with whom the obligee resides." Section 61.14(1)(b)2., F.S., provides a non-exclusive list of circumstances for the court to consider when determining whether to modify an existing award of alimony based on a supportive relationship.

Permanent Periodic Alimony

Permanent periodic alimony is usually awarded to meet the needs of a dependent former spouse. In a long-term marriage, Florida courts have held that there is a presumption in favor of permanent alimony, regardless of the spouse's age or ability to earn income, although the district courts of Florida do not agree as to what constitutes a long-term marriage.[7] Generally, a marriage of seventeen years or longer is considered long-term.[8] A marriage which is neither short-term nor long-term falls in a middle "grey area," where there is neither a presumption for nor against permanent alimony.[9] In a short-term marriage, courts have generally found that there is a presumption against alimony.[10]

There are three prerequisites found in Florida case law for modification of permanent alimony: a substantial change in circumstances; the circumstance was not contemplated at the time of the final judgment of dissolution; and the circumstance is sufficient, material, involuntary and permanent in nature.[11] Permanent periodic alimony generally terminates on the death of either spouse or the remarriage of either recipient spouse, unless the parties agree otherwise.

Rehabilitative Alimony

Rehabilitative alimony is used to establish self-support in the receiving spouse, either by redevelopment of previous skills, or by training necessary to develop new skills.[12] To receive an award of rehabilitative alimony, the party seeking support must provide the court with a rehabilitative plan including the purpose of the rehabilitation, the areas in which rehabilitation is needed, and the actual amount of money necessary for rehabilitation.[13]

A party seeking an extension of rehabilitative alimony must generally show that he or she has not been rehabilitated despite reasonable and diligent efforts.[14] However, an unanticipated change in circumstances has also been held to support a continuation of rehabilitative alimony.[15] Case law provides that rehabilitative alimony does not automatically terminate upon the remarriage of the recipient spouse; but, rather, the paying spouse must show a material and substantial change in circumstances.[16]

Bridge-the-gap Alimony

Bridge-the-gap alimony refers to awards of non-permanent alimony provided to ease the transition from married life to being single. This type of alimony is intended not to retrain or rehabilitate divorcing

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[7] *Young v. Young*, 677 So.2d 1301 (Fla. 5th DCA 1996).
[8] *Cruz v. Cruz*, 574 So.2d 1117 (Fla. 3d DCA 1990).
[9] *Levy v. Levy*, 862 So.2d 48 (Fla. 3d DCA 2003).
[10] *Reeves v. Reeves*, 821 So.2d 333 (Fla. 5th DCA 2002).
[11] *Eisemann v. Eisemann*, 5 So.3d 760 (Fla. 2d DCA 2009); *Damiano v. Damiano*, 855 So.2d 708 (Fla. 4th DCA 2003).
[12] *Holmes v. Holmes*, 579 So.2d 769 (Fla. 2d DCA 1991).
[13] *Id.*
[14] *Wilson v. Wilson*, 585 So.2d 1179 (Fla. 5th DCA 1991).
[15] *Garramore v. Garramore*, 559 So.2d 422 (Fla. 4th DCA 1990).
[16] *Owens v. Owens*, 559 So.2d 321 (Fla. 1st DCA 1990).

spouses,[17] but rather, is intended only for short-term assistance with legitimate, identifiable short-term needs.[18] Bridge-the-gap alimony typically lasts no longer than two years.[19] This type of alimony is often payable as a lump sum in installments or as a single lump sum.

Although s. 61.14, F.S., provides that an alimony award may be modified giving due regard to a change circumstances or financial ability, bridge-the-gap alimony is generally not subject to modification under current case law.

Effect of Bill

This bill makes changes to s. 61.08, F.S., regarding alimony and provides statutory guidelines for when and what type of alimony may be used in dissolution of marriage cases. Specifically, this bill provides that before a court may make an award of any type of alimony, the court must first make a specific factual determination as to whether there is an actual need for alimony by either party and whether either party has the ability to pay. If the court finds that a party has a need and the other party has the ability to pay alimony or maintenance, then the court must consider all relevant factors, including those listed in s. 61.08(2), F.S. This bill broadens the list of factors to consider from all relevant "economic" factors to all relevant factors.

In addition, this bill adds the following to the current list of factors a court must consider in determining an award for alimony:

- The earning capacities, education levels, vocational skills, and employability of the parties;
- The responsibilities each party will have with regard to any minor children they have in common;
- The tax treatment and consequences to both parties of an alimony award, including designation of all or a portion of the payment as nontaxable, nondeductible income; and
- Any income available to either party through investments of any asset held by that party.

This bill provides that in addition to permanent or rehabilitative alimony, a court may also provide bridge-the-gap alimony, which is currently recognized in Florida case law, or durational alimony, which has never been used in Florida, or any combination of these forms.

Permanent Alimony

This bill provides that permanent alimony may be awarded for the need and necessities of life as established during the marriage when a party lacks the financial ability to meet his or her needs and necessities of life. Permanent alimony may be awarded following a long-duration marriage, which is not defined within the statute but has typically been held as seventeen years or more; following a marriage of moderate duration, if it is appropriate based on the factors in s. 61.08(2), F.S.; or following a short-duration marriage if the circumstances are "exceptional."

An award of permanent alimony under this bill terminates upon the death of either party or the remarriage of the party receiving the award. An award may also be modified or terminated if there is a substantial change in circumstances or upon the existence of a supportive relationship as provided in s. 61.14, F.S., which is consistent with current law.

Rehabilitative Alimony

Rehabilitative alimony may be awarded under this bill to assist a party in "establishing the capacity for self-support" by either redeveloping previous skills or credentials or acquiring additional education, training, or work experience. This bill requires that there must be a specific and defined rehabilitative plan which must be included as part of the order for rehabilitative alimony. This provision is consistent with current case law.

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[17] *Green v. Green*, 672 So.2d 49 (Fla. 4th DCA 1996).
[18] *Borchard v. Borchard*, 730 So.2d 748, 753 (Fla. 2nd DCA 1999).
[19] *Borchard v. Borchard*, 730 So.2d 748 (Fla. 2nd DCA 1999).

Rehabilitative alimony may be modified or terminated in accordance with s. 61.14, F.S.,[20] if there is a substantial change in circumstances, if the party does not comply with the plan, or when the plan is completed.

Bridge-the-gap Alimony

This bill adds bridge-the-gap alimony as a type of alimony a judge may award under s. 61.08, F.S. Under this bill, bridge-the-gap alimony may be awarded to a party in order to provide support by allowing the party to make a transition from being married to being single. It is intended to assist a party with their short-term needs and the length of an award may not exceed two years duration.

This bill provides that bridge-the-gap alimony terminates on the death of either party or the remarriage of the party receiving the award. An award of bridge-the-gap alimony is not modifiable in amount or duration under this bill. Bridge-the-gap alimony may not exceed two years in length.

Durational Alimony

This bill creates durational alimony, which has not been recognized in Florida statute or case law, and which may be provided when permanent periodic alimony is not appropriate. The purpose of durational alimony under this bill is to provide economic assistance for a set period of time following a short-duration or moderate-duration marriage. What constitutes short or moderate duration is not defined within the bill.

The award terminates upon the death of either party or the remarriage of the party receiving alimony and can be modified or terminated upon a substantial change of circumstances in accordance with s. 61.14, F.S. However, the length of durational alimony may not be modified under this bill, except under "exceptional circumstances."

This bill does not provide a specific length of time for durational alimony, so a court would have discretion to decide how long an award of durational alimony would last in each case. Durational alimony may provide recipient spouses, who would otherwise be denied alimony, an award of durational alimony.

B. SECTION DIRECTORY:

Section 1 amends s. 61.08, F.S., relating to alimony.

Section 2 provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill appears to have a minimal indeterminate positive fiscal impact on court revenues resulting from a potential increase in alimony case filings, according to the Office of the State Courts Administrator.

2. Expenditures:

[20] Section 61.14, F.S., provides in part that a court may modify an award of alimony giving due regard to the change in circumstances or financial ability. In addition, the statute provides that court may reduce or terminate alimony upon specific written findings that a supportive relationship exists between the receiving spouse and another person.

This bill appears to have a minimal indeterminate negative fiscal impact on court expenditures due to an increase in the judicial workload, according to the Office of the State Courts Administrator.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may provide an indeterminate positive fiscal impact to spouses who receive durational alimony who were previously not entitled to an award of alimony. This bill may also provide a corresponding negative fiscal impact to payor spouses.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On January 21, 2010, the Civil Justice & Courts Policy Committee adopted one amendment to this bill. The amendment limited the length of an award of bridge-the-gap alimony to no more than two years duration. The bill was then reported favorably as a committee substitute. This analysis reflects the bill as amended.

A bill to be entitled

An act relating to alimony; amending s. 61.08, F.S.; allowing for award of more than one type of alimony; revising factors to be considered in whether to award alimony or maintenance; providing for award of bridge-the-gap alimony for a limited period; providing that such an award is not modifiable; providing for award of rehabilitative alimony in certain circumstances; providing for modification or termination of such an award; providing for award of durational alimony in certain circumstances; providing for modification or termination of such an award; providing for award of permanent alimony in certain circumstances; providing for modification or termination of such an award; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 61.08, Florida Statutes, is amended to read:

61.08 Alimony.—

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be bridge-the-gap, rehabilitative, durational, or permanent in nature or any combination of these forms of alimony. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions,

the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

(2) In determining whether to ~~a proper~~ award ~~of~~ alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance, the court shall consider all relevant ~~economic~~ factors, including, but not limited to:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each.

(e) The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) The responsibilities each party will have with regard to any minor children they have in common.

(h) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment.

(i) ~~(g)~~ All sources of income available to either party, including income available to either party through investments of any asset held by that party.

(j) ~~The court may consider~~ Any other factor necessary to do equity and justice between the parties.

(3) To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose.

(4) Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years. An award of bridge-the-gap alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award of bridge-the-gap alimony shall not be modifiable in amount or duration.

(5)(a) Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either:

1. The redevelopment of previous skills or credentials; or

2. The acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.

(b) In order to award rehabilitative alimony, there must be a specific and defined rehabilitative plan which shall be included as a part of any order awarding rehabilitative alimony.

(c) An award of rehabilitative alimony may be modified or terminated in accordance with s. 61.14 based upon a substantial change in circumstances, upon noncompliance with the rehabilitative plan, or upon completion of the rehabilitative plan.

(6) Durational alimony may be awarded when permanent periodic alimony is inappropriate. The purpose of durational alimony is to provide a party with economic assistance for a set period of time following a marriage of short or moderate duration. An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony may be modified or terminated based upon a substantial change in circumstances in accordance with s. 61.14. However, the length of an award of durational alimony may not be modified except under exceptional circumstances.

(7) Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during

the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration, following a marriage of moderate duration if such an award is appropriate upon consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are exceptional circumstances. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14.

(8) ~~(4)~~ (a) With respect to any order requiring the payment of alimony entered on or after January 1, 1985, unless the provisions of paragraph (c) or paragraph (d) apply, the court shall direct in the order that the payments of alimony be made through the appropriate depository as provided in s. 61.181.

(b) With respect to any order requiring the payment of alimony entered before January 1, 1985, upon the subsequent appearance, on or after that date, of one or both parties before the court having jurisdiction for the purpose of modifying or enforcing the order or in any other proceeding related to the order, or upon the application of either party, unless the provisions of paragraph (c) or paragraph (d) apply, the court shall modify the terms of the order as necessary to direct that payments of alimony be made through the appropriate depository as provided in s. 61.181.

(c) If there is no minor child, alimony payments need not be directed through the depository.

(d)1. If there is a minor child of the parties and both parties so request, the court may order that alimony payments need not be directed through the depository. In this case, the order of support shall provide, or be deemed to provide, that either party may subsequently apply to the depository to require that payments be made through the depository. The court shall provide a copy of the order to the depository.

2. If the provisions of subparagraph 1. apply, either party may subsequently file with the depository an affidavit alleging default or arrearages in payment and stating that the party wishes to initiate participation in the depository program. The party shall provide copies of the affidavit to the court and the other party or parties. Fifteen days after receipt of the affidavit, the depository shall notify all parties that future payments shall be directed to the depository.

3. In IV-D cases, the IV-D agency shall have the same rights as the obligee in requesting that payments be made through the depository.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 369 Murder
SPONSOR(S): Snyder and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 808

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	11 Y, 0 N	Padgett	Cunningham
2)	Criminal & Civil Justice Appropriations Committee	12 Y, 0 N	McAuliffe	Davis
3)	Criminal & Civil Justice Policy Council		Billmeier LMB	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

Section 782.04(1)(a)3., F.S., provides the unlawful killing of a human being which resulted from the unlawful distribution of certain controlled substances, including cocaine and opium or any synthetic derivative of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony.

In 2009, the Fourth District Court of Appeal upheld the dismissal of first degree murder charges against a defendant who sold methadone to a victim who later overdosed on the drug. The court held that methadone is not a drug enumerated in statute. As a result of the court's decision, a death resulting from the unlawful distribution of methadone cannot be prosecuted as a capital felony pursuant to s. 782.04(1)(a)(3), F.S.

The bill amends s. 782.04, F.S., to add methadone to the list of opium and opium derivatives in the first degree murder statute. This allows the state to prosecute a death resulting from the unlawful distribution of methadone as a capital felony in the same manner as a death resulting from opium and opium derivatives.

The Criminal Justice Impact Conference met February 23, 2010, and determined the bill will have an insignificant impact on state prison beds.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 782.04(1)(a)3., F.S., provides the unlawful killing of a human being which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), F.S.,[1] cocaine as described in s. 893.03(2)(a)4., F.S., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user is murder in the first degree and constitutes a capital felony,[2] punishable as provided in s. 775.082, F.S.

In State v. McCartney, 1 So. 3d 326 (Fla. 4th DCA 2009) the defendant was charged with first degree murder as the result of a death caused by an overdose of methadone which was sold to the victim by the defendant. The trial court granted a motion to dismiss the case because methadone is not a drug enumerated in Schedule I under the above statute. The state appealed, arguing that methadone does fall within the statute because it is a synthetic of opium. The Fourth District Court of Appeal held that methadone is not a synthetic of opium, but a substance that affects the body in the same manner as opium.[3]

As a result of the court's decision, a death resulting from the unlawful distribution of methadone cannot be prosecuted as a capital felony pursuant to s. 782.04(1)(a)(3), F.S.

Proposed Changes

The bill amends s. 782.04, F.S., to add methadone to the list of opium and opium derivatives in the first degree murder statute. This allows the state to prosecute a death resulting from the unlawful distribution of methadone as a capital felony in the same manner as a death resulting from opium and opium derivatives.

B. SECTION DIRECTORY:

Section 1: Amends s. 782.04, F.S., relating to murder.

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[1] Section 893.03(1), F.S., contains a list of Schedule I illegal substances. Schedule I substances have a high potential for abuse and have no currently accepted medical use in treatment and use under medical supervision does not meet accepted safety standards.

[2] A capital felony is punishable by death, or life imprisonment without the possibility of parole. Section 775.082(1), F.S.

[3] The court also noted that methadone is specifically listed as a Schedule II substance under s. 893.03(2)(b)14, F.S.

Section 2: Reenacts s. 775.0823, F.S., relating to violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.

Section 3: Reenacts s. 782.065, F.S., relating to murder; law enforcement officer.

Section 4: Reenacts s. 921.0022, F.S., relating to criminal punishment code; offense severity ranking chart.

Section 5: Reenacts s. 947.146, F.S., relating to control release authority.

Section 6: Provides effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Impact Conference met February 23, 2010, and determined the bill will have an insignificant impact on prison beds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to murder; amending s. 782.04, F.S.; providing that murder in the first degree includes the unlawful killing of a human being which resulted from the unlawful distribution of methadone by a person aged 18 or older when such drug is proven to be the proximate cause of the death of the user; providing penalties; reenacting ss. 775.0823(1) and (2), 782.065(1), 921.0022(3)(i), and 947.146(3)(i), F.S., relating to violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges, murder of law enforcement officer, the Criminal Punishment Code offense severity ranking chart, and the Control Release Authority, respectively, to incorporate the amendment to s. 782.04, F.S., in references thereto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) of section 782.04, Florida Statutes, is amended to read:

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),

b. Arson,

c. Sexual battery,

d. Robbery,

e. Burglary,

f. Kidnapping,

g. Escape,

h. Aggravated child abuse,

i. Aggravated abuse of an elderly person or disabled adult,

j. Aircraft piracy,

k. Unlawful throwing, placing, or discharging of a destructive device or bomb,

l. Carjacking,

m. Home-invasion robbery,

n. Aggravated stalking,

o. Murder of another human being,

p. Resisting an officer with violence to his or her person,

q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., ~~or~~ opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or methadone by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Section 2. For the purpose of incorporating the amendment made by this act to section 782.04, Florida Statutes, in references thereto, subsections (1) and (2) of section 775.0823, Florida Statutes, are reenacted to read:

775.0823 Violent offenses committed against law enforcement officers, correctional officers, state attorneys, assistant state attorneys, justices, or judges.—The Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer, as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); against any state attorney elected pursuant to s. 27.01 or assistant state attorney appointed under s. 27.181; or against any justice or judge of a court described in Art. V of the State Constitution, which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer, the state attorney's or assistant state attorney's duty as a prosecutor or investigator, or the justice's or judge's duty as a judicial officer, as follows:

(1) For murder in the first degree as described in s. 782.04(1), if the death sentence is not imposed, a sentence of imprisonment for life without eligibility for release.

(2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld.

Section 3. For the purpose of incorporating the amendment made by this act to section 782.04, Florida Statutes, in a reference thereto, subsection (1) of section 782.065, Florida Statutes, is reenacted to read:

782.065 Murder; law enforcement officer.—Notwithstanding ss. 775.082, 775.0823, 782.04, 782.051, and chapter 921, a defendant shall be sentenced to life imprisonment without eligibility for release upon findings by the trier of fact that, beyond a reasonable doubt:

(1) The defendant committed murder in the first degree in violation of s. 782.04(1) and a death sentence was not imposed; murder in the second or third degree in violation of s. 782.04(2), (3), or (4); attempted murder in the first or second degree in violation of s. 782.04(1)(a)1. or (2); or attempted felony murder in violation of s. 782.051; and

Section 4. For the purpose of incorporating the amendment made by this act to section 782.04, Florida Statutes, in a reference thereto, paragraph (i) of subsection (3) of section 921.0022, Florida Statutes, is reenacted to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(i) LEVEL 9

Florida Statute	Felony Degree	Description
316.193(3)(c)3.b.	1st	DUI manslaughter; failing to render aid or give information.
327.35(3)(c)3.b.	1st	BUI manslaughter; failing to render aid or give information.
409.920(2)(b)1.c.	1st	Medicaid provider fraud; $50,000 or more.
499.0051(9)	1st	Knowing sale or purchase of contraband prescription drugs resulting in great bodily harm.
560.123(8)(b)3.	1st	Failure to report currency or payment instruments totaling or exceeding $100,000 by money transmitter.
560.125(5)(c)	1st	Money transmitter business by unauthorized person, currency, or payment instruments totaling or exceeding $100,000.
655.50(10)(b)3.	1st	Failure to report financial transactions totaling or exceeding

			$100,000 by financial institution.
775.0844		1st	Aggravated white collar crime.
782.04(1)		1st	Attempt, conspire, or solicit to commit premeditated murder.
782.04(3)		1st,PBL	Accomplice to murder in connection with arson, sexual battery, robbery, burglary, and other specified felonies.
782.051(1)		1st	Attempted felony murder while perpetrating or attempting to perpetrate a felony enumerated in s. 782.04(3).
782.07(2)		1st	Aggravated manslaughter of an elderly person or disabled adult.
787.01(1)(a)1.		1st,PBL	Kidnapping; hold for ransom or reward or as a shield or hostage.
787.01(1)(a)2.		1st,PBL	Kidnapping with intent to commit or facilitate commission of any felony.
787.01(1)(a)4.		1st,PBL	Kidnapping with intent to interfere

			with performance of any governmental or political function.
127			
	787.02(3)(a)	1st	False imprisonment; child under age 13; perpetrator also commits aggravated child abuse, sexual battery, or lewd or lascivious battery, molestation, conduct, or exhibition.
128			
	790.161	1st	Attempted capital destructive device offense.
129			
	790.166(2)	1st,PBL	Possessing, selling, using, or attempting to use a weapon of mass destruction.
130			
	794.011(2)	1st	Attempted sexual battery; victim less than 12 years of age.
131			
	794.011(2)	Life	Sexual battery; offender younger than 18 years and commits sexual battery on a person less than 12 years.
132			
	794.011(4)	1st	Sexual battery; victim 12 years or older, certain circumstances.
133			

794.011(8)(b)	1st	Sexual battery; engage in sexual conduct with minor 12 to 18 years by person in familial or custodial authority.
794.08(2)	1st	Female genital mutilation; victim younger than 18 years of age.
800.04(5)(b)	Life	Lewd or lascivious molestation; victim less than 12 years; offender 18 years or older.
812.13(2)(a)	1st,PBL	Robbery with firearm or other deadly weapon.
812.133(2)(a)	1st,PBL	Carjacking; firearm or other deadly weapon.
812.135(2)(b)	1st	Home-invasion robbery with weapon.
817.568(7)	2nd,PBL	Fraudulent use of personal identification information of an individual under the age of 18 by his or her parent, legal guardian, or person exercising custodial authority.

827.03(2)	1st	Aggravated child abuse.
847.0145(1)	1st	Selling, or otherwise transferring custody or control, of a minor.
847.0145(2)	1st	Purchasing, or otherwise obtaining custody or control, of a minor.
859.01	1st	Poisoning or introducing bacteria, radioactive materials, viruses, or chemical compounds into food, drink, medicine, or water with intent to kill or injure another person.
893.135	1st	Attempted capital trafficking offense.
893.135(1)(a)3.	1st	Trafficking in cannabis, more than 10,000 lbs.
893.135(1)(b)1.c.	1st	Trafficking in cocaine, more than 400 grams, less than 150 kilograms.
893.135(1)(c)1.c.	1st	Trafficking in illegal drugs, more than 28 grams, less than 30 kilograms.

893.135(1)(d)1.c.	1st	Trafficking in phencyclidine, more than 400 grams.
893.135(1)(e)1.c.	1st	Trafficking in methaqualone, more than 25 kilograms.
893.135(1)(f)1.c.	1st	Trafficking in amphetamine, more than 200 grams.
893.135(1)(h)1.c.	1st	Trafficking in gamma-hydroxybutyric acid (GHB), 10 kilograms or more.
893.135(1)(j)1.c.	1st	Trafficking in 1,4-Butanediol, 10 kilograms or more.
893.135(1)(k)2.c.	1st	Trafficking in Phenethylamines, 400 grams or more.
896.101(5)(c)	1st	Money laundering, financial instruments totaling or exceeding $100,000.
896.104(4)(a)3.	1st	Structuring transactions to evade reporting or registration requirements, financial transactions totaling or exceeding $100,000.

Section 5. For the purpose of incorporating the amendment made by this act to section 782.04, Florida Statutes, in a reference thereto, paragraph (i) of subsection (3) of section 947.146, Florida Statutes, is reenacted to read:

947.146 Control Release Authority.—

(3) Within 120 days prior to the date the state correctional system is projected pursuant to s. 216.136 to exceed 99 percent of total capacity, the authority shall determine eligibility for and establish a control release date for an appropriate number of parole ineligible inmates committed to the department and incarcerated within the state who have been determined by the authority to be eligible for discretionary early release pursuant to this section. In establishing control release dates, it is the intent of the Legislature that the authority prioritize consideration of eligible inmates closest to their tentative release date. The authority shall rely upon commitment data on the offender information system maintained by the department to initially identify inmates who are to be reviewed for control release consideration. The authority may use a method of objective risk assessment in determining if an eligible inmate should be released. Such assessment shall be a part of the department's management information system. However, the authority shall have sole responsibility for determining control release eligibility, establishing a control release date, and effectuating the release of a sufficient number of inmates to maintain the inmate population between 99 percent and 100 percent of total capacity.

Inmates who are ineligible for control release are inmates who are parole eligible or inmates who:

(i) Are convicted, or have been previously convicted, of committing or attempting to commit murder in the first, second, or third degree under s. 782.04(1), (2), (3), or (4), or have ever been convicted of any degree of murder or attempted murder in another jurisdiction;

In making control release eligibility determinations under this subsection, the authority may rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence or postsentence investigation or any information contained in arrest reports relating to circumstances of the offense.

Section 6. This act shall take effect October 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 409 Garnishment
SPONSOR(S): Policy Council; Civil Justice & Courts Policy Committee; Policy Council; Brisé and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 492

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	11 Y, 0 N, As CS	DeZego	De La Paz
2)	Policy Council	17 Y, 0 N, As CS	Varn	Ciccone
3)	Criminal & Civil Justice Policy Council		De La Paz	Havlicak
4)				
5)				

SUMMARY ANALYSIS

A garnishment is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to the debtor to turn over to the creditor any of the debtor's property, such as wages or bank accounts, held by that third party. In Florida, a person who provides more than half the support for a child or other dependent (head of family) whose disposable earnings are less than or equal to $500 a week ($26,000 a year) is exempt from wage garnishment. A head of family whose disposable earnings are greater than $500 a week is also exempt from wage garnishment, unless he or she waives the exemption in writing.

CS/CS/HB 409 increases the amount of disposable earnings a head of family can make and still be exempt from garnishment of wages with or without a written waiver from $500 to $750 a week ($39,000 a year). In addition, the bill provides specific requirements for the written waiver of garnishment to be effective and example language for the format of the waiver.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of October 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS
I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law

A garnishment is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to the debtor to turn over to the creditor any of the debtor's property, such as wages or bank accounts, held by that third party.[1] One of the most common types of garnishment is wage garnishment, where an employer is required to deduct money from an employee's wages in accordance with a court order.

In Florida, a head of family whose disposable earnings[2] are less than or equal to $500 a week ($26,000 a year) is exempt from wage garnishment.[3] In addition, a head of family whose disposable earnings are greater than $500 a week is exempt from wage garnishment unless he or she has agreed otherwise in writing.[4] Florida law defines a head of family as a person who provides more than half the support for a child or other dependent. In a two income household, only one person may be considered the head of family. The $500 amount for disposable earnings was created by statute in 1993 and has not been increased since that time.[5] With inflation, the corresponding amount today would be $748.55.[6]

Section 77.041, F.S., streamlines procedures in garnishment proceedings against individuals and requires the Clerk of Court to attach a notice to writs of garnishment along with a "Claim of Exemption and Request for Hearing" form. This form contains eleven authorized exemptions, including head of family, as well as a space to list any other exemptions provided by law. The burden is on the debtor to prove entitlement to any exemption.[7]

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[1] Black's Law Dictionary 300 (2d pocket ed. 2001).
[2] Section 222.11(1)b, F.S., provides that "disposable earnings" are the part of the earnings of any head of family remaining after the deduction from those earnings of any amounts required by law to be withheld. Section 222.11(1)a, F.S., provides that "earnings" represent monies paid or payable in a sum certain, as a result of personal services or of labor performed.
[3] Section 222.11(2)a, F.S.
[4] Section 222.11(2)b, F.S.
[5] *See* 93-256, L.O.F
[6] *See* http://www.bls.gov/data/inflation_calculator.htm
[7] *In re Harrison,* 216 B.R. 451, 453 (So.Dis.Fla.1997) (citing *In re Parker,* 147 B.R. 810 (M.D.Fla.1992)); *Brock v. Westport Recovery Corp.,* 832 So.2d 209, 211 (Fla. 4th DCA 2002).

If a person's wages are attached or garnished, they cannot exceed the amount allowed under the Consumer Credit Protection Act.[8] This act provides that garnishment generally cannot exceed the lesser of twenty-five per cent of a person's disposable earnings for that week, or the amount by which his or her disposable earnings for that week exceed thirty times the Federal minimum hourly wage in effect at the time the earnings are payable.[9] The current Federal minimum hourly wage is $7.25.[10]

Section 61.12, F.S., "creates an exception to the head of family exemption from garnishment with respect to orders of the court for alimony, suit money, or child support."[11] Therefore, the head of family exemption in s. 222.11, F.S., does not apply to wage garnishment in child support cases.

Effect of Bill

The proposed effect of CS/CS/HB 409 is to increase the amount of disposable earnings a head of family may earn and still be exempted from garnishment of wages from $500 a week to $750 a week, which is consistent with the rate of inflation.[12] Therefore, a person who provides more than half the support for a child or other dependent whose disposable earnings are equal to or less than $39,000 a year is exempt from wage garnishment under this bill.

CS/CS/HB 409 also provides that if the head of family's disposable earnings are greater than $750 a week, instead of the current $500 a week, then he or she is exempt from garnishment unless the exemption is waived in writing. In addition, this bill adds requirements for the waiver to be valid. Specifically, this bill requires the waiver to be:

- In the same language as the contract or agreement to which the waiver relates,
- In a separate document that is attached to the contract or the agreement, and
- Written in at least size 14 font.

The waiver must be in substantially the same format as the language provided in the bill, which consists of a statement that must be signed by the consumer. The statement acknowledges that a person who provides more than one-half of the support for a child or other dependent is exempt in full or part from garnishment under Florida law and that this exemption may only be waived by signing the document. The creditor must also sign a statement confirming that the creditor has fully explained the document to the consumer.

The bill is not retroactive and does not affect waivers entered into prior to the effective date of October 1, 2010.[13]

B. SECTION DIRECTORY:

Section 1. Amends s. 77.041, F.S., relating to notice to an individual defendant for a claim of exemption from alimony.

Section 2. Amends s. 222.11, F.S., relating to exemption of wages from garnishment.

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[8] Section 222.11(2)c, F.S.

[9] *See* Consumer Credit Protection Act, 15 USC. S. 1673. The restrictions regarding maximum allowable garnishment do not apply to any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is established by State law, which affords substantial due process, and which is subject to judicial review; any order of any court of the United States having jurisdiction over cases under chapter 13 of title 11; or any debt due for any State or Federal tax.

[10] *See* http://www.dol.gov/dol/topic/wages/minimumwage.htm

[11] *Department of Health and Rehabilitative Services v. Sweeting,* 423 So.2d 1025, 1026 (Fla. 4th DCA 1982). *See Sokolsky v. Kuhn*, 405 So.2d 975 (Fla. 1981).

[12] The exemption amount of $500 per week was last updated in 1993. *See* http://www.bls.gov/data/inflation_calculator.htm

[13] Unless the Legislature states otherwise, legislation is presumed only to operate prospectively. *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).

Section 3. Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill appears to have an indeterminate positive fiscal impact on consumers due to the increase in persons who would qualify for a waiver of garnishment of wages under this bill. The bill also appears to have a corresponding negative fiscal impact on creditors.

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On January 12, 2010, the Civil Justice & Courts Policy Committee adopted one amendment to this bill. The amendment updates the Claim of Exemption and Request for Hearing Form in s. 77.041, F.S, to reflect the increase in the wage garnishment exemption increase from $500 to $750.

On February 4, 2010, the Policy Council adopted one amendment to the bill to change the effective date from July 1, 2010, to October 1, 2010. The bill was reported favorably as a Council Substitute for CS/HB 409. This analysis is drafted to the bill as amended.

A bill to be entitled

An act relating to garnishment; amending s. 77.041, F.S.; increasing the amount of wages of a head of family that is exempt from garnishment; amending s. 222.11, F.S.; increasing the amount of wages of a head of family that is exempt from garnishment; providing a form that must be used for an agreement to waive the exemption from garnishment; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 77.041, Florida Statutes, is amended to read:

77.041 Notice to individual defendant for claim of exemption from garnishment; procedure for hearing.—

(1) Upon application for a writ of garnishment by a plaintiff, if the defendant is an individual, the clerk of the court shall attach to the writ the following "Notice to Defendant":

NOTICE TO DEFENDANT OF RIGHT AGAINST
GARNISHMENT OF WAGES, MONEY,
AND OTHER PROPERTY

The Writ of Garnishment delivered to you with this Notice means that wages, money, and other property belonging to you have been garnished to pay a court judgment against you. HOWEVER, YOU MAY BE ABLE TO KEEP OR RECOVER YOUR WAGES, MONEY, OR PROPERTY. READ THIS NOTICE CAREFULLY.

State and federal laws provide that certain wages, money,

and property, even if deposited in a bank, savings and loan, or credit union, may not be taken to pay certain types of court judgments. Such wages, money, and property are exempt from garnishment. The major exemptions are listed below on the form for Claim of Exemption and Request for Hearing. This list does not include all possible exemptions. You should consult a lawyer for specific advice.

TO KEEP YOUR WAGES, MONEY, AND OTHER PROPERTY FROM BEING GARNISHED, OR TO GET BACK ANYTHING ALREADY TAKEN, YOU MUST COMPLETE A FORM FOR CLAIM OF EXEMPTION AND REQUEST FOR HEARING AS SET FORTH BELOW AND HAVE THE FORM NOTARIZED. YOU MUST FILE THE FORM WITH THE CLERK'S OFFICE WITHIN 20 DAYS AFTER THE DATE YOU RECEIVE THIS NOTICE OR YOU MAY LOSE IMPORTANT RIGHTS. YOU MUST ALSO MAIL OR DELIVER A COPY OF THIS FORM TO THE PLAINTIFF AND THE GARNISHEE AT THE ADDRESSES LISTED ON THE WRIT OF GARNISHMENT.

If you request a hearing, it will be held as soon as possible after your request is received by the court. The plaintiff must file any objection within 3 business days if you hand delivered to the plaintiff a copy of the form for Claim of Exemption and Request for Hearing or, alternatively, 8 business days if you mailed a copy of the form for claim and request to the plaintiff. If the plaintiff files an objection to your Claim of Exemption and Request for Hearing, the clerk will notify you and the other parties of the time and date of the hearing. You may attend the hearing with or without an attorney. If the plaintiff fails to file an objection, no hearing is required, the writ of garnishment will be dissolved and your wages, money,

or property will be released.

YOU SHOULD FILE THE FORM FOR CLAIM OF EXEMPTION IMMEDIATELY TO KEEP YOUR WAGES, MONEY, OR PROPERTY FROM BEING APPLIED TO THE COURT JUDGMENT. THE CLERK CANNOT GIVE YOU LEGAL ADVICE. IF YOU NEED LEGAL ASSISTANCE YOU SHOULD SEE A LAWYER. IF YOU CANNOT AFFORD A PRIVATE LAWYER, LEGAL SERVICES MAY BE AVAILABLE. CONTACT YOUR LOCAL BAR ASSOCIATION OR ASK THE CLERK'S OFFICE ABOUT ANY LEGAL SERVICES PROGRAM IN YOUR AREA.

CLAIM OF EXEMPTION AND

REQUEST FOR HEARING

I claim exemptions from garnishment under the following categories as checked:

_____ 1. Head of family wages. (You must check a. or b. below.)

_____ a. I provide more than one-half of the support for a child or other dependent and have net earnings of <u>$750</u> ~~$500~~ or less per week.

_____ b. I provide more than one-half of the support for a child or other dependent, have net earnings of more than <u>$750</u> ~~$500~~ per week, but have not agreed in writing to have my wages garnished.

_____ 2. Social Security benefits.

_____ 3. Supplemental Security Income benefits.

_____ 4. Public assistance (welfare).

_____ 5. Workers' Compensation.

_____ 6. Unemployment Compensation.

_____ 7. Veterans' benefits.

_____ 8. Retirement or profit-sharing benefits or pension money.

_____ 9. Life insurance benefits or cash surrender value of a life insurance policy or proceeds of annuity contract.

_____ 10. Disability income benefits.

_____ 11. Prepaid College Trust Fund or Medical Savings Account.

_____ 12. Other exemptions as provided by law.

_____(explain)

I request a hearing to decide the validity of my claim. Notice

of the hearing should be given to me at:

Address: _____

Telephone number:_____

The statements made in this request are true to the best of my knowledge and belief.

_____

Defendant's signature

Date_____

STATE OF FLORIDA

COUNTY OF

Sworn and subscribed to before me this _____ day of ...(month and year)..., by ...(name of person making statement)...

Notary Public/Deputy Clerk

Personally Known _____OR Produced Identification_____

Type of Identification Produced_____

Section 2. Subsection (2) of section 222.11, Florida Statutes, is amended to read:

222.11 Exemption of wages from garnishment.—

(2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to $750 ~~$500~~ a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than $750 ~~$500~~ a week, may not be attached or garnished unless such person has agreed otherwise in writing. The agreement to waive the protection provided by this paragraph must:

1. Be in the same language as the contract or agreement to

which the waiver relates.

2. Be contained in a separate document attached to the contract or agreement.

3. Be in substantially the following form in at least 14-point type:

IF YOU PROVIDE MORE THAN ONE-HALF OF THE SUPPORT FOR A CHILD OR OTHER DEPENDENT, ALL OR PART OF YOUR INCOME IS EXEMPT FROM GARNISHMENT UNDER FLORIDA LAW. YOU CAN WAIVE THIS PROTECTION ONLY BY SIGNING THIS DOCUMENT. BY SIGNING BELOW, YOU AGREE TO WAIVE THE PROTECTION FROM GARNISHMENT.

...(Consumer's Signature)... ...(Date Signed)...

I have fully explained this document to the consumer.

...(Creditor's Signature)... ...(Date Signed)...

~~In no event shall~~ The amount attached or garnished may not exceed the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

(c) Disposable earnings of a person other than a head of family may not be attached or garnished in excess of the amount allowed under the Consumer Credit Protection Act, 15 U.S.C. s. 1673.

Section 3. This act shall take effect October 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 445 Pretrial Detention and Release
SPONSOR(S): Criminal & Civil Justice Appropriations Committee; Dorworth
TIED BILLS: **IDEN./SIM. BILLS:** SB 782

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	13 Y, 0 N	Cunningham	Cunningham
2)	Criminal & Civil Justice Appropriations Committee	6 Y, 5 N, As CS	McAuliffe	Davis
3)	Criminal & Civil Justice Policy Council		Cunningham	Havlicak
4)				
5)				

SUMMARY ANALYSIS

The bill creates s. 907.041(5), F.S., to establish eligibility criteria that will apply to all pretrial release programs. There are currently no pretrial release program eligibility criteria in the Florida Statutes – each county develops its own. The bill specifies that a defendant is eligible to participate in a pretrial release program only by order of the court if the defendant:

- Is not charged with a capital, life, or first degree felony;
- Has not, within the past year, willfully failed to appear at any court proceeding;
- Is not, at the time of the arrest, subject to or on probation for another charge and is not facing charges for another crime anywhere in this state;
- Has no prior convictions involving violence; and
- Satisfies any other limitation upon eligibility for release which is in addition to those above, whether established by the board of county commissioners or the court.

The bill requires the court to determine whether a defendant is eligible to participate in a pretrial release program and requires pretrial release programs to certify in writing that the defendant satisfies each of the above requirements. The bill also requires pretrial release programs to notify every defendant released to the program of the times and places at which the defendant is required to appear before the court.

The bill also specifies that if a defendant seeks to post a surety bond pursuant to a bond schedule established by administrative order, the defendant must do so without any interaction with, or restriction by, a pretrial release program.

The bill prohibits pretrial release programs from charging defendants any fees other than those authorized by state law, but permits such programs to charge defendants for services that have been ordered by the court.

The bill specifies that a court may order a defendant who does not meet the above-described eligibility requirements to participate in a pretrial release program if the defendant is eligible under state law to participate in a drug court program, mental health court program, or a prison diversion program.

The bill may have a fiscal impact on local government. See "Fiscal Comments."

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Pretrial Release

Pretrial release is an alternative to incarceration that allows arrested defendants to be released from jail while they await disposition of their criminal charges.[1] Pretrial release is a constitutional right for most people arrested for a crime.[2] The primary consideration in deciding whether to grant a defendant pretrial release is whether the person presents a threat to the community, whether the person is a flight risk, or whether the person threatens the integrity of the judicial process.[3]

Types of Pretrial Release

Generally, pretrial release can be granted in one of the following three ways:[4]

Release on Own Recognizance

Release on own recognizance allows defendants to be released from jail based on their promise to return for mandatory court appearances.[5] Defendants released on recognizance are not required to post a bond and are not supervised.

Bond

Posting bond is a monetary requirement to ensure that defendants appear in court when required. A defendant whom the court approves for this release must post a cash bond to the court or arrange for a surety bond through a private bondsman. Defendants typically pay a nonrefundable fee to the bondsman of 10% of the bond required by the court for release. If the defendant does not appear, the bondsman is responsible for paying the entire amount. As such, bondsmen have a vested interest in ensuring that their clients attend their court dates and do not abscond. Bondsmen are not required to supervise a defendant.

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[1] Report No. 10-08, *"Pretrial Release Programs' Compliance with New Reporting Requirements is Mixed,"* Office of Program Policy Analysis & Government Accountability, January 2010.

[2] Article I, Section 14, *Florida Constitution*, provides that unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions.

[3] *Id. See also*, s. 907.041(1), F.S.

[4] Report No. 10-08, *"Pretrial Release Programs' Compliance with New Reporting Requirements is Mixed,"* Office of Program Policy Analysis & Government Accountability, January 2010.

[5] Some defendants can also be released at the time of arrest with a notice to appear in court.

Pretrial Release Programs

Pretrial release programs[6] actively supervise approved defendants. The programs do so through phone contacts, visits, and/or electronic monitoring until the defendant's case is disposed or until the defendant's supervision is revoked. Defendants generally are released into a pretrial release program without paying a bond. Defendants may be assigned to the program by a judge or selected for participation by the program. There are no pretrial release program eligibility criteria in the Florida Statutes – each county develops its own criteria for determining who is eligible for its pretrial release program.

Prior to a defendant being released to a pretrial release program, the program must certify to the court that it has investigated or otherwise verified:

- The circumstances of the accused's family, employment, financial resources, character, mental condition, and length of residence in the community;
- The accused's record of convictions, of appearances at court proceedings, of flight to avoid prosecution, or of failure to appear at court proceedings; and
- Other facts necessary to assist the court in its determination of the indigency of the accused and whether the accused should be released under the supervision of the program.[7]

According to a January 2010, report by the Office of Program Policy Analysis and Government Accountability (OPPAGA), Florida has 28 pretrial release programs, which are administered on a county basis by sheriffs, jails, or county government divisions. Pretrial release programs are primarily funded by the county and by fees charged to defendants who participate in the program.[8]

Section 907.043(3), F.S., requires pretrial release programs to prepare a register displaying information that is relevant to the defendants released through such a program. The statute specifies that a copy of the register must be located at the office of the clerk of the circuit court in the county where the program is located and must be readily accessible to the public. In addition, the register must be updated weekly and display accurate data regarding specified information.[9]

Presumption in Favor of Non-Monetary Release

The Legislature has established a presumption in favor of pretrial release on *nonmonetary conditions*. Section 907.041(3)(a), F.S., provides the following:

> It is the intent of the Legislature to create a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release unless such

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[6] Section 907.043(2)(b), F.S., defines the term "pretrial release program" as an entity, public or private, that conducts investigations of pretrial detainees, makes pretrial release recommendations to a court, and electronically monitors and supervises pretrial defendants. The term does not apply to any program in the Florida Department of Corrections. *See s.* 907.043(2)(b), F.S.

[7] s. 907.041(3)(b), F.S.

[8] Osceola county's pretrial release program is permitted to charge participating defendants a $2.70 fee per day for electronic monitoring, a $4.90 fee per day for GPS, a $4.75 fee for an alcohol monitoring device, a $30.80 fee for a drug test, and a $13.20 fee for an alcohol test. *See* "Osceola County Corrections Department Proposed Legislation Impact Analysis" for House Bill 445.

[9] The information must include the name, location, and funding source of the pretrial release program; the number of defendants assessed and interviewed for pretrial release; the number of indigent defendants assessed and interviewed for pretrial release; the names and number of defendants accepted into the pretrial release program; the names and number of indigent defendants accepted into the pretrial release program; the charges filed against and the case numbers of defendants accepted into the pretrial release program; the nature of any prior criminal conviction of a defendant accepted into the pretrial release program; the court appearances required of defendants accepted into the pretrial release program; the date of each defendant's failure to appear for a scheduled court appearance; the number of warrants, if any, which have been issued for a defendant's arrest for failing to appear at a scheduled court appearance; and the number and type of program noncompliance infractions committed by a defendant in the pretrial release program and whether the pretrial release program recommended that the court revoke the defendant's release. *See* s. 907.043(3)(b), F.S.

person is charged with a dangerous crime as defined in subsection (4).[10] Such person shall be released on monetary conditions if it is determined that such monetary conditions are necessary to assure the presence of the person at trial or at other proceedings, to protect the community from risk of physical harm to persons, to assure the presence of the accused at trial, or to assure the integrity of the judicial process.

Effectiveness of the Three Types of Pretrial Release

As noted above, the primary consideration in deciding whether to grant a defendant pretrial release is whether the person presents a threat to the community, whether the person is a flight risk, or whether the person threatens the integrity of the judicial process. In their January 2010 report, OPPAGA reviewed Miami-Dade county's 2008 data and reported that failure to appear rates were comparable for each of the different types of pretrial release, with defendants in pretrial release programs being slightly more likely to fail to appear than those released on bond or released on their own recognizance.[11] OPPAGA also found that Florida's pretrial release programs were following nationally recognized best practices for supervising defendants and reporting information to the courts.[12]

Rules of Criminal Procedure

Rule 3.131(b) of the Florida Rules of Criminal Procedure requires judges to impose *the first* of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process:

- Personal recognizance of the defendant;
- Execution of an unsecured appearance bond in an amount specified by the judge;
- Placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;
- Placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant (e.g., pretrial release programs);
- Execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
- Any other condition deemed reasonably necessary to assure appearance as required.

Thus, pursuant to the above, if a defendant's participation in a pretrial release program would reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the judge must order such participation *before* ordering the defendant to post a bail bond.

Effect of the Bill

As noted above, there are currently no pretrial release program eligibility criteria in the Florida Statutes. Instead, each county develops its own criteria for determining who is eligible for its pretrial release program. The bill creates s. 907.041(5), F.S., to establish pretrial release program eligibility criteria that will apply to each county's pretrial release programs. The bill specifies that a defendant is eligible to participate in a pretrial release program only by order of the court if the defendant:

- Is not charged with a capital, life, or first degree felony;
- Has not, within the past year, willfully failed to appear at any court proceeding;

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[10] Section 907.041(4), F.S., defines the term "dangerous crime" to include arson; aggravated assault; aggravated battery; illegal use of explosives; child abuse or aggravated child abuse; abuse or aggravated abuse of an elderly person or disabled adult; aircraft piracy; kidnapping; homicide; manslaughter; sexual battery; robbery; carjacking; lewd, lascivious, or indecent assault or act upon or in presence of a child under 16 years; sexual activity with a child, who is 12 years of age or older but less than 18 years of age, by or at solicitation of person in familial or custodial authority; burglary of a dwelling; stalking or aggravated stalking; act of domestic violence; home invasion robbery; act of terrorism; manufacturing any substances in violation of ch. 893; and attempting or conspiring to commit any of the aforementioned crimes.

[11] Report No. 10-08.

[12] *Id.*

- Is not, at the time of the arrest, subject to or on probation for another charge and is not facing charges for another crime anywhere in this state;
- Has no prior convictions involving violence; and
- Satisfies any other limitation upon eligibility for release which is in addition to those above, whether established by the board of county commissioners or the court.

The bill requires the court to determine whether a defendant is eligible to participate in a pretrial release program and requires pretrial release programs to certify in writing to the court that the defendant satisfies each of the above requirements before a determination is made concerning the defendant's eligibility for placement in the program. Judges would still be permitted to release defendants on their own recognizance.

The bill requires pretrial release programs to notify every defendant released to the program of the times and places at which the defendant is required to appear before the court.

The bill also specifies that if a defendant seeks to post a surety bond pursuant to a bond schedule established by administrative order, the defendant must do so without any interaction with, or restriction by, a pretrial release program.

The bill specifies that a court may impose any reasonable conditions of pretrial release upon any defendant (i.e., defendants released to a pretrial release program or released on bond). The bill provides that a court may order a defendant to pay for any services ordered as a condition of release.

The bill prohibits pretrial release programs from charging defendants any fees other than those authorized by state law.[13] However, the bill specifies that pretrial release programs may charge defendants fees for services that have been ordered by the court as a condition of release, such as electronic monitoring, drug testing, substances abuse treatment, etc.

The bill specifies that a court may order a defendant who does not meet the above-described eligibility requirements to participate in a pretrial release program if the defendant is eligible under state law to participate in a drug court program, mental health court program, or a prison diversion program established pursuant to s. 921.00241, F.S.

The bill provides that all pretrial release programs established by ordinance of the county commission, by administrative order of the court, or by any other means, enacted or established to facilitate the release of defendants from pretrial custody, are subject to the above provisions, which supersede and preempt all local ordinances, orders, or practices.

The bill also amends s. 907.043(3), F.S., to require pretrial release programs to update the program's register monthly rather than weekly.

B. SECTION DIRECTORY:

Section 1. Amends s. 907.041, F.S., relating to pretrial detention and release.

Section 2. Amends s. 907.043, F.S., relating to pretrial release; citizens' right to know.

Section 3. Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[13] Florida Statutes do not currently contain any provisions authorizing pretrial release programs to charge defendants any fees nor does the bill authorize any.

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   This bill may have a significant negative fiscal impact on local government. See "Fiscal Comments."

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The bill will likely result in a reduction in the number of defendants eligible for pretrial release programs. Defendants who are unable to participate in pretrial release programs will instead have to post bail to gain pretrial release (or be released on their own recognizance). It is likely that some of these defendants will use the services of a bail bondsman to obtain the bail amount. As a result, bail bondsmen are likely to see an increase in business.

D. FISCAL COMMENTS:

The bill will likely result in a reduction in the number of defendants eligible for pretrial release programs. Defendants who are unable to participate in pretrial release programs will instead have to post bail to gain pretrial release (or be released on their own recognizance). A portion of these defendants will not have the funds to post a bond and will remain in jail until the disposition of their case. Other defendants may ultimately post a bond, but may spend additional time in jail while accumulating the funds to do so. In either case, counties may see an increased need for jail beds. Some counties, depending on the size and population of their jail facilities, may need to construct additional jail beds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The mandates provision appears to apply because the bill may require counties or municipalities to spend funds or take an action requiring the expenditure of funds. However, if the legislature determines that the bill fulfills an important state interest, an exception to the mandates provision exists because the bill applies to all persons similarly situated, including the state.

2. Other:

   As noted above, Rule 3.131(b) of the Florida Rules of Criminal Procedure requires judges to impose *the first* of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process:

   - Personal recognizance of the defendant;
   - Execution of an unsecured appearance bond in an amount specified by the judge;
   - Placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;

- Placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant (e.g., pretrial release programs);
- Execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
- Any other condition deemed reasonably necessary to assure appearance as required.

Statutes which purport to create or modify a procedural rule of court, rather than substantive rule of court, are constitutionally infirm.[14] This principle is grounded in Art. V, Section 2(a) of the Florida Constitution, which states that the Florida Supreme Court shall adopt rules for the practice and procedure in all courts. Furthermore, Art. II, Section 3, of the state constitution, the separation of powers provision, provides that powers constitutionally bestowed upon the courts may not be exercised by the Legislature.

In *State v. Raymond*, the Florida Supreme Court declared s. 907.041(4)(b), F.S., which prohibited persons charged with dangerous crimes from being granted nonmonetary pretrial release at a first appearance hearing, an unconstitutional violation of the separation of powers in Article II, Section 3 of the Florida Constitution.[15]

The court stated that the terms practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof."[16] In contrast, matters of substantive law are within the Legislature's domain. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer.[17] It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property.[18]

It is possible that the statute created by this bill will be challenged on the grounds that it violates the separation of powers provision of the state constitution by dealing with procedural matters that are the province of the court.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 26, 2010, the Criminal & Civil Justice Appropriations Committee adopted a strike-all amendment, and two amendments to the strike-all amendment. The strike-all amendment, as amended:

- Specifies that pretrial release programs established by ordinance or by administrative order are subject to the provisions of the bill which supersede and preempt all local ordinances, orders, or practices.
- Provides that a person may participate in a pretrial released program if not charged with a capital, life, or first degree felony and has not willfully failed to appear, within the past year, at any court proceedings.

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[14] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978) and *Military Park Fire Control Tax Dist. No. 4 v. DeMarois*, 407 So.2d 1020 (Fla. 4th DCA 1981).

[15] 906 So.2d 1045 (Fla. 2005)

[16] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *In re Fla. Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

[17] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *State v. Garcia*, 229 So.2d 236 (Fla. 1969).

[18] *State v. Raymond*, 906 So.2d 1045 (Fla. 2005) citing *Adams v. Wright*, 403 So.2d 391 (Fla. 1981).

- Removes indigency as an eligibility requirement for participation in pretrial release programs.
- Specifies that the bill does not prohibit the court from imposing any reasonable conditions of release and authorize the court to order defendants to pay for services ordered as a condition of release.
- Prohibits a pretrial release program from charging defendants any fees other than those authorized by state law.
- Allows pretrial release programs to charge defendants for services that have been ordered by the court as a condition of release.
- Permits a court to order a defendant who does not meet the pretrial release program criteria established by the bill to participate in a pretrial release program so long as the defendant is eligible under state law to participate in a drug court program, a mental health court program, or a prison diversion program.
- Amends s. 907.043(3), F.S., to require pretrial release programs to update the program's register monthly rather than weekly.
- Changes the effective date from July 1, 2010 to October 1, 2010.

The bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.

A bill to be entitled

An act relating to pretrial detention and release; amending s. 907.041, F.S.; requiring all pretrial release programs established by ordinance of a county commission, by administrative order of a court, or by any other means to facilitate the release of defendants from pretrial custody to conform to the policies and restrictions established in the act; preempting local ordinances, orders, or practices; requiring that the defendant meet certain specified criteria in order to be eligible for pretrial release; requiring that the pretrial release program certify in writing that the defendant satisfies each requirement for eligibility; requiring the court to determine whether a defendant is eligible to participate in the pretrial release program after reviewing certain reports; requiring that the pretrial release program notify each defendant of the time and place of each required court appearance; providing that the act does not prohibit a court from releasing a defendant on the defendant's own recognizance; providing that the act does not prohibit a court from imposing any other reasonable condition of release; prohibiting a pretrial release program from charging a defendant any administrative fees; providing that a pretrial release program may charge a defendant fees for services that have been ordered by the court; providing that a defendant may participate in pretrial release programs if the defendant qualifies for drug court, mental health court, or other similar

programs; amending s. 907.043, F.S.; providing that pretrial release program registers be updated monthly rather than weekly; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (5) is added to section 907.041, Florida Statutes, to read:

907.041 Pretrial detention and release.—

(5) PRETRIAL RELEASE PROGRAMS.-

(a) A pretrial release program established by ordinance of the county commission, by administrative order of the court, or by any other means enacted or established to facilitate the release of defendants from pretrial custody is subject to the policies and restrictions established in this subsection which supersedes and preempts all local ordinances, orders, or practices.

(b) A defendant is eligible to participate in a pretrial release program only by order of a court if the defendant:

1. Is not charged with a capital, life, or a first degree felony offense;

2. Has not, within the past year, willfully failed to appear at any court proceeding;

3. Is not, at the time of the arrest, subject to or on probation for another charge and is not facing charges for another crime anywhere in this state;

4. Has no prior convictions involving violence; and

5. Satisfies any other limitation upon eligibility for

release which is in addition to those in this subsection, whether established by the board of county commissioners or the court.

(c) The pretrial release program must certify in writing to the court that the defendant satisfies each requirement of eligibility in paragraph (b) before a determination is made concerning the defendant's eligibility for placement in the pretrial release program.

(d) If a defendant seeks to post a surety bond pursuant to a bond schedule established by the administrative order, he or she must do so without any interaction with, or restriction by, the pretrial release program.

(e) The court shall determine whether the defendant is eligible to participate in the pretrial release program after the pretrial release program evaluates the defendant's eligibility and certifies its findings to the court.

(f) The pretrial release program shall notify every defendant released under this subsection of the times and places at which he or she is required to appear before the court.

(g) This subsection does not prohibit a court from releasing a defendant on the defendant's own recognizance.

(h) This subsection does not prohibit a court from imposing any reasonable conditions of release, including, but not limited to, electronic monitoring, drug testing, substance abuse treatment, and domestic violence counseling. A court may order the defendant pay for any services ordered as a condition of release.

(i) A pretrial release program may not charge a defendant

who is participating in the program any fees other than those authorized by state law. However, a pretrial release program may charge a defendant fees for electronic monitoring, drug testing, substance abuse treatment, and other services that have been ordered by the court as a condition of release prior to trial.

(j) A court may order a defendant who does not meet the eligibility criteria in paragraph (b) to participate in a pretrial release program if the defendant is eligible under state law to participate in a drug court program, mental health court program, or a prison diversion program established under s. 921.00241.

Section 2. Subsection (3) of section 907.043, Florida Statutes, is amended to read

907.043 Pretrial release; citizens' right to know.—

(3)(a) Each pretrial release program must prepare a register displaying information that is relevant to the defendants released through such a program. A copy of the register must be located at the office of the clerk of the circuit court in the county where the program is located and must be readily accessible to the public.

(b) The register must be updated monthly ~~weekly~~ and display accurate data regarding the following information:

1. The name, location, and funding source of the pretrial release program.

2. The number of defendants assessed and interviewed for pretrial release.

3. The number of indigent defendants assessed and interviewed for pretrial release.

4. The names and number of defendants accepted into the pretrial release program.

5. The names and number of indigent defendants accepted into the pretrial release program.

6. The charges filed against and the case numbers of defendants accepted into the pretrial release program.

7. The nature of any prior criminal conviction of a defendant accepted into the pretrial release program.

8. The court appearances required of defendants accepted into the pretrial release program.

9. The date of each defendant's failure to appear for a scheduled court appearance.

10. The number of warrants, if any, which have been issued for a defendant's arrest for failing to appear at a scheduled court appearance.

11. The number and type of program noncompliance infractions committed by a defendant in the pretrial release program and whether the pretrial release program recommended that the court revoke the defendant's release.

Section 3. This act shall take effect October 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 621 Possession of Stolen Credit Cards
SPONSOR(S): Criminal & Civil Justice Appropriations Committee; Public Safety & Domestic Security Policy Committee; Brandenburg
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	10 Y, 0 N, As CS	Billmeier	Cunningham
2)	Criminal & Civil Justice Appropriations Committee	9 Y, 1 N, As CS	McAuliffe	Davis
3)	Criminal & Civil Justice Policy Council		Billmeier LMB	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

Currently, mere possession of a stolen credit card is not, per se, illegal. Section 817.60, F.S., contains several offenses relating to the unauthorized possession of a credit card, however all current offenses under this section require either proof of intent to use, sell, or transfer a stolen credit card; or require a fraudulent intent in obtaining the credit card.

The bill amends s. 817.60(1), F.S., to provide that a person commits a third degree felony if a person possesses, receives, or retains custody of a credit card with the knowledge it has been stolen.

The bill provides that proof of possession of a credit card that has been recently stolen or possession of a credit card in the name of a person other than that of the possessor gives rise to the inference that the person in possession of the credit card knew or should have known the credit card was stolen.

The bill provides that retailers who in good faith take, accept, retain, or possess a stolen credit card without knowledge that the card is stolen do not violate s. 817.60, F.S.

The Criminal Justice Impact Conference met March 17, 2010, and determined this bill will have an insignificant impact on state prison beds.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 817.60, F.S., provides criminal penalties punishable as a first degree misdemeanor[1] for several offenses relating to credit cards[2] including:

- Taking[3] a credit card from the person, possession, custody, or control of another without the cardholder's consent, or with knowledge the card has been so taken, receiving the credit card with the intent to use it, to sell it, or to transfer it to another person other than the issuer or the cardholder;
- Receiving a credit card that is known to have been lost, mislaid, or delivered by mistake as to the identity or address of the cardholder, and retaining the card with the intent to use, sell, or transfer the card to another person other than the issuer or the cardholder;
- Selling or buying a credit card from a person other than the issuer;
- Obtaining a credit card as security for debt with intent to defraud; or
- Signing the credit card of another.[4]

Section 817.60, F.S., provides criminal penalties punishable as a third degree felony[5] for several offenses relating to credit cards including:

- Receiving two or more credit cards within a 12 month period issued in the names of different cardholders, which the person had reason to know were taken or retained under circumstances that constitute credit card theft;
- Possessing two or more counterfeit credit cards;
- Making a device or instrument that purports to be a credit card of a named issuer but which the issuer did not authorize; or
- Falsely embossing a credit card without authorization of the issuer.[6]

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[1] A first degree misdemeanor is punishable by up to one year in county jail and a maximum $1,000 fine. Sections 775.082, and 775.083, F.S.

[2] "Credit card" is defined to mean any instrument or device, whether known as a credit card, credit plate, bank service card, banking card, check guarantee card, electronic benefits transfer (EBT) card, or debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services, or anything else of value on credit or for use in an automated banking device to obtain any of the services offered through the device." Section 817.58(4), F.S.

[3] Taking a credit card without consent includes obtaining the card by statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick, or embezzlement or obtaining property through false pretense, false promise, or extortion. Section 817.60(1), F.S.

[4] Section 817.60(1)-(4), F.S.

[5] A third degree felony is punishable by up to five years imprisonment and a maximum $5,000 fine. Sections 775.082, 775.083, and 775.084, F.S.

It is possible that possession of a stolen credit card could be prosecuted as theft under s. 812.014, F.S. Section 812.014(1), F.S., provides a person commits theft if the person knowingly obtains the property of another with the intent to, either temporarily or permanently:

- deprive the other person of a right to the property or benefit from the property; or
- appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.[7]

The penalties for a violation of s. 812.014, F.S., are generally tied to value of the stolen goods.[8] The actual value of a credit card would likely be determined to be the value of the plastic used to make the credit card, which would be a negligible amount. The value of the stolen goods would likely be under $300 and prosecuted as a second degree misdemeanor[9].[10]

It is possible that possession of a stolen credit card could be prosecuted as the offense of dealing in stolen property.[11] Section 812.019(1), F.S., provides that a person commits a second degree felony[12] if the person traffics[13] in or endeavors to traffic in property that he or she knew or should have known was stolen.

Section 812.022, F.S., provides evidence of theft or dealing in stolen property which may be used to create an inference that a person knew, or should have known that the property was stolen.[14] Examples include: possession of recently stolen property, unless satisfactorily explained; the purchase or sale of stolen property at a price substantially below fair market value, unless satisfactorily explained; and the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indicia of ownership, unless satisfactorily explained.[15]

Proposed Changes

The bill amends s. 817.60(1), F.S., to provide that a person commits a third degree felony if a person possesses, receives, or retains custody of a credit card with the knowledge it has been stolen.

The bill provides that proof of possession of a credit card that has been recently stolen or possession of a credit card in the name of a person other than that of the possessor gives rise to the inference that the person in possession of the credit card knew or should have known the credit card was stolen.[16]

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[6] Section 817.60(5), and s. 817.60(6), F.S.

[7] Section 812.014(1), F.S.

[8] Section 812.014, F.S. If the value of the stolen property is $100,000 or greater, the offense is punishable as a first degree felony; if the value of the stolen property is between $20,000 and $100,000, the offense is a second degree felony; if the value of the stolen property is between $300 and $5,000, the offense is a third degree felony; if the value of the stolen goods is valued at between $100 and $300, the offense is a first degree misdemeanor; if the value of the stolen goods is valued at less than $100, the offense is a second degree misdemeanor. Some property is listed specifically in s. 812.014, F.S. Theft of this specified property may be punished at a greater degree of punishment regardless of the value of the stolen items.

[9] A second degree misdemeanor is punishable by up to 60 days in county jail and a maximum $500 fine. Sections 775.082, and 775.083, F.S.

[10] Section 812.014(3)(a), F.S.

[11] Section 812.019(1), F.S.

[12] A second degree felony is punishable by up to 15 years imprisonment and a maximum $10,000 fine. Sections 775.082, 775.083, and 775.084, F.S.

[13] "Traffic" is defined to mean to sell, transfer, distribute, dispense, or otherwise dispose of property, or to buy, receive possess, obtain control of, or use property with intent to sell, transfer, distribute, dispense, or otherwise dispose of such property. Section 812.012(8), F.S.

[14] Section 812.022, F.S.

[15] *Id.*

[16] The language in the bill is similar to language in s. 812.022, F.S., relating to evidence of theft or dealing in stolen property. See e.g. s. 812.022(3), F.S. ("Proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that the property had been stolen").

The bill provides that retailers who in good faith take, accept, retain, or possess a stolen credit card without knowledge that the card is stolen do not violate s. 817.60, F.S.

B. SECTION DIRECTORY:

Section 1: Amends s. 817.60, F.S., relating to theft; obtaining credit card through fraudulent means.

Section 2: Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met March 17, 2010, and determined this bill will have an insignificant impact on state prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On February 2, 2010, the Public Safety & Domestic Security Policy Committee adopted an amendment to the bill. The original bill removed the intent requirement from the credit card theft statute. The amendment restored the intent element to the crime. The bill was reported favorably as a committee substitute.

On March 26, 2010, the Criminal & Civil Justice Appropriations Committee adopted an amendment providing that retailers who in good faith take, accept, retain, or possess a stolen credit card without knowledge that the card is stolen do not violate s. 817.60, F.S. The bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.

A bill to be entitled

An act relating to fraudulently taking or using a credit card; amending s. 817.60, F.S.; providing that a person who takes a credit card from the possession, custody, or control of another without the cardholder's consent, who possesses, receives, or retains custody of the credit card with the knowledge that it has been taken, or who receives the credit card with the intent to use it, to sell it, or to transfer it to a person other than the issuer or the cardholder commits a felony of the third degree rather than a misdemeanor of the first degree; providing increased criminal penalties; providing for an inference that the person in possession of a credit card knew or should have known that the credit card had been stolen in certain circumstances; providing that a retailer who in good faith takes, accepts, retains, or processes a stolen credit card without knowledge that the card is stolen does not commit a violation; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 817.60, Florida Statutes, is amended, and subsection (8) is added to that section, to read:

817.60 Theft; obtaining credit card through fraudulent means.—

(1) THEFT BY TAKING OR RETAINING POSSESSION OF CARD TAKEN.—A person who takes a credit card from the person,

possession, custody, or control of another without the cardholder's consent; ~~or~~ who possesses, receives, or retains custody of the credit card~~,~~ with knowledge that it has been so taken; or who~~,~~ receives the credit card with intent to use it, to sell it, or to transfer it to a person other than the issuer or the cardholder commits ~~is guilty of~~ credit card theft and is subject to the penalties set forth in s. 817.67(2)~~(1)~~. Taking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick or embezzlement or obtaining property by false pretense, false promise or extortion. Proof of possession of a credit card that has been recently stolen or possession of a credit card in the name of a person other than that of the possessor, unless satisfactorily explained, gives rise to an inference that the person in possession of the credit card knew or should have known that the credit card had been stolen.

(8) RETAILER EXCEPTION.—A retailer who in good faith takes, accepts, retains, or processes a stolen credit card without knowledge that the card is stolen does not commit a violation of this section.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 833 Reports and Functions of the Department of Juvenile Justice
SPONSOR(S): Thurston
TIED BILLS: **IDEN./SIM. BILLS:** SB 1006

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	13 Y, 0 N	Cunningham	Cunningham
2)	Criminal & Civil Justice Policy Council		Cunningham	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

Currently, the Department of Juvenile Justice (DJJ) is required to submit annual reports on:

- The performance of assessment and treatment services for serious or habitual juvenile offenders.
- The performance of assessment and treatment services for offenders less than 13 years of age receiving intensive residential treatment.
- The implementation and progress of literacy programs within residential commitment programs.

DJJ states that the above reports are duplicative in that the information in these reports is also contained in the annual report required by s. 985.632, F.S., and the annual report required by s. 1003.52, F.S.

Section 985.636, F.S., authorizes the Secretary of DJJ to designate as law enforcement officers within the Office of the Inspector General, persons holding a law enforcement certification. According to DJJ, this statute is obsolete because the department does not employ sworn law enforcement officers.

The bill removes the requirements that DJJ submit the above-described reports and repeals s. 985.636, F.S., relating to the Office of the Inspector General.

The bill does not appear to have a fiscal impact and is effective July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Annual Reports

Section 985.47(8)(a)4., F.S., requires the Department of Juvenile Justice (DJJ) to submit an annual report on the performance of assessment and treatment services for serious or habitual juvenile offenders. Similarly, s. 985.483, F.S., requires DJJ to submit an annual report on the performance of assessment and treatment services for offenders less than 13 years of age receiving intensive residential treatment. Both reports are required to be submitted annually to the Governor, the Attorney General, the President of the Senate, the Speaker of the House of Representatives, and the Auditor General (the report relating to offenders less than 13 years of age must also be submitted to the Office of Program Policy Analysis and Government Accountability). DJJ reports that the information in these reports is also contained in the annual report required by s. 985.632, F.S., which DJJ refers to as the Comprehensive Accountability Report.

Section 985.625(5), F.S., requires DJJ, in consultation with the Department of Education, to submit an annual report to the President of the Senate and the Speaker of the House of Representatives on the implementation and progress of literacy programs within residential commitment programs. DJJ reports that the information in this report is also contained in the annual report required by s. 1003.52, F.S., which DJJ refers to as the Quality Assurance Report and is produced by the Juvenile Justice Education Enhancement Program[1] (JJEEP).

The bill removes the requirements that DJJ submit the above-described reports.

Office of the Inspector General

Section 985.636, F.S., authorizes the Secretary of DJJ to designate as law enforcement officers within the Office of the Inspector General, persons holding a law enforcement certification. This designation is for the purpose of enforcing any criminal law and conducting any investigation involving a state-operated program that falls under DJJ's jurisdiction. However, according to DJJ, this statute is obsolete because the department does not employ sworn law enforcement officers.

The bill repeals this section of statute.

[1] JJEEP is a discretionary project funded by the Department of Education (DOE) and managed by the School of Criminology at Florida State University. Major functions are to assist DOE in ensuring high-quality education for youth in juvenile justice education programs. *See,* http://www.fldoe.org/ese/dr-jjeep.asp

B. SECTION DIRECTORY:

Section 1. Amends s. 985.47, F.S., relating to serious or habitual juvenile offender.

Section 2. Amends s. 985.483, F.S., relating to intensive residential treatment program for offenders less than 13 years of age.

Section 3. Repeals s. 985.625(5), F.S., relating to literacy programs for juvenile offenders.

Section 4. Repeals s. 985.636, F.S., relating to inspector general; inspectors.

Section 5. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to reports and functions of the Department of Juvenile Justice; amending s. 985.47, F.S.; deleting a provision that requires the Department of Juvenile Justice to develop an annual report on the performance of assessment and treatment services for serious or habitual juvenile offenders for delivery to the Governor and other designated persons by a specified date; amending s. 985.483, F.S.; deleting a provision that requires the department to develop an annual report on the performance of assessment and treatment services of the intensive residential treatment program for offenders less than 13 years of age for delivery to the Governor and other designated persons by a specified date; repealing s. 985.625(5), F.S., relating to the requirement that the department and the Department of Education develop and implement an evaluation of the literacy programs for juvenile offenders and prepare an annual report on the progress of the literacy programs; repealing s. 985.636, F.S., relating to the authority of the Secretary of Juvenile Justice to designate certain persons within the Office of Inspector General to enforce any criminal law and conduct any criminal investigation that relates to state-operated programs or state-operated facilities over which the department has jurisdiction; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (8) of section 985.47, Florida Statutes, is amended to read:

985.47 Serious or habitual juvenile offender.—

(8) ASSESSMENT AND TREATMENT SERVICES.—Pursuant to this chapter and the establishment of appropriate program guidelines and standards, contractual instruments, which shall include safeguards of all constitutional rights, shall be developed as follows:

(a) The department shall provide for:

1. The oversight of implementation of assessment and treatment approaches.

2. The identification and prequalification of appropriate individuals or not-for-profit organizations, including minority individuals or organizations when possible, to provide assessment and treatment services to serious or habitual delinquent children.

3. The monitoring and evaluation of assessment and treatment services for compliance with this chapter and all applicable rules and guidelines pursuant thereto.

~~4. The development of an annual report on the performance of assessment and treatment to be presented to the Governor, the Attorney General, the President of the Senate, the Speaker of the House of Representatives, and the Auditor General no later than January 1 of each year.~~

Section 2. Paragraph (a) of subsection (8) of section 985.483, Florida Statutes, is amended to read:

985.483 Intensive residential treatment program for

offenders less than 13 years of age.—

(8) ASSESSMENT AND TREATMENT SERVICES.—Pursuant to this chapter and the establishment of appropriate program guidelines and standards, contractual instruments, which shall include safeguards of all constitutional rights, shall be developed for intensive residential treatment programs for offenders less than 13 years of age as follows:

(a) The department shall provide for:

1. The oversight of implementation of assessment and treatment approaches.

2. The identification and prequalification of appropriate individuals or not-for-profit organizations, including minority individuals or organizations when possible, to provide assessment and treatment services to intensive offenders less than 13 years of age.

3. The monitoring and evaluation of assessment and treatment services for compliance with this chapter and all applicable rules and guidelines pursuant thereto.

~~4. The development of an annual report on the performance of assessment and treatment to be presented to the Governor, the Attorney General, the President of the Senate, the Speaker of the House of Representatives, the Auditor General, and the Office of Program Policy Analysis and Government Accountability no later than January 1 of each year.~~

Section 3. Subsection (5) of section 985.625, Florida Statutes, is repealed.

Section 4. Section 985.636, Florida Statutes, is repealed.

Section 5. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 907 Child Support Guidelines
SPONSOR(S): Civil Justice & Courts Policy Committee; Flores
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 2246

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	13 Y, 0 N, As CS	Bond	De La Paz
2)	Health Care Services Policy Committee	13 Y, 1 N	Schoonover	Schoolfield
3)	Criminal & Civil Justice Policy Council		Bond	Havlicak
4)				
5)				

SUMMARY ANALYSIS

This bill makes a number of changes to laws on child support. Significantly, this bill:

- Requires child support awards to end automatically upon majority and, where appropriate, to account for revised child support guidelines based on remaining children owed support.
- Enacts basic principles of child support awards.
- Provides that a parent who refuses to provide financial information may have the average wage in the community imputed to him or her.
- Eliminates the 25% reduction in actual child care expenses paid, thereby requiring full credit to the parent paying child care expenses.
- Requires the court to fully account for the effect of federal tax deductions and credits when determining the appropriate child support award.
- Eliminates the 40% time-sharing threshold for a child support award adjustment, requiring all child support awards to be adjusted for time-sharing.

This bill may have a minimal negative fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Termination of Child Support at Majority

In general, child support ends as the child reaches the age of majority, that is, upon the child reaching 18 years of age. However, s. 743.07(2), F.S., provides that a child support obligation may be extended beyond the 18th birthday in two different circumstances:

- If the child will continue to be dependent upon his or her parents for support beyond his or her 18th birthday because of a physical or mental incapacity that existed prior to the child turning 18.

- If the child is still in high school, performing in good faith and with a reasonable expectation of graduation before the age of 19.

An order establishing child support is a continuing obligation owed by the parent paying support. Many parents paying and receiving child support are surprised to learn that the child support obligation does not automatically end by operation of law. Instead, the parties must obtain a court order modifying the support obligation when a child reaches the age at which support should end.[1] Where one child reaches the age of majority, the parties must return to court and re-litigate child support based on then-current incomes and the number of children remaining to whom child support applies. Obviously, couples often have two or more children of differing ages. One appellate court explained:

> It is well established that a trial court may, in its discretion, award lump sum support for two or more children, rather than award a separate amount of support for each child, and that the parent paying such unallocated support "has the duty to petition the court to reduce the amount when one child attains majority." *State v. Segrera*, 661 So.2d 922, 923 (Fla. 3d DCA 1995); *Hammond v. Hammond*, 492 So.2d 837, 838 (Fla. 5th DCA 1986) (confirming that a trial court may award lump sum child support for several children and when it does so, the payor parent must "petition for an order reducing the amount when one child attains majority"). It is equally well settled that because support obligations become the vested rights of the payee and vested obligations of the payor at the time the payments are due, child support payments are not subject to retroactive modification.[2]

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[1] Section 61.13, F.S.

[2] *State, Dept. of Revenue ex rel. Ortega v. Ortega*, 948 So.2d 855 (Fla. 3rd DCA 2007).

This bill amends s. 61.13(1)(a), F.S., to provide that child support orders and income deduction orders entered on or after October 1, 2010, must account for the anticipated time at which the child support obligations related to dependent children should terminate. A child support award must change the support obligation at those times to account for the reduced obligation of the one child reaching the age of majority, together with the changed support obligation owed for the remaining child or children, if applicable.

Child Support Guidelines - Principles

Current statutory law does not provide principles that a court should follow when establishing or modifying child support obligations. This bill creates s. 61.29, F.S., to establish the following principles that a court must follow when establishing or modifying child support obligations:

- A parent's first and principal obligation is to support his or her minor child.
- Both parents are mutually responsible for the support of their children.
- Each parent should pay for the support of the children according to a parent's ability to pay.
- Children should share in the standard of living of both parents. Child support may therefore be appropriately used to improve the standard of living of the children's primary residence in order to improve the lives of the children.
- The guidelines schedule takes into account each parent's actual income and level of responsibility for the children.
- It is presumed that the parent having primary physical responsibility for the children contributes a significant portion of his or her available resources for the support of the children.
- The guidelines schedule is based on the parents' combined net income estimated to have been allocated to the child if the parents and children were living in an intact household.
- The guidelines schedule encourages fair and efficient settlement of conflicts between parents and minimizes the need for litigation.

Child Support Guidelines Formula -- Imputed Income

In general, a court determines support obligations of the parties based on their income and, in the case of child support, the time-sharing arrangement.[3] In some circumstances, the current income of a party does not give an accurate picture of the party's ability and duty to make support payments. Where this occurs, s. 61.30(2)(b), F.S., allows the court to impute income to that party. Imputed income is an estimate of what the party should be earning. The imputed income is then used in determining child support rather than actual income.

This bill amends s. 61.30(2)(b), F.S., related to imputed income. If a parent does not provide income information, earnings must be imputed at the median wage for all full-time workers. According to the U.S Census Bureau, median income for a single earner in Florida in 2008 was $41,226.[4] In comparison, the income of an individual based solely on minimum wage is $15,068.40.[5]

This bill further provides that, for a court to impute income based on unemployment or underemployment, the court must find that the unemployment or underemployment is voluntary and must determine whether subsequent underemployment resulted from the spouse's pursuit of his or her own interests or from less than diligent efforts to find suitable employment. The bill also provides that the burden of proof is on the parent seeking to impute income to the other.

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[3] Section 61.30, F.S.
[4] U.S. Census Bureau, http://www.census.gov/hhes/www/income/medincearnersandstate.xls (Last visited 3/12/2010).
[5] $7.25 per hour effective July 24, 2009, the minimum wage is $7.25 per hour. Multiplied by 40 hours per week and assuming 4.33 weeks in a month, yearly gross income at minimum wage in 2010 is $15,068.40.

Child Support - Very Low Income Parents

A child support guideline determination references the minimum child support need chart at s. 61.30(6), F.S. The net income of the parents is added together to determine the combined monthly net income amount. The chart has $50 increments starting at $650 combined net income. The chart also contains separate columns for between one and six children. If the combined monthly net income is less than the lowest level on the chart ($650), the court is directed to determine child support on a "case-by-case" basis.

This bill amends s. 61.30(6), F.S., as it refers to the low income calculation of child support, to change the reference to "combined income" to a reference to the net income of the obligor parent only (net income is less than $650 a month). The child support payment required of a parent whose net income is less than $650 a month is the lesser of the case-by-case child support amount determination in s. 61.30(6), F.S., and 90 percent of the difference between the obligor parent's monthly net income and the current federal poverty guidelines for a single individual.[6]

Child Support Guidelines Formula - Credit for Child Care Expense

One part of the child support calculation is the apportionment of child care expenses between the parents. Under current law, the parent actually paying the child care expense is only given credit for 75% of the cost of such day care.[7] This 25% subtraction appears to have been put into law to account for the corresponding federal child care tax credit of 25%; however, higher income parents do not qualify for the full 25% credit rate under current federal tax law (some do not qualify at all) and, because the credit was nonrefundable until the 2009 tax year, lower income parents could not utilize the full 25% credit.

This bill amends s. 61.30(7), F.S., to fully apportion child care expense without a 25% deduction. Note that other parts of this bill change s. 61.30(11)(a), F.S., to require the court to account for the effect of tax laws, including the child care tax credit actually applicable to the parties based on their financial circumstances.

Child Support Guidelines Formula -- Tax Credits

The child support guidelines formula is a formula that calculates the net income of the parents, determines a minimum child support need, and splits that need by the shared parenting plan to calculate a presumptive child support amount owed by one parent to the other. The court may not award child support that varies from the formula by more than 5% except upon limited circumstances.[8]

This first part of the formula is a determination of each parent's net income by subtracting various expenses from the parent's gross income. The first allowable subtraction from gross income, at s. 61.30(3)(a), F.S., is for income tax liabilities. To properly calculate the subtraction, the court is directed to calculate the appropriate income tax deduction that is expected in the immediate future. The formula does not use current income tax deductions as the case outcome typically affects and changes the income tax liabilities of the parents.[9]

Income tax laws provide for deductions and tax credits. A deduction reduces the gross income that is used in calculating the income tax, a tax credit is a reduction of taxes owed. Federal income tax law in the past generally prohibited tax credits from creating a negative tax situation where the federal government would owe money back to the taxpayer. In tax parlance, these tax credits were

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[6] As of 3/12/2010, the federal poverty guideline for a single individual is $10,830.00. http://aspe.hhs.gov/POVERTY/09poverty.shtml (last visited 3/12/2010).
[7] Section 61.30(7), F.S.
[8] Section 61.30(1)(a), F.S.
[9] After divorce, the parents will move from married to either single or head of household. Also, the court may award a dependency deduction to one parent or the other.

"nonrefundable", they would generally be lost once a person owed no federal income tax. However, the earned income tax credit, a credit given to the working poor, was refundable under previous tax law. One aspect of the 2009 federal stimulus bill is that several tax credits have moved from nonrefundable to refundable, and thus may have the effect of increasing a parent's net income. It is possible that a strict reading of s. 61.30(3)(a), F.S., which simply refers to deductions from income, may not allow the court to account for refundable tax credits when calculating income for child support purposes.

This bill amends s. 61.30(11)(a), F.S., to account for, in the child support formula, the Child & Dependent Care Tax Credit and the Earned Income Tax Credit, in addition to other tax items in current law. The effect is to account for refundable tax credits in a parent's net income used to calculate child support.

Child Support Formula Adjustment for Timesharing

The child support formula is set forth in s. 61.30, F.S. The basic formula is provided in subsections (1) through (10), and other changes to that formula are set forth in portions of the analysis above. In short, the formula uses the adjusted incomes of the parents to develop a minimum child support need based on the chart. The minimum child support need is then increased by child care costs and health insurance costs to establish a total child support need. That total need is then multiplied by a parent's percentage share of the joint income to determine that parent's minimum child support obligation.

Section 61.30(11)(b), F.S., provides that a court must adjust the minimum child support need where a parenting plan provides that each child spend a substantial amount of time with each parent. In short, the adjustment of child support requires a recalculation based on the percentage of overnight stays at each parent's home. Subparagraph 8. defines the term substantial amount of time to be where one parent has 40% or more of the overnights of the year.

This bill amends s. 61.30(11), F.S., to remove the references to substantial amount of time. The effect is that nearly all child support calculations will require adjustment based on the timesharing arrangement.[10]

When adjusting for timesharing arrangements, current law requires that the base child support obligation (without day care and health insurance costs) is to be multiplied by 1.5, which is then apportioned between the parties based on their relative timesharing share. The effect of using a 1.5 multiplier is to lessen the financial impact on a parent receiving child support where substantial timesharing would otherwise substantially reduce the child support award. This bill amends s. 61.30(11), F.S., to eliminate the 1.5 multiplier, thereby requiring all child support awards to be directly affected by the timesharing arrangement.

The effect of these changes will create a timesharing adjustment to the child support amount that applies to all levels of shared parenting but increases with the amount of the noncustodial parent's parenting time. In the example below and other possible scenarios, it appears that the proposed changes would result in a lower payment by the non-custodial parent.

Example
Custodial Parent's Support Obligation: $1,000/Month
Non-Custodial Support Obligation: $2,500/Month

Current Law
Steps Under 61.30(11)(b), F.S.,:
1. Multiply each parents support obligation by 1.5
   Custodial: $1,000/Month x 1.5 = $1,500
   Non-Custodial: $2,500/Month x 1.5 = $3,750

[10] There would be no timesharing adjustment in cases where the court orders that a parent have no contact with the child.

2. Percentage of Overnight Stays with each Parent
   60%/40%
3. Multiply each parent's support obligation calculated in 1. by the % of the other parent's overnight stays
   Custodial: $1,500 x 40%= $600
   Non-Custodial: $3,750 x 60% = $2,250
4. The difference between the amounts calculated in 3. is the amount owed to the custodial parent
   2250-600= **$1,650**

Under the current formula, prior to adjustments for day care and health insurance, the non-custodial parents would pay the custodial parent $1,650/month.

Proposed Changes

1. Custodial Parent's Support Obligation = $1,000/Month
   Non-Custodial Support Obligation = $2,500/Month
2. Percentage of Overnight Stays with each Parent
   60%/40%
3. Multiply each parent's support obligation calculated in 1. by the sum of 1 and the smaller % in 2.
   Custodial Parent: $1,000(1+40%)= $1,400
   Non-custodial Parent: $2,500(1+40%)= $3,500
4. Multiply each parent's support obligation calculated in 3. by % of the other parent's overnight stays
   Custodial: $1,400(.40)= $560
   Non-Custodial: $3,500(.60)= $2,100
5. The difference between the amounts calculated in 4. is the amount paid to the custodial parent
   $2,100-$560= **$1,540**

B. SECTION DIRECTORY:

Section 1 amends s. 61.13, F.S., regarding calculation of child support obligations.

Section 2 creates s. 61.29, F.S., providing guidelines and principles for the setting of child support obligations.

Section 3 amends s. 61.30, F.S, regarding child support guidelines.

Section 4 provides an effective date of January 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Both the State Courts System and the Department of Revenue (which administers a child support enforcement office) believe that this bill may lead to an increased number of child support modification cases, which would correspondingly increase workloads and perhaps increase required expenditures. Neither agency gave an estimate in dollars, and neither accounted for the lower number of modifications resulting from the change in Section 1.

   This bill will require the two agencies to make one-time changes to forms and procedures. Neither agency gave an estimate in dollars of the cost of such changes.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Section 1 of the bill may lessen the number of child support modification cases, lowering legal costs to parents and correspondingly lowering fees earned by lawyers and other professionals.

Any bill amending the child support calculations has the potential to affect the payment and receipt of child support awards to many families. The exact impact will differ from family to family.

The changes to the child support formula (timesharing adjustment in all cases, repeal of the 1.5 multiplier) may substantially alter the result of the formula for most families. The effect cannot be quantified as the percentage change one way or another will differ based on relative incomes and timesharing arrangements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The effective date of the bill was changed to January 1, 2011, but Section 1 of the bill contains a requirement that becomes effective October 1, 2010. Either the effective date or the text of Section 1 should be amended to conform with one another.

Lines 318-332: It appears the language in this section is intended to create two options in determining an obligor parent's payment if his/her income is less than $650/month. However, the construction of this language is confusing because sub-paragraph 1. states that the parent's income should be determined on a case-by-case basis. Then sub-paragraph 2. states that the obligor parent's child support payment shall be the lesser of the actual dollar share of the total minimum support amount as determined in sub-paragraph 1., and 90% of the difference between the two specified amounts. Reference to choosing the lesser of the two amounts would be better placed in paragraph (a).

Lines 374-375 provide an update to account for tax credits. However, the proposed change does not account for future changes by the federal government relating to tax credits and children.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 9, 2010, the Civil Justice & Courts Policy Committee adopted one amendment to this bill, which amendment conformed the bill to the Senate companion. The amendment:

- Removed provisions regarding application of alimony payments.
- Added principles for child support.
- Removed the presumption, for purposes of imputed income, that a parent can earn the minimum wage.
- Added that, where the parent does not provide information regarding income, the court must impute income at the median full-time income for workers.
- Removed changes to imputed income within the laws on administrative establishment of child support.
- Removed changes to the child support chart.
- Changed the formula for low income obligor parents (net income less than $650 a month).
- Removed changes that might have limited child support obligations of high income obligor parents (net income of greater than $10,000 a month).
- Removed a provision that would have prohibited a child support award from leaving a parent with net income below the poverty guidelines.
- Removed the reduction of the 40% level for substantial time with a child to 20%, making the adjustment for timesharing applicable in all cases.
- Repeals the 1.5 multiplier from the child support formula.
- Removed from the bill repeal of the financial affidavit.
- Removed from the bill conforming changes in the law related to administrative establishment of a child support obligation.
- Removed change that would have prohibited compound interest on child support arrearages.
- Moved the effective date of the bill back 3 months to January 1, 2011.

The bill was then reported favorably as a committee substitute.

A bill to be entitled

An act relating to child support guidelines; amending s. 61.13, F.S.; requiring all child support orders after a certain date to contain certain provisions; creating s. 61.29, F.S.; providing principles for implementing the support guidelines schedule; amending s. 61.30, F.S.; requiring that census information be used if information about earnings level in the community is not available; providing that the burden of proof is on the party seeking to impute income to the other party; providing for the calculation of the obligor parent's child support payment under certain circumstances; revising the deviation factors that a court may consider when adjusting a parent's share of the child support award; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (1) of section 61.13, Florida Statutes, is amended to read:

61.13 Support of children; parenting and time-sharing; powers of court.—

(1)(a) In a proceeding under this chapter, the court may at any time order either or both parents who owe a duty of support to a child to pay support to the other parent or, in the case of both parents, to a third party who has ~~the person with~~ custody in accordance with the child support guidelines schedule in s. 61.30.

1. All child support orders and income deduction orders entered on or after October 1, 2010, must provide:

a. For child support to terminate on a child's 18th birthday unless the court finds or previously found that s. 743.07(2) applies, or is otherwise agreed to by the parties;

b. A schedule, based on the record existing at the time of the order, stating the amount of the monthly child support obligation for all the minor children at the time of the order and the amount of child support that will be owed for any remaining children after one or more of the children are no longer entitled to receive child support; and

c. The month, day, and year that the reduction or termination of child support becomes effective.

2. The court initially entering an order requiring one or both parents to make child support payments has continuing jurisdiction after the entry of the initial order to modify the amount and terms and conditions of the child support payments if ~~when~~ the modification is found ~~necessary~~ by the court to be in the best interests of the child; ~~,~~ when the child reaches majority; if ~~, when~~ there is a substantial change in the circumstances of the parties; if ~~, when~~ s. 743.07(2) applies; ~~,~~ or when a child is emancipated, marries, joins the armed services, or dies. The court initially entering a child support order has continuing jurisdiction to require the obligee to report to the court on terms prescribed by the court regarding the disposition of the child support payments.

Section 2. Section 61.29, Florida Statutes, is created to read:

61.29 Child support guidelines; principles.—The courts shall adhere to the following principles in implementing the child support guidelines schedule:

(1) A parent's first and principal obligation is to support his or her minor child.

(2) Both parents are mutually responsible for the support of their children.

(3) Each parent should pay for the support of the children according to a parent's ability to pay.

(4) Children should share in the standard of living of both parents. Child support may therefore be appropriately used to improve the standard of living of the children's primary residence in order to improve the lives of the children.

(5) The guidelines schedule takes into account each parent's actual income and level of responsibility for the children.

(6) It is presumed that the parent having primary physical responsibility for the children contributes a significant portion of his or her available resources for the support of the children.

(7) The guidelines schedule is based on the parents' combined net income estimated to have been allocated to the child if the parents and children were living in an intact household.

(8) The guidelines schedule encourages fair and efficient settlement of conflicts between parents and minimizes the need for litigation.

Section 3. Paragraph (b) of subsection (2) and subsections

(6), (7), and (11) of section 61.30, Florida Statutes, are amended to read:

61.30 Child support guidelines; retroactive child support.—

(2) Income shall be determined on a monthly basis for each parent as follows:

(b) Monthly income ~~on a monthly basis~~ shall be imputed to an unemployed or underemployed parent if ~~when~~ such unemployment ~~employment~~ or underemployment is found by the court to be voluntary on that parent's part, absent a finding of fact by the court of physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community if such information is available. If the information is unavailable or the unemployed or underemployed parent fails to supply the required financial information in a child support proceeding, the earnings level shall be based on the median income of year-round, full-time workers as derived from current population reports or replacement reports published by the United States Bureau of Census. ~~as provided in this paragraph;~~ However, the court may refuse to impute income to a parent if the court finds it necessary for the parent to stay home with the child who is the subject of a child support calculation.

1. To impute income to a party in a child support

proceeding, the court must:

a. Conclude that the unemployment or underemployment was voluntary.

b. Determine whether any subsequent underemployment resulted from the spouse's pursuit of his or her own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received.

2. The burden of proof is on the party seeking to impute income to the other party.

(6) The following guidelines schedule shall be applied to the combined net income to determine the minimum child support need:

Combined Monthly Net Income	Child or Children One	Two	Three	Four	Five	Six
650.00	74	75	75	76	77	78
700.00	119	120	121	123	124	125
750.00	164	166	167	169	171	173

800.00	190	211	213	216	218	220
850.00	202	257	259	262	265	268
900.00	213	302	305	309	312	315
950.00	224	347	351	355	359	363
1000.00	235	365	397	402	406	410
1050.00	246	382	443	448	453	458
1100.00	258	400	489	495	500	505
1150.00	269	417	522	541	547	553
1200.00	280	435	544	588	594	600
1250.00	290	451	565	634	641	648
1300.00	300	467	584	659	688	695
1350.00	310	482	603	681	735	743
1400.00	320	498	623	702	765	790
1450.00	330	513	642	724	789	838

147	1500.00	340	529	662	746	813	869
148	1550.00	350	544	681	768	836	895
149	1600.00	360	560	701	790	860	920
150	1650.00	370	575	720	812	884	945
151	1700.00	380	591	740	833	907	971
152	1750.00	390	606	759	855	931	996
153	1800.00	400	622	779	877	955	1022
154	1850.00	410	638	798	900	979	1048
155	1900.00	421	654	818	923	1004	1074
156	1950.00	431	670	839	946	1029	1101
157	2000.00	442	686	859	968	1054	1128
158	2050.00	452	702	879	991	1079	1154
159	2100.00	463	718	899	1014	1104	1181
160	2150.00	473	734	919	1037	1129	1207

161	2200.00	484	751	940	1060	1154	1234
162	2250.00	494	767	960	1082	1179	1261
163	2300.00	505	783	980	1105	1204	1287
164	2350.00	515	799	1000	1128	1229	1314
165	2400.00	526	815	1020	1151	1254	1340
166	2450.00	536	831	1041	1174	1279	1367
167	2500.00	547	847	1061	1196	1304	1394
168	2550.00	557	864	1081	1219	1329	1420
169	2600.00	568	880	1101	1242	1354	1447
170	2650.00	578	896	1121	1265	1379	1473
171	2700.00	588	912	1141	1287	1403	1500
172	2750.00	597	927	1160	1308	1426	1524
173	2800.00	607	941	1178	1328	1448	1549
174	2850.00	616	956	1197	1349	1471	1573

175	2900.00	626	971	1215	1370	1494	1598
176	2950.00	635	986	1234	1391	1517	1622
177	3000.00	644	1001	1252	1412	1540	1647
178	3050.00	654	1016	1271	1433	1563	1671
179	3100.00	663	1031	1289	1453	1586	1695
180	3150.00	673	1045	1308	1474	1608	1720
181	3200.00	682	1060	1327	1495	1631	1744
182	3250.00	691	1075	1345	1516	1654	1769
183	3300.00	701	1090	1364	1537	1677	1793
184	3350.00	710	1105	1382	1558	1700	1818
185	3400.00	720	1120	1401	1579	1723	1842
186	3450.00	729	1135	1419	1599	1745	1867
187	3500.00	738	1149	1438	1620	1768	1891
188	3550.00	748	1164	1456	1641	1791	1915

189	3600.00	757	1179	1475	1662	1814	1940
190	3650.00	767	1194	1493	1683	1837	1964
191	3700.00	776	1208	1503	1702	1857	1987
192	3750.00	784	1221	1520	1721	1878	2009
193	3800.00	793	1234	1536	1740	1899	2031
194	3850.00	802	1248	1553	1759	1920	2053
195	3900.00	811	1261	1570	1778	1940	2075
196	3950.00	819	1275	1587	1797	1961	2097
197	4000.00	828	1288	1603	1816	1982	2119
198	4050.00	837	1302	1620	1835	2002	2141
199	4100.00	846	1315	1637	1854	2023	2163
200	4150.00	854	1329	1654	1873	2044	2185
201	4200.00	863	1342	1670	1892	2064	2207
202	4250.00	872	1355	1687	1911	2085	2229

203	4300.00	881	1369	1704	1930	2106	2251
204	4350.00	889	1382	1721	1949	2127	2273
205	4400.00	898	1396	1737	1968	2147	2295
206	4450.00	907	1409	1754	1987	2168	2317
207	4500.00	916	1423	1771	2006	2189	2339
208	4550.00	924	1436	1788	2024	2209	2361
209	4600.00	933	1450	1804	2043	2230	2384
210	4650.00	942	1463	1821	2062	2251	2406
211	4700.00	951	1477	1838	2081	2271	2428
212	4750.00	959	1490	1855	2100	2292	2450
213	4800.00	968	1503	1871	2119	2313	2472
214	4850.00	977	1517	1888	2138	2334	2494
215	4900.00	986	1530	1905	2157	2354	2516
216	4950.00	993	1542	1927	2174	2372	2535

217	5000.00	1000	1551	1939	2188	2387	2551
218	5050.00	1006	1561	1952	2202	2402	2567
219	5100.00	1013	1571	1964	2215	2417	2583
220	5150.00	1019	1580	1976	2229	2432	2599
221	5200.00	1025	1590	1988	2243	2447	2615
222	5250.00	1032	1599	2000	2256	2462	2631
223	5300.00	1038	1609	2012	2270	2477	2647
224	5350.00	1045	1619	2024	2283	2492	2663
225	5400.00	1051	1628	2037	2297	2507	2679
226	5450.00	1057	1638	2049	2311	2522	2695
227	5500.00	1064	1647	2061	2324	2537	2711
228	5550.00	1070	1657	2073	2338	2552	2727
229	5600.00	1077	1667	2085	2352	2567	2743
230	5650.00	1083	1676	2097	2365	2582	2759

231	5700.00	1089	1686	2109	2379	2597	2775
232	5750.00	1096	1695	2122	2393	2612	2791
233	5800.00	1102	1705	2134	2406	2627	2807
234	5850.00	1107	1713	2144	2418	2639	2820
235	5900.00	1111	1721	2155	2429	2651	2833
236	5950.00	1116	1729	2165	2440	2663	2847
237	6000.00	1121	1737	2175	2451	2676	2860
238	6050.00	1126	1746	2185	2462	2688	2874
239	6100.00	1131	1754	2196	2473	2700	2887
240	6150.00	1136	1762	2206	2484	2712	2900
241	6200.00	1141	1770	2216	2495	2724	2914
242	6250.00	1145	1778	2227	2506	2737	2927
243	6300.00	1150	1786	2237	2517	2749	2941
244	6350.00	1155	1795	2247	2529	2761	2954

245	6400.00	1160	1803	2258	2540	2773	2967
246	6450.00	1165	1811	2268	2551	2785	2981
247	6500.00	1170	1819	2278	2562	2798	2994
248	6550.00	1175	1827	2288	2573	2810	3008
249	6600.00	1179	1835	2299	2584	2822	3021
250	6650.00	1184	1843	2309	2595	2834	3034
251	6700.00	1189	1850	2317	2604	2845	3045
252	6750.00	1193	1856	2325	2613	2854	3055
253	6800.00	1196	1862	2332	2621	2863	3064
254	6850.00	1200	1868	2340	2630	2872	3074
255	6900.00	1204	1873	2347	2639	2882	3084
256	6950.00	1208	1879	2355	2647	2891	3094
257	7000.00	1212	1885	2362	2656	2900	3103
258	7050.00	1216	1891	2370	2664	2909	3113

259	7100.00	1220	1897	2378	2673	2919	3123
260	7150.00	1224	1903	2385	2681	2928	3133
261	7200.00	1228	1909	2393	2690	2937	3142
262	7250.00	1232	1915	2400	2698	2946	3152
263	7300.00	1235	1921	2408	2707	2956	3162
264	7350.00	1239	1927	2415	2716	2965	3172
265	7400.00	1243	1933	2423	2724	2974	3181
266	7450.00	1247	1939	2430	2733	2983	3191
267	7500.00	1251	1945	2438	2741	2993	3201
268	7550.00	1255	1951	2446	2750	3002	3211
269	7600.00	1259	1957	2453	2758	3011	3220
270	7650.00	1263	1963	2461	2767	3020	3230
271	7700.00	1267	1969	2468	2775	3030	3240
272	7750.00	1271	1975	2476	2784	3039	3250

273	7800.00	1274	1981	2483	2792	3048	3259
274	7850.00	1278	1987	2491	2801	3057	3269
275	7900.00	1282	1992	2498	2810	3067	3279
276	7950.00	1286	1998	2506	2818	3076	3289
277	8000.00	1290	2004	2513	2827	3085	3298
278	8050.00	1294	2010	2521	2835	3094	3308
279	8100.00	1298	2016	2529	2844	3104	3318
280	8150.00	1302	2022	2536	2852	3113	3328
281	8200.00	1306	2028	2544	2861	3122	3337
282	8250.00	1310	2034	2551	2869	3131	3347
283	8300.00	1313	2040	2559	2878	3141	3357
284	8350.00	1317	2046	2566	2887	3150	3367
285	8400.00	1321	2052	2574	2895	3159	3376
286	8450.00	1325	2058	2581	2904	3168	3386

287	8500.00	1329	2064	2589	2912	3178	3396
288	8550.00	1333	2070	2597	2921	3187	3406
289	8600.00	1337	2076	2604	2929	3196	3415
290	8650.00	1341	2082	2612	2938	3205	3425
291	8700.00	1345	2088	2619	2946	3215	3435
292	8750.00	1349	2094	2627	2955	3224	3445
293	8800.00	1352	2100	2634	2963	3233	3454
294	8850.00	1356	2106	2642	2972	3242	3464
295	8900.00	1360	2111	2649	2981	3252	3474
296	8950.00	1364	2117	2657	2989	3261	3484
297	9000.00	1368	2123	2664	2998	3270	3493
298	9050.00	1372	2129	2672	3006	3279	3503
299	9100.00	1376	2135	2680	3015	3289	3513
300	9150.00	1380	2141	2687	3023	3298	3523

301	9200.00	1384	2147	2695	3032	3307	3532
302	9250.00	1388	2153	2702	3040	3316	3542
303	9300.00	1391	2159	2710	3049	3326	3552
304	9350.00	1395	2165	2717	3058	3335	3562
305	9400.00	1399	2171	2725	3066	3344	3571
306	9450.00	1403	2177	2732	3075	3353	3581
307	9500.00	1407	2183	2740	3083	3363	3591
308	9550.00	1411	2189	2748	3092	3372	3601
309	9600.00	1415	2195	2755	3100	3381	3610
310	9650.00	1419	2201	2763	3109	3390	3620
311	9700.00	1422	2206	2767	3115	3396	3628
312	9750.00	1425	2210	2772	3121	3402	3634
313	9800.00	1427	2213	2776	3126	3408	3641
314	9850.00	1430	2217	2781	3132	3414	3647

9900.00	1432	2221	2786	3137	3420	3653
9950.00	1435	2225	2791	3143	3426	3659
10000.00	1437	2228	2795	3148	3432	3666

(a) If the obligor parent's ~~For combined monthly~~ net income is less than the amount in ~~set out on~~ the ~~above~~ guidelines schedule:~~,~~

1. The parent should be ordered to pay a child support amount, determined on a case-by-case basis, to establish the principle of payment and lay the basis for increased support orders should the parent's income increase ~~in the future~~.

2. The obligor parent's child support payment shall be the lesser of the obligor parent's actual dollar share of the total minimum child support amount, as determined in subparagraph 1., and 90 percent of the difference between the obligor parent's monthly net income and the current poverty guidelines as periodically updated in the Federal Register by the United States Department of Health and Human Services pursuant to 42 U.S.C. s. 9902(2) for a single individual living alone.

(b) For combined monthly net income greater than the amount ~~set out~~ in the ~~above~~ guidelines schedule, the obligation is ~~shall be~~ the minimum amount of support provided by the guidelines schedule plus the following percentages multiplied by the amount of income over $10,000:

Child or Children					
One	Two	Three	Four	Five	Six
5.0%	7.5%	9.5%	11.0%	12.0%	12.5%

(7) Child care costs incurred ~~on behalf of the children~~ due to employment, job search, or education calculated to result in employment or to enhance income of current employment of either parent ~~shall be reduced by 25 percent and then~~ shall be added to the basic obligation. After the ~~adjusted~~ child care costs are added ~~to the basic obligation~~, any moneys prepaid by a parent for child care costs for the child or children of this action shall be deducted from that parent's child support obligation for that child or those children. Child care costs may ~~shall~~ not exceed the level required to provide quality care from a licensed source ~~for the children~~.

(11)(a) The court may adjust the total minimum child support award, or either or both parents' share of the total minimum child support award, based upon the following deviation factors:

1. Extraordinary medical, psychological, educational, or dental expenses.

2. Independent income of the child, not to include moneys received by a child from supplemental security income.

3. The payment of support for a parent which ~~regularly~~ has been regularly paid and for which there is a demonstrated need.

4. Seasonal variations in one or both parents' incomes or

expenses.

5. The age of the child, taking into account the greater needs of older children.

6. Special needs, such as costs that may be associated with the disability of a child, that have traditionally been met within the family budget even though ~~the~~ fulfilling ~~of~~ those needs will cause the support to exceed the presumptive amount established by the guidelines.

7. Total available assets of the obligee, obligor, and the child.

8. The impact of the Internal Revenue Service Child & Dependent Care Tax Credit, Earned Income Tax Credit, and dependency exemption and waiver of that exemption. The court may order a parent to execute a waiver of the Internal Revenue Service dependency exemption if the paying parent is current in support payments.

9. An ~~When~~ application of the child support guidelines schedule that requires a person to pay another person more than 55 percent of his or her gross income for a child support obligation for current support resulting from a single support order.

10. The particular parenting plan~~, such as where the child spends a significant amount of time, but less than 40 percent of the overnights, with one parent, thereby reducing the financial expenditures incurred by the other parent;~~ or the refusal of a parent to become involved in the activities of the child.

11. Any other adjustment that ~~which~~ is needed to achieve an equitable result which may include, but not be limited to, a

reasonable and necessary existing expense or debt. Such expense or debt may include, but is not limited to, a reasonable and necessary expense or debt that ~~which~~ the parties jointly incurred during the marriage.

(b) If ~~Whenever~~ a particular parenting plan provides that each child spend ~~a substantial amount of~~ time with each parent, the court shall adjust any award of child support, as follows:

1. In accordance with subsections (9) and (10), calculate the amount of support obligation apportioned to each parent without including day care and health insurance costs in the calculation ~~and multiply the amount by 1.5~~.

2. Calculate the percentage of overnight stays the child spends with each parent.

3. Multiply each parent's support obligation as calculated in subparagraph 1. by the sum of one and the smaller percentage calculated in subparagraph 2.

4.~~3.~~ Multiply each parent's support obligation as calculated in subparagraph 3. ~~1.~~ by the percentage of the other parent's overnight stays with the child as calculated in subparagraph 2.

5.~~4.~~ The difference between the amounts calculated in subparagraph 4. is ~~3. shall be~~ the monetary transfer necessary between the parents for the care of the child, subject to an adjustment for day care and health insurance expenses.

6.~~5.~~ Pursuant to subsections (7) and (8), calculate the net amounts owed by each parent for the expenses incurred for day care and health insurance coverage for the child. ~~Day care shall be calculated without regard to the 25-percent reduction~~

~~applied by subsection (7).~~

7.~~6.~~ Adjust the support obligation owed by each parent pursuant to subparagraph 5. ~~4.~~ by crediting or debiting the amount calculated in subparagraph 6. ~~5.~~ This amount represents the child support which must be exchanged between the parents.

8.~~7.~~ The court may deviate from the child support amount calculated pursuant to subparagraph 7. ~~6.~~ based upon the deviation factors in paragraph (a), as well as the obligee parent's low income and ability to maintain the basic necessities of the home for the child, the likelihood that either parent will actually exercise the time-sharing schedule set forth in the parenting plan granted by the court, and whether all of the children are exercising the same time-sharing schedule.

~~8. For purposes of adjusting any award of child support under this paragraph, "substantial amount of time" means that a parent exercises visitation at least 40 percent of the overnights of the year.~~

(c) A parent's failure to regularly exercise the court-ordered or agreed time-sharing schedule not caused by the other parent which resulted in the adjustment of the amount of child support pursuant to subparagraph (a)10. or paragraph (b) shall be deemed a substantial change of circumstances for purposes of modifying the child support award. A modification pursuant to this paragraph is ~~shall be~~ retroactive to the date the noncustodial parent first failed to regularly exercise the court-ordered or agreed time-sharing schedule.

Section 4. This act shall take effect January 1, 2011.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1179 Electronic Documents Recorded in the Official Records
SPONSOR(S): Grimsley and Others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1288

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 0 N	Mato	De La Paz
2)	Governmental Affairs Policy Committee	13 Y, 0 N	Williamson	Williamson
3)	Criminal & Civil Justice Policy Council		Mato	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

Several of the clerks of the court and county recorders were accepting electronic recordings relating to real property prior to the 2006 adoption of the Uniform Real Property Electronic Recording Act and others began accepting electronic documents for recording before rules contemplated in the act were formally adopted.

The bill retroactively and prospectively ratifies the validity of all such electronic documents submitted to and accepted by a county recorder for recordation, whether or not the electronic documents were in strict compliance with the statutory or regulatory framework in effect at that time. The bill provides that all such recorded documents are deemed to provide constructive notice. It also clarifies that changes made by the bill do not alter the duty of the clerk or recorder to comply with the Uniform Real Property Electronic Recording Act or rules adopted by the Department of State pursuant to that act.

The bill appears to have no fiscal impact.

The bill provides that it is effective upon becoming a law.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

In 2000, the Legislature adopted the Uniform Electronic Transaction Act (UETA).[1] This Act was based on work by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Many, including NCCUSL, believed the UETA permitted the electronic creation, submission, and recording of electronic documents affecting real property.

Some county recorders began accepting electronic recordings based on the authorities facially granted under the UETA. As such, a significant number of electronic documents were filed.

Some legal commentators disagreed, feeling the UETA alone did not authorize the recording of electronic documents affecting title to real property. That disagreement, and the natural conservative nature of most real estate professionals, resulted in a limitation on the use and acceptability of electronic documents in real estate transactions.

To address this problem, NCCUSL promulgated a separate uniform law to address these perceived shortcomings. A variation of the NCCUSL uniform law was adopted by the by the Legislature in 2006 and was called the Uniform Real Property Electronic Recording Act (URPERA).[2]

The adoption of the URPERA, as a matter of statutory interpretation, called into question the efficacy of electronic documents recorded under UETA. The URPERA requires the Department of State, by rule to prescribe standards to implement the act in consultation with the Electronic Recording Advisory Committee.[3], It also directs any county recorder who elects to receive, index, store, archive, and transmit electronic documents to do so in compliance with standards established by rules adopted by the Department of State.[4]

Before the Department of State could begin establishing rules, several county recorders began accepting electronic recordings and, as a result, discovered significant cost and labor savings. At

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[1] *See* s. 668.50, F.S., part II of chapter 668, F.S.

[2] *See* s. 695.27, F.S.

[3] Section 695.27(5)(a), F.S. This section creates the Electronic Recording Advisory Committee. It also requires the Florida Association of Court Clerks and Comptrollers to provide administrative support to the Department of State and the committee at no charge. The committee is composed of nine members who serve one year terms.

[4] Section 695.27(4)(b), F.S.

present, Rule 1B-31, Florida Administrative Code, implements the URPERA and provides guidelines for accepting electronic documents.

Effect of the Bill

The bill creates s. 695.28, F.S., to retroactively and prospectively ratify the validity of all electronic documents affecting title to real property submitted to and accepted by a county recorder for recordation, notwithstanding possible technical defects.

The bill provides that all documents, previously or hereafter accepted by a county recorder for recordation electronically, whether under the UETA or the URPERA, are deemed to be validly recorded and provides notice to all persons notwithstanding that:

- Such documents may have been received and recorded before the formal adoption of rules by the Department of State; or
- Defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure to electronically record documents that may have been in effect at the time the electronic documents were submitted for recording.

The bill clarifies that the newly created s. 695.28, F.S., does not alter the duty of the clerk or recorder to comply with the URPERA or rules adopted by the Department of State pursuant to that act.

Finally, the bill adds to the URPERA cross-references for the newly created section and provides that the newly created section also may be referred to as the Uniform Real Property Electronic Recording Act.

B. SECTION DIRECTORY:

Section 1 amends s. 695.27, F.S., relating to the Uniform Real Property Recording Act.

Section 2 creates s. 695.28, F.S., relating to the validity of electronically recorded documents.

Section 3 provides this act is intended to clarify existing law and applies prospectively and retroactively.

Section 4 provides that the bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill clarifies that the newly created s. 695.28, F.S., does not alter the duty of the clerk or recorder to comply with the URPERA or rules adopted by the Department of State pursuant to that act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to electronic documents recorded in the official records; amending s. 695.27, F.S.; providing for the inclusion of an additional statute in the Uniform Real Property Electronic Recording Act; delaying termination of the Electronic Recording Advisory Committee; creating s. 695.28, F.S.; declaring that certain electronic documents accepted for recordation are deemed validly recorded; providing intent to clarify existing law; providing for retroactive application; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 695.27, Florida Statutes, is amended to read:

695.27 Uniform Real Property Electronic Recording Act.—

(1) SHORT TITLE.—This section and s. 695.28 may be cited as the "Uniform Real Property Electronic Recording Act."

(2) DEFINITIONS.—As used in this section and s. 695.28:

(a) "Document" means information that is:

1. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

2. Eligible to be recorded in the Official Records, as defined in s. 28.222, and maintained by a county recorder.

(b) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(c) "Electronic document" means a document that is received by a county recorder in an electronic form.

(d) "Electronic signature" means an electronic sound, symbol, or process that is executed or adopted by a person with the intent to sign the document and is attached to or logically associated with a document such that, when recorded, it is assigned the same document number or a consecutive page number immediately following such document.

(e) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, instrumentality, or any other legal or commercial entity.

(f) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(3) VALIDITY OF ELECTRONIC DOCUMENTS.—

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic

signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

(4) RECORDING OF DOCUMENTS.—

(a) In this subsection, the term "paper document" means a document that is received by the county recorder in a form that is not electronic.

(b) A county recorder:

1. Who implements any of the functions listed in this section shall do so in compliance with standards established by rule by the Department of State.

2. May receive, index, store, archive, and transmit electronic documents.

3. May provide for access to, and for search and retrieval of, documents and information by electronic means.

4. Who accepts electronic documents for recording shall continue to accept paper documents as authorized by state law and shall place entries for both types of documents in the same index.

5. May convert paper documents accepted for recording into electronic form.

6. May convert into electronic form information recorded before the county recorder began to record electronic documents.

7. May agree with other officials of a state or a political subdivision thereof, or of the United States, on procedures or processes to facilitate the electronic

satisfaction of prior approvals and conditions precedent to recording.

(5) ADMINISTRATION AND STANDARDS.—

(a) The Department of State, by rule pursuant to ss. 120.536(1) and 120.54, shall prescribe standards to implement this section in consultation with the Electronic Recording Advisory Committee, which is hereby created. The Florida Association of Court Clerks and Comptrollers shall provide administrative support to the committee and technical support to the Department of State and the committee at no charge. The committee shall consist of nine members, as follows:

1. Five members appointed by the Florida Association of Court Clerks and Comptrollers, one of whom must be an official from a large urban charter county where the duty to maintain official records exists in a county office other than the clerk of court or comptroller.

2. One attorney appointed by the Real Property, Probate and Trust Law Section of The Florida Bar Association.

3. Two members appointed by the Florida Land Title Association.

4. One member appointed by the Florida Bankers Association.

(b) Appointed members shall serve a 1-year term. All initial terms shall commence on the effective date of this act. Members shall serve until their successors are appointed. An appointing authority may reappoint a member for successive terms. A vacancy on the committee shall be filled in the same manner in which the original appointment was made, and the term

shall be for the balance of the unexpired term.

(c) The first meeting of the committee shall be within 60 days of the effective date of this act. Thereafter, the committee shall meet at the call of the chair, but at least annually.

(d) The members of the committee shall serve without compensation and shall not claim per diem and travel expenses from the Secretary of State.

(e) To keep the standards and practices of county recorders in this state in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this section and to keep the technology used by county recorders in this state compatible with technology used by recording offices in other jurisdictions that enact substantially this section, the Department of State, in consultation with the committee, so far as is consistent with the purposes, policies, and provisions of this section, in adopting, amending, and repealing standards, shall consider:

1. Standards and practices of other jurisdictions.

2. The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.

3. The views of interested persons and governmental officials and entities.

4. The needs of counties of varying size, population, and resources.

5. Standards requiring adequate information security protection to ensure that electronic documents are accurate,

authentic, adequately preserved, and resistant to tampering.

(f) The committee shall terminate on July 1, 2013 ~~2010~~.

(6) UNIFORMITY OF APPLICATION AND CONSTRUCTION.—In applying and construing this section, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

(7) RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.—This section modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but this section does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

Section 2. Section 695.28, Florida Statutes is created to read:

695.28 Validity of recorded electronic documents.—

(1) A document that is otherwise entitled to be recorded and that was or is submitted to the clerk of the court or county recorder by electronic means and accepted for recordation is deemed validly recorded and provides notice to all persons notwithstanding:

(a) That the document was received and accepted for recordation before the Department of State adopted standards implementing s. 695.27; or

(b) Any defects in, deviations from, or the inability to demonstrate strict compliance with any statute, rule, or procedure to submit or record an electronic document in effect

at the time the electronic document was submitted for recording.

(2) This section does not alter the duty of the clerk or recorder to comply with s. 695.27 or rules adopted pursuant to that section.

Section 3. This act is intended to clarify existing law and applies prospectively and retroactively.

Section 4. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1383 Pregnant Children and Youth in Out-of-Home Care
SPONSOR(S): Health Care Appropriations Committee; Weinstein
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Health Care Appropriations Committee	10 Y, 4 N, As CS	Schoonover	Massengale
2)	Criminal & Civil Justice Policy Council		Thomas	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

The bill makes several changes to current law and creates a new section to address issues related to pregnant children and youth in out-of-home care. Specifically, the bill does the following:

- Ensures appointment of a pro bono attorney or guardian ad litem for all pregnant children and youth in out-of-home care;
- Creates a 3-year pilot program in the Fourth Judicial Circuit to provide specialty guardians ad litem for pregnant children and youth in out of home care;
- Requires community-based care providers to report information about pregnant children and youth in licensed care to the Department of Children and Family Services.

The bill provides an appropriation of $55,000 in recurring revenue from the General Revenue Fund to the Statewide Guardian ad Litem Office to implement the Specialty Guardian ad Litem Pilot Program in the Fourth Judicial Circuit.

The bill also provides an appropriation of $150,000 in nonrecurring revenue from the General Revenue Fund to the Department of Children and Family Services to modify the children and families client and management information system to collect and report information on pregnant children and youth in out-of-home care.

The bill provides an effective date of July 1, 2010.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

A recent national study shows that by age 19 nearly half of young women in foster care have been pregnant compared to one-fifth of their peers not in foster care.[1] Additionally, youth in foster care are 2.5 times more likely to be pregnant.[2] Studies have also shown that foster care youth tend to have high levels of unprotected sex and have a perception that child rearing is a way to create the family the youth doesn't have or to fill an emotional void.[3]

Guardian Ad Litem Program

In 2003, the Statewide Guardian Ad Litem Office was created within the Justice Administrative Commission.[4] The purpose of the Statewide Guardian Ad Litem Office is to oversee responsibilities for and provide technical assistance to all guardian ad litem and attorney ad litem programs located within the judicial circuits.[5]

Currently, a Guardian Ad Litem (GAL) must be appointed by the court at the earliest possible time to represent a child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal.[6] A GAL includes a certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney, staff members of a program office, a court-appointed attorney, or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding.[7] In most instances, following the appointment to a dependency case by the court at a shelter hearing, the program assigns a program attorney and a volunteer and/or staff advocate to the case.[8]

The GAL volunteer, the GAL volunteer's supervisor, and the program attorney work as a team to ensure the child's well-being, best interest, and safety are considered, and that child-centered

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[1] Amy Dworsky, "Preventing Pregnancy Among Youth in Foster Care: Remarks for Congressional Roundtable," (2009). http://www.chapinhall.org/sites/default/files/DworskyFosterPregnancy-7-16-09.pdf (last visited 3/30/10)
[2] *Id.*
[3] *Id.*
[4] Chapter 2003-53, L.O.F.
[5] section 39.8296(2)(b), F.S.
[6] section 39.822(1), F.S.
[7] section 39.820(1), F.S.
[8] Staff Analysis, HB1383 (2010), Statewide Guardian Ad Litem Office. (On file with committee staff).

decisions are made on critical issues such as permanency, placement, visitation, and education.[9] This team tracks cases and attends all case proceedings on behalf of the child.[10] The program attorney represents the program in court by advocating on behalf of the program and also by advocating on behalf of the child when filing necessary legal motions. In 2009, GAL represented 80 percent of the children under dependency court supervision.[11]

Foster Care

The state's child welfare program serves children and families in their homes, as well as children who have been removed from their families and placed in foster care.[12] Foster care settings include licensed foster homes, residential facilities, and placements with relatives and approved non-relatives.[13] In 1996, the Legislature encouraged DCF to contract with community-based, not-for-profit entities to provide child welfare services, including but not limited to, prevention, child protection, licensing, placement, foster care, adoptions, and independent living.[14] In 1998, the Legislature directed DCF to contract with community-based lead agencies to assume many of the management and operational responsibilities previously performed by its internal staff.[15] Under this outsourced system, lead agencies are responsible for providing foster care and related services including, but not limited to, family preservation, emergency shelter, and adoption.[16]

The state completed the transition to community-based care during the latter part of Fiscal Year 2004-2005.[17] As of March 2010, 20 community-based lead agencies provide child welfare services statewide, including foster care.[18] The lead agencies contract with a large number of subcontractors for case management and direct care services to children and their families.[19] In addition to DCF's contracts with 20 lead agencies, as of March 2010 the lead agencies maintained 70 subcontracts for case management services and 646 subcontracts for direct care services such as foster care placement, adoption supervision, and substance abuse and mental health intervention.[20]

Client and Management Information System

Current law requires the Department of Children and Family Services (DCF) to establish a statewide children and families client and management information system to provide information concerning children served by DCF.[21] Pursuant to this requirement, DCF established the Florida Safe Families Network (FSFN) to provide, at a minimum, a service information system to implement comprehensive screening, uniform assessment, case planning, monitoring, resource matching, and outcome evaluations for all programs and services related to child welfare, prevention, diversion, and child care.[22] However, FSFN does not collect data and information about children or youth who become pregnant before or while residing in licensed out-of-home care.[23] Current law does specify that, whenever feasible, the information system shall have online computers and be available for data entry and retrieval at the unit level of organization by program component counselors.[24] Recently, DCF extracted data and learned that in January 2010, there were 130 females in out-of-home care who are listed as having children.[25]

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[9] Guardian Ad Litem 2009 Annual Report. http://www.guardianadlitem.org/documents/GAL-2009AnnualReport.pdf. (last visited 3/30/10).
[10] *Id.*
[11] *Id.*
[12] "Child Welfare System Performance Mixed in First Year of Statewide Community-Based Care," Office of Program Policy and Government Accountability (OPPAGA), Report 06-50.
[13] *Id.*
[14] section 5, ch. 96-402, L.O.F.
[15] section 1, ch. 98-180, L.O.F.
[16] OPPAGA, Report 06-50.
[17] *Id.*
[18] Lead Agency Contacts, Department of Children and Family Services. http://www.dcf.state.fl.us/programs/cbc/docs/leadagencycontacts.pdf (last visited 3/31/10).
[19] OPPAGA, Report 06-50.
[20] Email from Alan Abramowitz, Director of Family Safety, DCF (October 31, 2010). On file with committee staff.
[21] section 409.146(1), F.S.
[22] section 409.146(2), F.S.
[23] Staff Analysis, HB 1383 (2010). Department of Children and Family Services. (On file with committee staff).
[24] section. 409.146(7), F.S.
[25] Staff Analysis, HB 1383 (2010). Department of Children and Family Services. (On file with committee staff). Data was collected using FSFN and adding up the amount of females in the system that had the "mother" radial checked off under the "relationship" tab. It does not appear that this method of tabulation is able to account for the amount of females currently in out-of-home care who either became pregnant or entered care while pregnant.

The Independent Living Transitional Services Checklist survey is a voluntary self-reporting survey for youth 13-17 years old in foster care and for 18-22 year olds that have aged out of foster care. The 2008 survey provided the following results related to pregnancy and parents in foster care:[26]

- Are you Pregnant?
  - 4 percent of 13-17 year olds answered yes
  - 10 percent of 18-22 year olds answered yes
- Do you have children?
  - 15 percent of 13-22 year olds answered yes
- Are those children in your legal custody?
  - 69 percent answered yes.

Parental Notice of Abortion Act

In 2004, the Legislature passed House Joint Resolution 1 to amend the state constitution. The joint resolution, placed on the November 2004 ballot, provided:

> ARTICLE X SECTION 22. Parental notice of termination of a minor's pregnancy.—The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

The voters approved this amendment on November 2, 2004.[27] The amendment permitted the Legislature to create a parental notification statute notwithstanding the state right to privacy. Accordingly, in 2005, the Legislature recreated the Parental Notice of Abortion Act under s. 390.01114, F.S.,[28] which specifies the following:

Notice. A physician or the referring physician must give 48 hours actual notice of the physician's intent to perform or induce the termination of a minor's pregnancy to one of the minor's parents or to the legal guardian of the minor. If the physician is unable, after making reasonable efforts, to give actual notice, the physician may provide constructive notice by mail, overnight delivery guaranteed, return receipt requested with delivery restricted to a parent or legal guardian. This constructive notice must be mailed at least 72 hours before the procedure is commenced. The physician is required to document the efforts to provide notice and keep such records with the minor's medical file.

Notice Exceptions. Section 22 of Article X of the Florida Constitution, requires the Legislature to provide exceptions to the notice requirement. Under s. 390.01114(3)(b), F.S., prior actual or constructive notice is not required in the following circumstances:

- If, in the physician's good faith clinical judgment, a medical emergency exists and there is insufficient time to comply with the notice requirements. If a medical emergency exists, the physician may terminate the pregnancy but must document the reason for the medical necessity and provide notice after performing the procedure;
- Notice is waived by the person entitled to receive notice;
- Notice is waived by the minor who is or has been married or has had the disability of nonage removed under s. 743.015, F.S.;
- Notice is waived by the patient because the patient has a minor child dependent on her; or
- Notice is waived through a waiver petition granted by a circuit court.

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[26] *Id.*

[27] According to the Department of State website, http://election.dos.state.fl.us, 4,639,635 people voted for the amendment and 2,534,910 voted against the amendment.

[28] An earlier Parental Notice Act (1999 Act) – s. 390.01115, F.S. – was declared unconstitutional by the Florida Supreme Court.

Judicial Waiver of Notice. Section 22 of Article X of the Florida Constitution requires the Legislature to create a procedure for a judicial waiver of notice. Accordingly, s. 390.01114(4), F.S., specifies that a pregnant minor who is less than 18 years of age may petition the circuit court in a judicial circuit within the jurisdiction of the District Court of Appeal where she resides for a waiver of the notice requirement. The court must provide the minor counsel upon her request and at no cost.

The court must give court proceedings under this act precedence over other pending matters and the court must rule, and issue written findings of fact and conclusions of law, within 48 hours of the minor's request. If the court fails to rule within 48 hours, and an extension has not been granted at the request of the minor, the petition must be granted.

While the law provides that notice shall be given to parents of a minor, there are exceptions such that the court may grant a petition to waive notice if the court finds:

- By clear and convincing evidence, that the minor is sufficiently mature to terminate her pregnancy without the knowledge of her parent or guardian;
- By a preponderance of the evidence, that there is evidence of child abuse or sexual abuse by one or both of her parents or her guardian. In addition, the court must report the evidence of child abuse or sexual abuse to the Department of Children and Families' Child Abuse and Neglect hotline, in accordance with s. 39.201, F.S.; or
- By a preponderance of the evidence, that the notification of a parent or guardian is not in the best interest of the minor.

If one of these exceptions is not met, the court must dismiss the minor's petition.

The Office of State Court Administrator (OSCA) must report to the Governor, President of the Senate, and the Speaker of the House of Representatives on the number of petitions for judicial waiver and the timing and manner of disposal of the petitions.[29] According to OSCA, from July 2009 to February 2010, 14 minors from the Fourth Judicial Circuit filed petitions seeking judicial bypass of the parental notice requirements.[30] Of those petitions, 12 were granted. It is unclear how many, if any, of the 14 these minors were foster children.

Florida Pregnancy Support Services Program

The Florida Pregnancy Support Program is administered by two contract managers—Florida Pregnancy Care Network and the Uzzell Group—under contract with the Department of Health.[31] The contract managers subcontract with more than 50 direct service providers throughout the state to provide counseling and other services to individuals who are suspecting or experiencing an unplanned pregnancy. Services are not limited to women, as sometimes the eligible woman's partner and family members who are directly impacted by her pregnancy are also eligible for services, and the services may continue for up to 12 months after the birth of the child.

Direct service providers administer a number of services to clients, including free pregnancy testing; counseling; and social service/medical referrals for services such as housing, employment, childcare, education, Medicaid and other support services, and mental health or other health care services. Additionally, some direct service providers have education programs for expectant families.

As of March 9, 2010, there were three direct service providers in the Fourth Judicial Circuit.

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[29] section 390.01114(6), F.S.

[30] Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County (July 2009-February 2010) Office of State Courts Administrator, Research and Data as of March 31, 2010.

[31] The Florida Pregnancy Support Services Program also consists of the Florida Hope Line, a free hotline answered 24 hours a day, 365 days a year in order to refer women to the nearest direct service providers. The Hope Line is operated by Option Line, a nationally pregnancy helpline.

Effect of Proposed Changes

Appointment of a Guardian ad Litem for a Pregnant Child or Youth in Out-of-Home Care

The bill amends s. 39.822, F.S., by requiring the court, at the first hearing after the court is notified a child or youth in out-of-home care is pregnant, to appoint to the child or youth a pro-bono attorney or a guardian ad litem if a pro bono attorney is not available. The effect of this change will ensure that pregnant children and youth are provided the support they need.

Specialty Guardian Ad Litem Pilot Program

The bill creates s. 38.8299, F.S., by creating a 3-year Specialty Guardian ad Litem (GAL) program in the Fourth Judicial Circuit for pregnant children and youth in out-of-home care. Specifically, the bill requires the Statewide Guardian Ad Litem Office to do the following:

- Designate a GAL in the Fourth Judicial Circuit to administer the Specialty GAL program under the supervision of the executive director of Statewide GAL Office;
- Develop and implement a training program to ensure that specialty GALs receive all the training provided to GALs, as well as additional specialty training, including training about:
    - Social service programs available to pregnant women;
    - Legal requirements related to the parental notice of abortions act;
    - Availability of pregnancy counseling services in the Fourth Judicial Circuit, including providers offering services under contract under the Florida Pregnancy Support Services Program;
- Design and implement an appropriate specialty GAL program and may establish the number of specialty GALs needed to meet the needs of the pilot program. Current GALs will be prohibited from serving as Specialty GALs prior to completing the proper training requirements.

The program created in s. 38.8299, F.S., also limits the specialty GAL's representation for children and youth in out-of-home care that are pregnant to dependency proceedings and other proceedings in ch. 39, F.S.. The specialty GAL may, at the request of the pregnant child or youth, represent that child or youth in parental notice judicial bypass proceedings. The specialty GAL does not have the authority to accept notice of termination of pregnancy and must represent the child's best interest as long as the child or youth's wishes are consistent with the child or youth's safety and well-being. A specialty GAL is directed to represent a pregnant youth or child until 6 months after the conclusion of the child or youth's pregnancy.

The bill provides, for the 2010-2011 fiscal year, an appropriation of $55,000 in recurring revenue from the General Revenue Fund to the Statewide Guardian ad Litem Office to implement the Specialty Guardian ad Litem Pilot Program in the Fourth Judicial Circuit.

Collection and Reporting of Pregnant Children and Youth in Out-of-Home Care

The bill amends s. 409.146, F.S., by requiring DCF through its client and management information system, Florida Safe Families Network (FSFN), to collect and report information on pregnant children and youth in licensed care, but not those placed with relatives. The bill allows DCF to collect and report the data by another method until FSFN is in full operational status.

The bill directs lead community-based providers and their subcontractors to notify DCF within 72 hours of determining or discovering that a child or youth in their care is pregnant. The notification must include the following data:

- Age of pregnant child or youth;
- Whether the child or youth was pregnant prior to entering licensed care or became pregnant while in licensed care;
- The name of any entity that is providing prenatal care, counseling, or other social services; and
- Whether the child or youth has declined prenatal care, counseling, or other social services.

The bill requires lead community-based providers and their subcontractors to notify DCF, through FSFN, within 7 days after determining or discovering the pregnancy outcome of a child or youth in licensed care, but those placed with relatives. The notification may include whether the pregnancy was terminated or resulted in a live birth, still birth, or fetal death. For live births, the bill requires indication in the reporting as to whether the infant remains in the care of the child or youth, has been placed for adoption, or has been placed in other licensed care.

The bill provides an appropriation of $150,000 in nonrecurring revenue from the General Revenue Fund to the Department of Children and Family Services to modify the children and families client and management information system to collect and report information on pregnant children and youth in out-of-home care.

B. SECTION DIRECTORY:

Section 1. Amends s. 39.822, F.S., relating to appointment of guardian ad litem for abused, abandoned, or neglected child.

Section 2. Creates s. 39.8299, F.S., relating to Specialty Guardian Ad Litem Pilot Program for pregnant children or youth in out-of-home care.

Section 3. Amends s. 409.146, F.S., relating to children and families client and management information system.

Section 4. Provides appropriations.

Section 5. Provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

	Amount Year 1 (FY 2010-2011)	Amount Year 2 (FY 2011-2012)
A. Nonrecurring or First-Year Start-up Effects:	$150,000[32]	
B. Recurring or Annualized Continuation Effects:	$55,000[33]	$55,000
C. Appropriations Consequences:	**$205,000**	**$55,000**

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

[32] Cost associated with updating DCF's FSFN information system to enable it to collect data required by bill.
[33] Cost of one position to serve as the administrator of the Specialty Guardian Ad Litem Pilot Program in the Fourth Judicial Circuit.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Section 23 of Article 1 of the Florida Constitution provides, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[34] Because the right to privacy is a fundamental right, when imposing on this right, the state must prove that a statute furthers a compelling state interest through the least intrusive means.[35]

The Florida Supreme Court has determined that Section 23 of Article I is implicated in a woman's decision to terminate or continue her pregnancy.[36] The provisions in the bill do not interfere with the minor's right to choose. Instead, the bill authorizes a child or youth in out-of-home care in the pilot program area to request a specialty guardian ad litem to represent the child's best interests during a judicial bypass proceeding under s. 390.01114(4), F.S. This does not replace the requirement in s. 390.01114(4)(a), F.S., for a minor to receive notice that the minor has a right to court appointed counsel, and does not prohibit the minor from having both a specialty guardian ad litem and counsel present, as the specialty guardian's ad litem participation is not in the capacity as a legal advisor.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[34] *See also in re T.W.,* 551 So.2d 1186 (Fla. 1989) (holding that this provision applies to minors as well as adults).
[35] *Id.*
[36] *Id.*

On April 6, 2010, the Health Care Appropriations Committee adopted three amendments to HB 1383. The amendments:

- Remove the provision that the funding for the pilot program is subject to an appropriation in the General Appropriations Act, and renumbers the section to conform.
- Provide an appropriation to implement the provisions of the bill. Specifically, the appropriation includes for the 2010-2011 fiscal year: one full-time equivalent position with salary rate of 32,000; $55,000 in recurring revenue from the General Revenue Fund to implement the pilot program; and $150,000 in nonrecurring revenue from General Revenue Fund to DCF to modify the client and management information system to accommodate the reporting requirements of the bill.
- Allow DCF to determine another method for reporting on the status of pregnant children and youth in out-of-home care until the client and management information system currently under development is in full operation status.

The bill was reported favorably as a committee substitute. The analysis reflects the committee substitute.

A bill to be entitled

An act relating to pregnant children and youth in out-of-home care; amending s. 39.822, F.S.; requiring courts to appoint by a specified time a pro bono attorney or guardian ad litem for a child or youth in out-of-home care who is pregnant; creating s. 39.8299, F.S.; requiring the Statewide Guardian Ad Litem Office to establish a Specialty Guardian Ad Litem Pilot Program in the Fourth Judicial Circuit to serve children and youth in out-of-home care who are pregnant; providing for development, implementation, administration, and supervision of the program; directing the Statewide Guardian Ad Litem Office, in conjunction with the pilot program, to develop and implement a training program for specialty guardians ad litem; providing requirements for appointment of specialty guardians ad litem by the court; specifying information to be provided to the administrator after an appointment is made; requiring that a pro bono attorney or guardian ad litem be appointed if a specialty guardian ad litem is not available; limiting the specialty guardian ad litem's representation to proceedings under specified provisions; providing that the specialty guardian ad litem does not have the authority to accept notice of termination of pregnancy; providing for a guardian ad litem to be appointed at the end of the specialty guardian ad litem's representation; providing that the pilot program and specialty guardians ad litem are subject to specified provisions relating to the appointment of a guardian ad

litem for an abused, neglected, or abandoned child; amending s. 409.146, F.S.; requiring the children and families client and management information system to include information concerning the status and outcomes of pregnant children and youth in licensed care; requiring community-based providers and subcontractors to report specified pregnancy and outcome data to the Department of Children and Family Services; specifying reporting procedures; providing appropriations; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 39.822, Florida Statutes, is amended to read:

39.822 Appointment of guardian ad litem for abused, abandoned, or neglected child.—

(1)(a) A guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect judicial proceeding, whether civil or criminal.

(b) At the first hearing after the court is notified that a child or youth in out-of-home care is pregnant, the court shall appoint a pro bono attorney, or a guardian ad litem if a pro bono attorney is not available, for the child or youth.

(c) Any person participating in a civil or criminal judicial proceeding resulting from an ~~such~~ appointment pursuant to this subsection shall be presumed prima facie to be acting in

good faith and in so doing shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed.

Section 2. Section 39.8299, Florida Statutes, is created to read:

39.8299 Specialty Guardian Ad Litem Pilot Program for pregnant children or youth in out-of-home care.—

(1) By October 1, 2010, the Statewide Guardian Ad Litem Office shall establish a 3-year Specialty Guardian Ad Litem Pilot Program in the Fourth Judicial Circuit to serve children and youth in out-of-home care who are pregnant.

(2) The Statewide Guardian Ad Litem Office shall designate a guardian ad litem in the Fourth Judicial Circuit as the administrator of the pilot program. The administrator must meet the qualifications for guardians ad litem as specified in s. 39.821 and have 5 or more years of experience in the area of child advocacy, child welfare, or juvenile law or as a program attorney, case coordinator, or volunteer with the Statewide Guardian Ad Litem Office. The executive director of the Statewide Guardian Ad Litem Office shall supervise the administration of the pilot program.

(3) The Statewide Guardian Ad Litem Office, in conjunction with the pilot program, shall develop and implement a training program for specialty guardians ad litem that includes all training developed and provided for guardians ad litem pursuant to s. 39.8296(2)(b)4. as well as training regarding:

(a) Social service programs available to pregnant women in the state.

(b) The legal requirements of s. 390.01114.

(c) The availability of pregnancy counseling services in the Fourth Judicial Circuit, including all providers offering services under the Florida Pregnancy Support Services Program.

(4) Using funds specifically appropriated for the pilot program, the Statewide Guardian Ad Litem Office, in conjunction with the pilot program, shall design and implement an appropriate specialty guardian ad litem program and may establish the number of specialty guardians ad litem needed to meet the needs of the pilot program. An existing guardian ad litem may serve as a specialty guardian ad litem only after completing the additional training requirements specified in subsection (3).

(5) The court shall appoint a specialty guardian ad litem at the first hearing after the court is notified that the child or youth is pregnant. If a guardian ad litem is representing the child or youth at that time and is trained as a specialty guardian ad litem, a new specialty guardian ad litem need not be appointed. When a specialty guardian ad litem is appointed, the court shall provide to the administrator, at a minimum, the name of the child or youth, the location and placement of the child or youth, the name of the department's authorized agent and contact information, copies of all notices sent to the parent or legal custodian of the child or youth, and any other information or records concerning the child or youth. If a specialty guardian ad litem is not available, then, pursuant to s. 39.822(1)(b), the court shall appoint a pro bono attorney or a guardian ad litem if a pro bono attorney is not available.

(6) The specialty guardian ad litem's representation shall

be limited to proceedings initiated under this chapter, except that, upon the request of the child or youth, the specialty guardian ad litem may represent the child or youth in a proceeding filed pursuant to s. 390.01114(4). The specialty guardian ad litem does not have the authority to accept notice of termination of pregnancy pursuant to s. 390.01114.

(7) Upon the direction of the court, the pilot program administrator shall assign a specialty guardian ad litem who shall represent the child or youth until 6 months after the conclusion of the child or youth's pregnancy. Once assigned, the specialty guardian ad litem shall replace any existing guardian ad litem appointed for the child or youth if the existing guardian ad litem is not trained as a specialty guardian ad litem and shall represent the child or youth's wishes for purposes of proceedings under this chapter and s. 390.01114(4), when applicable, as long as the child or youth's wishes are consistent with the safety and well being of the child or youth. Upon conclusion of the specialty guardian ad litem's representation of the child or youth, a guardian ad litem shall be appointed by the court at the earliest possible time.

(8) The pilot program and specialty guardians ad litem assigned pursuant to the pilot program are subject to s. 39.822.

Section 3. Subsections (3) through (9) of section 409.146, Florida Statutes, are renumbered as subsections (4) through (10), respectively, and a new subsection (3) is added to that section to read:

409.146 Children and families client and management information system.—

(3)(a) The system shall include information concerning the status of pregnant children and pregnant youth in licensed care.

(b) Lead community-based providers and their subcontractors operating pursuant to s. 409.1671 shall notify the department within 72 hours after determining or discovering that a child or youth in licensed care is pregnant. This notification shall include the following data:

1. The age of the pregnant child or youth.

2. Whether the child or youth was pregnant prior to entering licensed care or became pregnant while in licensed care.

3. The name of any entity that is providing prenatal care, counseling, or other social services to the child or youth.

4. Whether the child or youth has declined prenatal care, counseling, or other social services.

(c) Lead community-based providers and their subcontractors shall notify the department within 7 days after determining or discovering the pregnancy outcome of a child or youth in licensed care, including whether the pregnancy was terminated or resulted in a live birth, stillbirth, or fetal death as defined in s. 382.002, and such data shall be entered in the system. If the pregnancy resulted in a live birth, the data shall also indicate whether the infant remains in the care of the child or youth, has been placed for adoption, or has been placed in other licensed care.

(d) Data provided to the department pursuant to this subsection shall be entered, aggregated, and reported pursuant to subsection (7) within 12 months after the Florida Safe

Families Network system is deployed to full production operational status. In the interim, such data may be collected and reported by other means.

Section 4. (1) For the 2010-2011 fiscal year, one full-time equivalent position with associated salary rate of 32,000 is authorized and the sum of $55,000 in recurring revenue from the General Revenue Fund is appropriated to the Statewide Guardian Ad Litem Office to implement the Specialty Guardian Ad Litem Pilot Program in the Fourth Judicial Circuit.

(2) For the 2010-2011 fiscal year, the sum of $150,000 in nonrecurring revenue from the General Revenue Fund is appropriated to the Department of Children and Family Services for the purpose of modifying the children and families client and management information system to accommodate the reporting required under s. 409.146(3), Florida Statutes.

Section 5. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1493 Career Offenders
SPONSOR(S): Public Safety & Domestic Security Policy Committee, Cruz and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 2750

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	10 Y, 0 N, As CS	Cunningham	Cunningham
2)	Criminal & Civil Justice Policy Council		Cunningham	Havlicak
3)				
4)				
5)				

SUMMARY ANALYSIS

Section 775.261, F.S. creates the Florida Career Offender Registration Act. The act requires offenders who have been sentenced as a habitual violent felony offender, a violent career criminal, a three-time violent felony offender or as a prison releasee reoffender to register with law enforcement as a "career offender". The Florida Department of Law Enforcement (FDLE) maintains a statewide database containing information regarding career offenders.

The bill makes it a first degree misdemeanor for any person who has reason to believe that a career offender is not complying, or has not complied, with the requirements of section 775.261, F.S., to, with the intent to assist the career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance with the requirements of the section:

- Withhold information from, or fail to notify, the law enforcement agency about the career offender's noncompliance with the requirements of the section, and, if known, the whereabouts of the career offender;
- Harbor, or attempt to harbor, or assist another person in harboring or attempting to harbor, the career offender;
- Conceal or attempt to conceal, or assist another person in concealing or attempting to conceal, the career offender; or
- Provide information to the law enforcement agency regarding the career offender that the person knows to be false information.

This bill creates a 1st degree misdemeanor which may impact local jails.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Section 775.261, F.S. creates the Florida Career Offender Registration Act. The act requires offenders who have been sentenced under specified sentencing statutes to register as a "career offender". Specifically, the act defines the term "career offender" as a person who is designated as a habitual violent felony offender,[1] a violent career criminal,[2] a three-time violent felony offender[3] or as a prison releasee reoffender.[4] These sentencing statutes have different criteria but, in general, are used to sentence offenders who have been convicted on multiple occasions of certain felony offenses to enhanced sentences.

A career offender released from a sanction[5] imposed in this state on or after July 1, 2002 is required to register with the sheriff's office in the county in which the career offender establishes or maintains a permanent or temporary residence within 2 working days of establishing the residence.[6] The career offender is required to provide identifying information to the sheriff such as the offender's name, social security number, age, race, date of birth, address.[7] The sheriff provides the information obtained to FDLE, which maintains a statewide database and a searchable public website with this information.[8] The career offender is required to update his or her residence information within 2 working days after any change.[9] Failure to comply with the requirements of the section is a third degree felony.[10]

According to FDLE, as of April 8, 2010, there were 12,739 career offenders in the registry database. Of that number, 9,962 of the career offenders are incarcerated and 2,777 are living in the community.[11]

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[1] s. 775.084(1)(b), F.S.
[2] s. 775.084(1)(d), F.S.
[3] s. 775.084(1)(c), F.S.
[4] s. 775.082(9), F.S.
[5] For the purposes of this section, the term "sanction "includes but is not limited to, a fine, probation, community control, parole, conditional release, control release or incarceration in a state prison, private correctional facility or local detention facility.
[6] s. 775.261(4)(a), F.S.
[7] *Id.*
[8] http://www.fdle.state.fl.us/coflyer/home.asp
[9] s. 775.261(4)(d), F.S.
[10] s. 775.261(8)(a), F.S.
[11] Data provided by FDLE's Career Offender Unit on April 8, 2010.

Effect of the Bill

The bill makes it a first degree misdemeanor[12] for any person who has reason to believe that a career offender is not complying, or has not complied, with the requirements of the section and who, with the intent to assist the career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance with the requirements of the section:

(a) Withholds information from, or does not notify, the law enforcement agency about the career offender's noncompliance with the requirements of the section, and, if known, the whereabouts of the career offender;

(b) Harbors, or attempts to harbor, or assists another person in harboring or attempting to harbor, the career offender;

(c) Conceals or attempts to conceal, or assists another person in concealing or attempting to conceal, the career offender; or

(d) Provides information to the law enforcement agency regarding the career offender that the person knows to be false information.

Similar language relating to sexual predators and sexual offenders is currently contained in sections 775.21(10)(g), 943.0435(13), and 944.607(12), F.S.

B. SECTION DIRECTORY:

Section 1. Amending s. 775.261, F.S.; relating to the Florida Career Offender Registration Act.

Section 2. Providing effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   This bill creates a 1st degree misdemeanor which may impact local jails.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[12] A 1st degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a $1,000 fine. ss. 775.082 and 775.083, F.S.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the Public Safety & Domestic Security Committee adopted a strike-all amendment to the bill. The amendment specifies that the penalty for violating the bill's provisions is a 1st degree misdemeanor rather than a 3rd degree felony, and provides that the bill is effective July 1, 2010. The bill was reported favorably as a committee substitute. This analysis reflects the committee substitute.

A bill to be entitled

An act relating to career offenders; amending s. 775.261, F.S.; providing that it is a first-degree misdemeanor for a person to perform specified acts with the intent to assist a career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance; providing criminal penalties; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (10) is added to section 775.261, Florida Statutes, to read:

775.261 The Florida Career Offender Registration Act.—

(10) ASSISTING IN NONCOMPLIANCE.—It is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, for a person who has reason to believe that a career offender is not complying, or has not complied, with the requirements of this section and who, with the intent to assist the career offender in eluding a law enforcement agency that is seeking to find the career offender to question the career offender about, or to arrest the career offender for, his or her noncompliance with the requirements of this section, to:

(a) Withhold information from, or fail to notify, the law enforcement agency about the career offender's noncompliance with the requirements of this section and, if known, the whereabouts of the career offender;

(b) Harbor or attempt to harbor, or assist another in harboring or attempting to harbor, the career offender;

(c) Conceal or attempt to conceal, or assist another in concealing or attempting to conceal, the career offender; or

(d) Provide information to the law enforcement agency regarding the career offender which the person knows to be false.

Section 2. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1523 Homeowner Relief
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee, Civil Justice & Courts Policy Committee; Grady and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2270

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee	10 Y, 4 N, As CS	Bond	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee	11 Y, 1 N, As CS	Kliner	Cooper
3)	Criminal & Civil Justice Policy Council		Bond MB	Havlicak RH
4)				
5)				

SUMMARY ANALYSIS

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. Where current judicial foreclosure only allows for sale by auction, this bill gives the creditor the option of foreclosure by auction, foreclosure by negotiated sale, or foreclosure by appraisal. A creditor may simultaneously pursue auction and sale or auction and appraisal.

The process under this bill requires, at a minimum, that a debtor receive at least 30 days notice of the potential foreclosure, and a formal notice that the foreclosure will be finalized 90 days or more in the future. A debtor must be given the name and phone number of an individual who will discuss the default. During the process, the creditor must, upon request, meet with the debtor regarding the foreclosure. There is a limited right of a debtor to object to nonjudicial foreclosure and insist on judicial foreclosure.

As in judicial foreclosure, under this bill debtors maintain their equity of redemption, which is the right to pay off the debt and keep the property, all the way through the process up to the time of auction sale or completion of the process.

Current real estate foreclosure law provides that a court may enter a deficiency judgment, which is the difference between what was owed minus the value of the property foreclosed. Under this bill, a foreclosing creditor may sue for a deficiency, except that a debtor foreclosed out of a homestead property and who acts in good faith during the process is not liable for a deficiency judgment.

This bill will only apply to debts where the debtor has agreed that this process may be used.

This bill has a recurring negative fiscal impact on state revenues, estimated at $199 million in FY 2010-11, $151.3 million in FY 2011-12, and $105 million in FY 2012-13. This bill does not appear to have a fiscal impact on local governments.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

It is common to borrow money and pledge an asset as security for the loan. If the loan is not timely paid, the creditor may take the property, sell it, and apply the proceeds of sale against the debt. Where personal property is pledged, a creditor has the option of judicial or nonjudicial process for taking the property and selling it. Where real property is pledged, however, current law only allows for judicial process known as foreclosure to take the property and sell it for the benefit of the creditor.

The writers of the Uniform Nonjudicial Foreclosure Act believe that:

> In the great majority of foreclosures, judicial involvement is unnecessary because there is no dispute between the debtor and creditor. Using the time of judges and the machinery of the courts to conduct routine foreclosures is often a misallocation of public funds as well as a waste of the secured creditor's resources. The delays and inefficiency associated with foreclosure by judicial action are costly. They increase the risk of vandalism, fire loss, depreciation, damage, and waste. The resulting costs raise the price of private mortgages and erode the economic value of government subsidy program involving mortgages. The availability of a uniform, less expensive, and more expeditious foreclosure procedure will ameliorate these conditions, and will facilitate the secondary market sale and resale of real estate loans

Judicial foreclosures in Florida are clogging the courts. In February, the Florida Supreme Court, in an opinion asking the Legislature to appropriate funds for additional judgeships and additional court resources, said:

> Although the dramatic increase in mortgage foreclosure filings is expected to abate at some future date and therefore may not be a part of the long-term sustained net need, there is evidence that a second wave of foreclosures is now entering the court system and that this workload issue will persist. Various media reports note that many of these new foreclosures are fueled by double digit unemployment, declining housing prices, and the lingering recession. Over a 36-month period (Fiscal Year 2005-2006 to Fiscal Year 2007-2008), real property/mortgage foreclosure filings increased by 396 percent in our trial courts. During the same time period, the clearance rate for real property/mortgage foreclosure cases decreased by 52 percent, from 94 percent in Fiscal Year 2005-2006 to 42 percent in Fiscal Year 2007-2008.

According to Realty Trac, Florida has the third highest rate of mortgage foreclosures in the country with one in every 158 housing units in foreclosure.[1]

This bill creates an optional nonjudicial foreclosure process modeled on the Uniform Nonjudicial Foreclosure Act. The bill creates ch. 52, F.S.

Application

This bill authorizes the nonjudicial foreclosure of any security interest in real property provided that the debtor has agreed in substance in the security instrument that foreclosure may be made by nonjudicial process. The original notice of foreclosure must be given after July 1, 2010.

Nonjudicial foreclosure may not be used to foreclose statutory liens other than those owed to a common interest community[2], property in a common interest community where such property is considered personal property, or a security interest in rents or proceeds of real property.

Nonjudicial foreclosure may not be pursued if a judicial foreclosure case is pending, or if a judicial proceeding challenging the note or mortgage is pending.

Protection of the Process

In general, the parties to a contract may vary their legal rights and remedies in the contract. This bill provides that the parties to a mortgage generally may not vary their rights and obligations under ch. 52, F.S., unless the chapter specifically allows variance. For instance, under this bill the parties may agree to longer notice periods, and commercial debtors may agree that a guarantor will not receive notice of a foreclosure.

Form of Notice

Current law does not require a creditor to give any notice to a debtor prior to commencing foreclosure proceedings.[3] Judicial foreclosure is commenced by formal service of process upon every defendant. Formal service is accomplished by hand delivery of a summons and complaint to the person. Where a defendant cannot be found, service of process for the foreclosure may be accomplished by publication pursuant to ch. 49, F.S., although no deficiency judgment can be entered against a defendant served by publication.

As to homestead property, this bill requires that notices of default and notices of foreclosure must be provided to the owner by both regular United States mail and by a commercially reasonable carrier other the U.S. Postal Service. As to all other property, those notices may be by hand delivery, mail, private carrier, or electronic. The parties may agree to limit the available forms of notice. If a person cannot be found, a person sending notice must make a reasonable effort to find the person; following the requirements under ch. 49, F.S., are deemed sufficient.

Notice of Default, Cure

This bill requires that a notice of default be furnished to a debtor before foreclosure. The notice must contain:

- Facts supporting the claim that the mortgage is in default.
- What the debtor must do to cure the default.
- The name, address and telephone number of an individual who represents the creditor and who can be contacted regarding the default.
- A statement that foreclosure may be started if the default is not timely cured.

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[1] *In Re: Certification of Need for Additional Judges*, Supreme Court Case No. 10-320, February 25, 2010.
[2] A common interest community would be condominium association or a homeowners association.
[3] Mortgage lenders commonly communicate with delinquent debtors on numerous occasions prior to filing a foreclosure action.

The creditor must wait at least 30 days after the notice of default was given before giving the notice of foreclosure that commences the foreclosure process. If the default is monetary, the debtor may cure the default within those 30 days. If the default is non-monetary[4], the debtor must commence the cure within 30 days and must complete it within 90 days in order to avoid foreclosure. A nonresidential creditor need not be given a second chance to cure a nonmonetary default that occurs within 1 year. A creditor must cooperate with a debtor in default by promptly providing, upon request, information regarding the default.

Notice of Foreclosure

In judicial foreclosure, the formal process is started by filing a complaint with the clerk of court, and serving a summons and a copy of the complaint on each defendant. Under this bill, delivery of a notice of foreclosure starts the formal nonjudicial foreclosure process.

In judicial foreclosure, the plaintiff records a lis pendens in the public records, which gives notice to the general public of the pending judicial foreclosure. Under this bill, the notice of foreclosure is recorded and acts like a lis pendens. Like a lis pendens, there is no requirement to notify persons who may assert an interest in the real property that is recorded in the public records after the recording of the notice of foreclosure, as their interest will be terminated should the foreclosure be completed.

Within 5 days after the filing of a notice of foreclosure in the public records, the creditor is required to furnish a copy (see notice requirements above) to the following persons:

- Any debtor under the mortgage.
- Any person specified in the mortgage to receive notice.
- Any person listed in the public records as an owner of the real property.
- Any other person who may hold a real property interest.
- Any person who has recorded a request for notice.
- An officer or director of an applicable common interest community.

Under judicial foreclosure, there is no requirement to post notice of the foreclosure on the property.[5] Under this bill, within 10 days after recording the notice of foreclosure, the creditor must attach a copy upon a conspicuous place on the real property.

This bill provides the requirements of a notice of foreclosure. The notice must:

- Have this heading: NOTICE OF FORECLOSURE. YOU ARE HEREBY NOTIFIED THAT YOU MAY LOSE YOUR RIGHTS TO CERTAIN PROPERTY. READ THIS NOTICE IMMEDIATELY AND CAREFULLY.
- Contain the date, owner name, property description, and a list of personal property secured by the mortgage.
- Contain the date and recording information of the mortgage or other security instrument.
- State that a default exists, with the facts supporting the default.
- State that a foreclosure is being initiated and include a statement of whether the creditor is electing to accelerate the debt.
- Include redemption information.
- State the method of foreclosure elected.
- Include notice that the foreclosure will terminate legal rights.
- Include an explanation of a debtor's right to avoid a deficiency, if applicable.
- Include, if applicable, information regarding objection to negotiated sale or appraisal.
- If homestead, include information on the right to request a meeting with the creditor.

[4] Non-monetary defaults occur significantly less often than monetary defaults. An example of a non-monetary default is a failure to maintain the property where the failure is so significant that it impairs the value of the security interest.
[5] Which is one reason that many tenants fail to learn of a pending foreclosure action.

- Include the name, address and phone number of a representative of the creditor.
- Include a statement informing the recipient that he or she can file an objection to the foreclosure in the courts, and the time within which such objection must be filed.

This bill also provides that any person may record in the public records a request for notice of foreclosure. If a creditor later commences a nonjudicial foreclosure by the filing of a notice of foreclosure, but fails to timely give a notice of foreclosure to someone who has properly recorded a request, the creditor must pay a $500 penalty to such person. If the recorded request for notice states that the person has a legal interest in the property and that person is not timely given notice, that person's legal interest in the property will not be foreclosed.[6] There is no provision in current law for a person to demand notice should a foreclosure be filed in the future.

Meeting Between Creditor and Debtor

Current statutory judicial foreclosure law does not require a foreclosing creditor to meet with a debtor on the debtor's request, although many local courts have enacted such requirements. Those requirements are usually tied to a recently enacted requirement that the creditor pay a mediator as much as $750 a case.[7]

Under this bill, if a person who has received a notice of foreclosure requests a meeting with the creditor within 30 days of receipt of the notice, the creditor must schedule and attend a meeting with that person. The representative who attends the meeting must be given the authority to cancel the foreclosure if the representative determines that there is no legal basis for the foreclosure. The meeting is not required to be in person, it may be conducted over the phone. At the meeting, the representative must have records to show entitlement to the foreclosure. If the debtor wishes to discuss modification, the debtor must bring financial statements to the meeting. Within 10 days after the meeting, the representative must inform the persons who attended the meeting of any decision regarding discontinuation of the foreclosure or modification of the mortgage. Statements made by any person at the meeting are inadmissible in any litigation. The form of this meeting, including the confidentiality, is similar to the mediated meetings required by local court orders, albeit without the presence of a mediator.

Foreclosure Time

A foreclosure under this bill must be completed no less than 90 days after the notice of foreclosure, nor more than 1 year after. These time periods are tolled should any court enjoin or stay the foreclosure (including during a bankruptcy stay). There is no time limit for completion of a judicial foreclosure.

Moving Foreclosure to Court

This bill provides that a creditor may file a court action for violation of ch. 52, F.S. The court may issue any order necessary. This action may be filed at any time prior to the time of foreclosure.

This bill also provides that any person who was required to be given a notice of foreclosure may file an action demanding that the foreclosure proceed through legal process. As to homestead residential real property, the complaint must be filed within 45 days of receipt of the notice of foreclosure. The complaint must state a bona fide defense to the foreclosure, and must include a certificate under oath certifying that the complaint is not being filed for the purpose of delay. If the court finds that the complaint was filed solely for delay, the court must dismiss the action. If the homestead debtor files an affidavit certifying that payment of the court filing fee is a hardship, the foreclosing creditor must pay the

[6] For instance, a tenant could file this request when commencing a tenancy, and thereby guarantee adequate advance notice should a nonjudicial foreclosure be filed against the leased property sometime in the future.
[7] *In Re: Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Florida Supreme Court Case No. AOSC09-54, December 28, 2009.

filing fee. If the debtor is represented by an attorney, the attorney filing the action must certify to the facts represented by the debtor. A lawyer representing a debtor in such action must also, in writing, inform the debtor that electing court action means that the debtor may be subject to a deficiency judgment and a negative credit rating. The writing must be acknowledged by the debtor. The bill provides that failure to provide this notice is "negligence per se." If the court finds that the affidavits are false or without a reasonable basis, the debtor and his or her attorney are jointly and severally liable for the costs and fees of the foreclosing creditor.

As to nonhomestead property, the complaint must be filed within 20 days of receipt of the notice of foreclosure. The complaint must state a bona fide defense to the foreclosure, and must include a certificate under oath certifying that the complaint is not being filed for the purpose of delay. If the court finds that the complaint was filed solely for delay, the court must dismiss the action.

This bill also provides a judicial means to set aside a wrongful foreclosure (see below).

Equity of Redemption

Under current judicial foreclosure law, any person with an interest in the property being foreclosed may redeem the property at any time prior to the auction sale.[8] Redemption is the right to stop the foreclosure by payment of the underlying debt. This bill provides the same right in ch. 52, F.S., namely, that any person with an interest in the property may redeem it at any time prior to the time of foreclosure set in the notice of foreclosure. A creditor must cooperate with any request for the redemption amount.

Creditor Option: Foreclosure by Auction

This bill provides for foreclosure by auction. It is one of the three options available to a creditor. A foreclosing creditor who elects foreclosure by auction must obtain evidence of title and provide a copy of such evidence to any bidder at the sale. The evidence of title must state that the issuer is willing to provide evidence of title to the winning bidder. By contrast, buyers at a judicial foreclosure sale are not given any evidence of title and therefore purchase the property as if receiving a quit claim deed.[9]

Current judicial foreclosure law requires advertisement of the sale. This bill similarly requires the creditor to advertise the foreclosure sale. The creditor must elect one of two methods for advertising the sale:

- The creditor may advertise the sale under s. 45.031, F.S., which is current law providing advertising requirements for judicial sales. Section 45.031(2), F.S., requires that notice of sale must be published once a week for 2 consecutive weeks, published in a newspaper of general circulation in the county in which the property is located, the second of which must be at least 5 days prior to the sale.

- The creditor may advertise the sale once per week for 3 consecutive weeks in a newspaper of general circulation in the county in which the property is located. The 3rd notice must be no fewer than 7 days prior to the auction nor more than 30 days.

Current judicial foreclosure law does not require a creditor to furnish a copy of the advertisement of the sale to the parties, although only defendants who have filed papers in the case will receive a copy of the court order setting the sale date. This bill requires the creditor to furnish a copy of the advertisement to all persons entitled to a notice of foreclosure at least 21 days prior to the sale date.

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[8] Section 45.0315, F.S.

[9] Unsophisticated bidders sometimes bid on and buy properties that have title problems, such as a federal tax lien or a superior lien.

Current judicial foreclosure law does not address whether a foreclosing creditor may place a sign advertising the auction on the property. This bill allows, but does not require, a creditor to place a sign on the property advertising the sale.

An auction sale under this bill must be conducted at a date, time and place that is authorized for judicial sales.

Where multiple parcels are under one security interest, this bill allows a creditor to sell the parcels separately or together, or both, in order to obtain the highest price. If sold separately, the auctions must stop once the total bids exceed the amount owed.

Under current judicial foreclosure law, a creditor must obtain court permission to postpone the auction sale. This bill allows the person conducting a nonjudicial auction sale to postpone the sale for any reason. The postponement must be announced at the sale. A postponement may not extend for more than 30 days.

Judicial foreclosure auctions are either conducted by a deputy clerk of the court by verbal auction, requiring personal attendance by persons who wish to bid, or conducted by vendors by electronic auction conducted over this internet. This bill provides that a nonjudicial foreclosure sale is generally conducted like a judicial auction by a deputy clerk. In addition, in an auction under this bill:

- The auctioneer may demand that prospective bidders verify that they can make the required deposit before they are allowed to bid.
- The auctioneer may enter credit bids for the creditor.
- A bidder not in attendance may submit a fixed written bid in advance.

In a sale under this bill, the winning bidder must immediately deposit 10 percent of the bid amount, unless the creditor agrees to a smaller deposit. The advertisement for the auction must state the required deposit.

In a judicial sale, the winning bidder must pay the full bid on the day of the sale, or lose the deposit. Under this bill, a winning bidder in a nonjudicial sale has 7 days to pay the remainder of the bid price before losing the deposit

In judicial foreclosure, the clerk gives the winning bidder a certificate of title, which is the equivalent of a quitclaim deed. In a sale under this bill, the creditor must record for the winning bidder a warranty deed together with an affidavit certifying that the foreclosure procedure was completed correctly.

Creditor Option: Foreclosure by Negotiated Sale

Foreclosure by negotiated sale is not a remedy available to the court in a judicial foreclosure. It is common for judicial foreclosures to be resolved through a short sale, where the creditor and debtor agree to a sale. However, under current law only debtors initiate short sales because a creditor cannot easily market the property prior to taking title and possession after auction.

Under this bill, the creditor may elect foreclosure by negotiated sale. The creditor may list the property for sale through a broker, and may place a sign on the property. If the creditor receives a contract, the creditor must notify all persons entitled to notice of the foreclosure at least 30 days prior to the closing date of the date of closing and the expected proceeds of the negotiated sale.

At closing, the creditor must give the buyer a warranty deed and an affidavit certifying that the foreclosure procedure was completed correctly. The deed and affidavit must be recorded to transfer title.

Any person who receives the notice of the negotiated sale may object to the sale by giving notice to the creditor at least 7 days prior to closing. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.[10]

If a person fails to timely object, the person may not claim that the sale price was inadequate.

Creditor Option: Foreclosure by Appraisal

Foreclosure by appraisal is not a remedy available to the court in a judicial foreclosure. In short, foreclosure by appraisal under this bill is a means by which the creditor takes title to the property at the conclusion of the foreclosure, crediting the debtor's account with the appraised value of the property.[11]

Under this bill, the foreclosing creditor seeking foreclosure by appraisal must obtain an appraisal of the property dated no more than 60 days prior to the date of foreclosure. At least 30 days prior to the date of foreclosure, the creditor must give notice to all persons entitle to notice of the foreclosure by appraisal which includes:

- A copy of the appraisal report.
- The date that the foreclosure by appraisal will be finalized.
- The amount to be credited to the debtor and the amount, if any, to be paid to junior creditors.
- Notice that title will be transferred.
- Notice that any objection must be filed no later than 7 days prior to the date that the foreclosure by appraisal will be finalized.

If there is no timely objection, the foreclosure by appraisal is completed by recording an affidavit of the creditor stating that the process has been properly completed. The bill provides that this affidavit serves to transfer title to the creditor.

Any person who receives the notice of foreclosure by appraisal may object to the foreclosure by appraisal by giving notice to the creditor at least 7 days prior to the date of foreclosure. Upon receipt of the notice, the creditor must elect one of the following options:

- Discontinue the foreclosure.
- Give notice to the objecting person that the person's interest in the real property will be preserved from termination by the foreclosure.
- Pay the person a liquidated sum for that person's interest.

If a person fails to timely object, the person may not claim that the foreclosure amount was inadequate.

Application of Proceeds

In judicial foreclosure, the proceeds of a judicial sale are paid to the clerk, and applied in the following order, until exhausted:

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[10] This option is only available to persons whose interests can be resolved by payment of money. For instance, should a second mortgage holder timely object to the sale, the creditor would have to pay the second mortgage in full in order to clear the interest.

[11] An appraisal determines fair market value of a negotiated sale. In general, property sells at auction for far less than it would at a negotiated sale.

- To clerk's fees that are outstanding.
- To the plaintiff, up to the amount of the final judgment. The final judgment will include costs of the foreclosure and attorney's fees.
- To a surplus trustee, for distribution to junior creditors or the former owner, as their interests appear.

Under this bill, the proceeds of the foreclosure are applied as follows, until exhausted:

- Expenses of the foreclosure.
- The debt owed to the creditor.
- Other liens, in the order of their priority.
- The former owner.

A creditor acting in good faith in making a distribution is not liable for making an erroneous distribution.

Actions Against a Creditor, Setting Aside a Foreclosure

In judicial foreclosure, a person seeking relief from a wrongful foreclosure has the following remedies:

- A defendant can file an appeal of the final judgment of foreclosure. The appeal must be filed within 30 days of the final judgment of foreclosure.[12]

- A person may challenge the auction itself by motion filed with the trial court within 10 days after the sale.

- A defendant can ask the trial court to set aside the final judgment of foreclosure. An allegation of mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; or fraud, misrepresentation, or other misconduct of an adverse party must be filed within 1 year of the final judgment. If on any other ground, it must be filed within a reasonable period of time.

- Any interested person may file a new lawsuit to set aside the prior judgment.

Under this bill, a person seeking relief from, or damages related to, a nonjudicial foreclosure has the following remedies (which must be pursued in a civil court action):

- A person has an action for damages against a foreclosing creditor for any violation of ch. 52, F.S., or applicable law or principle of equity. The complaint must be filed within 3 years of the time of foreclosure.

- A person may seek to set aside the foreclosure or correct a violation of ch. 52, F.S. The complaint must be filed within 1 year of the time of foreclosure.

In any action, the recording of the affidavits required at the time of foreclosure conclusively establishes compliance with the requirements of ch. 52, F.S. Accordingly, a person challenging the nonjudicial foreclosure has the burden of proof.

Possession of the Foreclosed Real Property

In judicial foreclosure, the clerk may issue to the winning bidder a writ of possession[13] if more than 10 days has elapsed since the sale and provided that no person has filed a motion challenging the sale.

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[12] Florida Rules of Appellate Procedure 9.110(b).

[13] A writ of possession is an order to the sheriff directing the sheriff to put a person into possession of real property by removing any other person from the property. Upon service, any person in possession has 24 hours to remove his or her

Under this bill, the person who has taken title to the real property may obtain a writ of possession from the clerk or may file an action for ejectment or unlawful detainer.

Deficiency Judgment

In judicial foreclosure, the foreclosing creditor may seek a deficiency judgment against any person who is legally liable for the foreclosed debt. A deficiency judgment is a money judgment that, like any other money judgment, is collectable for up to 20 years.

This bill allows a foreclosing creditor to similarly seek a deficiency judgment in a court action. However, a debtor will not be liable for a deficiency judgment if the debtor acted in good faith in the process. A debtor acted in good faith if the debtor:

- Peacefully and timely vacated the real property at the conclusion of the process.
- Did not significantly damage the property or significantly contaminate the property with hazardous materials, and leave such damage or contamination.
- Did not commit fraud against the creditor.
- Did not engage in criminal activity on the property that significantly reduced the property value.
- Did not allow significant damage to the property to occur resulting from a failure to take reasonable precautions.
- Allowed reasonable access to the property for inspection and, if the creditor elected foreclosure by negotiated sale, reasonable access to prospective purchasers.

This provision does not prohibit a deficiency judgment that may be owed to someone other than the foreclosing creditor.[14]

In judicial foreclosure, the foreclosing creditor is entitled to a deficiency judgment for the unpaid amount on the mortgage less the fair market value of the property securing the mortgage.[15] Under this bill, where a deficiency may be owed, the deficiency must be determined in a judicial proceeding. The deficiency under foreclosure by negotiated sale or foreclosure by appraisal is calculated by taking the amount owed to the creditor (principal, interest, and costs of foreclosure) and subtracting the net sale proceeds or the appraisal value. Under sale by auction, the deficiency is the amount owed minus the greater of the winning bid or 90 percent of the fair market value of the property.

Effect on Credit Rating

In judicial foreclosure, credit rating agencies usually learn of the foreclosure and reduce any debtor's credit rating as a result of the foreclosure. Credit rating agencies learn of the foreclosure both as a result of reporting by creditors and by examination of the public records. This bill creates s. 52.607, F.S., to provide that if a debtor acts in good faith as regards the nonjudicial foreclosure (see discussion of good faith above), the debtor is not considered to have been in default and the foreclosing creditor is required to report to such agencies that the debtor is not in default under the obligation.

There are concerns regarding this provision, see DRAFTING ISSUES OR OTHER COMMENTS.

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belongings. If the belongings are not timely removed or the other person refuses to leave, the sheriff may, at the conclusion of the 24 hours, forcibly remove such persons and their belongings.

[14] For instance, if the first mortgage is the foreclosing creditor, the holder of a second mortgage could still seek a deficiency judgment.

[15] 37 Fla.Jur.2d Mortgages, s. 373.

Discontinuation of Foreclosure

In judicial foreclosure, the foreclosing creditor may file a voluntary dismissal of the case at any time, unless a defendant has filed a counterclaim. Court rules require the foreclosing creditor to mail a copy of the notice of dismissal. The notice of dismissal simply states that the case is dismissed.

Under this bill, the foreclosing creditor may discontinue the foreclosure at any time prior to completion of the sale by auction, closing of the negotiated sale, or the time of foreclosure as set in the notice of foreclosure by appraisal. The foreclosing creditor must give notice to every person entitled to a notice of foreclosure that informs such persons that the foreclosing creditor intends to either:

- Pursue a new foreclosure by the same method.
- Continue to foreclose by another authorized method and under the notice of foreclosure previously given.
- Commence foreclosure by a different authorized method and under a new notice of foreclosure.
- Commence judicial foreclosure, provided the foreclosing creditor does not seek a deficiency.
- Abandon foreclosure.

However, this bill penalizes a foreclosing creditor for abandoning a foreclosure and then commencing a judicial foreclosure. Such creditor will not be entitled to a deficiency judgment and will have the limit on assessments owed to a condominium or homeowners association.

Documentary Stamp Taxes

In a judicial foreclosure, the documentary stamp tax is calculated based on the winning bid price.[16] In a foreclosure under this bill, the documentary stamp tax is calculated based on:

- The winning bid, if foreclosure by auction;
- The sale price, if foreclosure by negotiated sale; or
- The appraised price, if foreclosure by appraisal.

Miscellaneous

This bill is to be interpreted by the courts in conformity with judicial decisions in other states that have adopted the Uniform Nonjudicial Foreclosure Act.

This bill modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act.

The statutory limits on liability of a first mortgage holder for unpaid assessments owed to a condominium or homeowners association at the time of a judicial foreclosure sale apply to a nonjudicial foreclosure under this bill.

The provisions for judicial foreclosure, at s. 702.01, F.S., are amended to allow for foreclosure under ch. 52, F.S.

B. SECTION DIRECTORY:

Section 1 creates Part I of ch. 52, F.S., creating general provisions for nonjudicial foreclosure.

Section 2 creates Part II of ch. 52, F.S., creating procedures that are required prior to foreclosure.

[16] Section 201.02(9), F.S.

Section 3 creates Part III of ch. 52, F.S., creating procedures for foreclosure by auction.

Section 4 creates Part IV of ch. 52, F.S., creating procedures for foreclosure by negotiated sale.

Section 5 creates Part V of ch. 52, F.S., creating procedures for foreclosure by appraisal.

Section 6 creates Part VI of ch. 52, F.S., setting forth rights of the parties after foreclosure.

Section 7 creates Part VII of ch. 52, F.S., providing for discontinuation of a foreclosure.

Section 8 creates Part VIII of ch. 52, F.S., creating miscellaneous provisions related to nonjudicial foreclosure.

Section 9 amends s. 702.01, F.S., to provide for nonjudicial foreclosure.

Section 10 provides an effective date of July 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Revenue Estimating Conference has determined the following impact of this bill as first filed, in millions[17]:

	FY 2010-11	FY 2011-12	FY 2012-13
General Revenue	($ 14.0)	($ 10.4)	($ 7.3)
G.R. Service Charge	($ 14.8)	($ 11.3)	($ 7.8)
State Court Revenue T.F.	($170.2)	($129.6)	($ 89.9)
Total	($199.0)	($151.3)	($105.0)

The amendments do this bill do not appear to affect the assumptions behind this estimate.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill is likely to have a substantial positive fiscal impact on the private sector. Foreclosure is expensive to creditors. A foreclosing creditor will save court filing fees of as much as $1,900 a case, plus court costs of several hundred dollars a case. Foreclosing creditors under this bill will realize smaller losses from uncollected interest as this process should be significantly faster than judicial foreclosure.

Auction sales of real property commonly have a sale price less than fair market value. The options created by this bill (foreclosure by negotiated sale, foreclosure by appraisal) are expected to lead to

[17] Revenue Estimating Conference, 2010 results, page 370.

higher sale prices. Higher foreclosure returns to creditors don't just benefit the foreclosing creditor, they benefit the real estate market (higher comparable sales prices), second mortgage holders (higher chance of payment of some or all of the debt), and in some cases debtors (where there are funds remaining at the conclusion of the process).

Most debtors facing foreclosure of their homestead property will qualify under this bill to avoid a deficiency judgment. These debtors should realize significant financial savings plus a financial fresh start.

This bill may have a negative fiscal impact on some vendors of foreclosure-related services whose services would not be required in nonjudicial foreclosure actions, such as private process servers.

D. FISCAL COMMENTS:

Foreclosures are clogging the courts, leading to delays not just in foreclosures but in all litigation. One economist estimated in 2009 that such delays cost Florida businesses $10.1 billion in direct costs and another $7.3 billion in indirect costs annually. In that this bill may reduce the delays occasioned by foreclosure cases, this bill may have a significant positive indirect fiscal impact on Florida's business climate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments - Possible Conflict with Federal Credit Reporting Laws

Section 52.607, F.S., created by this bill, requires a foreclosing creditor to report that a debtor who acts in good faith is not in default of the debtor's obligation to pay the debt owed to the creditor. However, such debtor has defaulted, which is why the debtor is in foreclosure. Credit reporting agencies (credit bureaus) and businesses that grant credit are regulated by the federal Fair Credit Reporting Act. 15 U.S.C. s. 1681s–2 requires that any business furnishing information to a credit reporting agency must report accurate information. 15 U.S.C. s. 1681t(b)(1)(F) prohibits states from enacting any law modifying this requirement. Where they are in conflict with one another, federal law controls over state law.[18] It is possible that proposed s. 52.607, F.S., conflicts with federal law.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 22, 2010, the Civil Justice & Courts Policy Committee adopted 1 amendment to this bill. The amendment provides that, as to foreclosure of homestead real property, the owner may object to nonjudicial foreclosure within 90 days of receiving notice of the foreclosure. If the owner timely objects, the foreclosing creditor must abandon nonjudicial foreclosure and must utilize the judicial foreclosure procedure. The bill was then reported favorably as a committee substitute.

[18] See art. VI, cl. 2 of the federal constitution.

A bill to be entitled

An act relating to homeowner relief; creating parts I, II, III, IV, V, VI, VII, and VIII of chapter 52, F.S.; providing general provisions for an alternative method of foreclosures other than under the judicial system; providing a short title; providing for scope of applicability; providing definitions; providing for variation by agreement; providing for application of supplemental principles of law and equity; providing criteria for notice and knowledge; providing for transactions creating a security interest; providing for time of foreclosure; providing procedures, requirements, and limitations before foreclosure; specifying a right to foreclose; requiring a notice of default; providing a right to cure; providing requirements for a notice of foreclosure; providing for a meeting and meeting requirements to object to foreclosure; providing a period of limitation for foreclosure; providing for judicial supervision of foreclosure; providing procedures and limitations for foreclosures brought under the judicial system; exempting homestead debtors from certain filing fees under certain circumstances; providing for a right to redeem collateral; providing authority, requirements, procedures, and limitations on foreclosures by auction, foreclosures by negotiated sale, and foreclosures by appraisal; providing for rights after foreclosure; providing for application of proceeds, transfer of title, actions for damages or to set aside a foreclosure,

possession after foreclosure, judgments for deficiencies, and determinations of amounts of a deficiency; providing for effect of good faith by a debtor; providing application and construction; providing authority, requirements, procedures, and limitations on discontinuation of a foreclosure; providing for uniformity of application and construction; specifying a relation to the Electronic Signatures in Global and National Commerce Act; providing criteria for calculating documentary stamp taxes for certain purposes; amending s. 702.01, F.S.; revising requirements for mortgage foreclosures in equity; providing construction; providing an effective date.

WHEREAS, Florida is still recovering from the worst housing bubble in memory, and

WHEREAS, many Floridians are left unable to pay their mortgage debt, taxes, or insurance and fees and face the prospect of huge deficiency judgments, that is, they are liable for mortgage debt that exceeds the value of their homes, and

WHEREAS, many homeowner and condominium associations are struggling to maintain common areas because owners are not paying dues and assessments, and

WHEREAS, municipalities, counties, and school districts are struggling to pay for the valuable services they provide because so many homeowners are not paying real estate taxes owed, and

WHEREAS, Florida's courts are overburdened with foreclosure cases, with nearly 500,000 backlogged cases as of December 31,

2009, and expected delays of 18-24 month periods before foreclosure cases are resolved, and

WHERE, local community banks are unable to make new loans to small businesses to create new jobs because their capital is tied up in defaulted real estate mortgages that are bogged down in the courts, and

WHEREAS, Florida's economy will not bottom out, and sustained recovery cannot begin, until real estate supply and demand balance and homeowner debt issues are resolved, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Part I of chapter 52, Florida Statutes, consisting of sections 52.101, 52.102, 52.103, 52.104, 52.105, 52.106, 52.107, and 52.108, is created to read:

PART I

GENERAL PROVISIONS

52.101 Short title; scope of applicability.—

(1) This chapter may be cited as the "Homeowner Relief and Housing Recovery Act."

(2) In lieu of any other foreclosure remedy which may be available under the laws of this state under the judicial system, this chapter may, at the option of the foreclosing creditor, be used to effect a foreclosure of a security instrument. However, if the foreclosing creditor does not elect to use this chapter to effect a foreclosure, nothing in this

chapter is intended to modify any other foreclosure remedy available under the laws of this state.

52.102 Definitions.—For purposes of this chapter:

(1) "Collateral" means property, real or personal, subject to a security interest.

(2) "Common interest community" means real property for which a person is obligated to pay real property taxes, insurance premiums, maintenance, or improvement of other real property described in a declaration or other governing documents, however denominated, by virtue of the community's or association's ownership thereof or the holding of a leasehold interest of at least 20 years, including renewal options therein. The term "common interest community" includes a community governed by one or more condominium associations as defined in s. 718.103, by a cooperative association as defined in s. 719.103, or by a homeowners' association as defined in s. 720.301.

(3) "Day" means a calendar day.

(4) "Debtor" means a person that owes payment or other performance of an obligation, whether absolute or conditional, primary or secondary, secured under a security instrument, whether or not the security instrument imposes personal liability on the debtor. The term does not include a person whose sole interest in the property is a security interest.

(5) "Evidence of title" means a title insurance policy, a preliminary title report or binder, a title insurance commitment, an attorney's opinion of title based on an examination of the public records or an abstract, or any other

means of reporting the state of title to real estate that is customary in the locality.

(6) "Expenses of foreclosure" means the lesser of the reasonable costs incurred by a secured creditor or the maximum amounts permitted by any other laws of this state in connection with a foreclosure for transmission of notices, advertising, evidence of title, inspections and examinations of the collateral, management and securing of the collateral, liability insurance, filing and recording fees, attorneys' fees and litigation expenses incurred pursuant to ss. 52.207 and 52.601 to the extent provided in the security instrument or authorized by law, appraisal fees, the fee of the person conducting the sale in the case of a foreclosure by auction, fees of court-appointed receivers, and other expenses reasonably necessary to the foreclosure.

(7) "Foreclosing creditor" means a secured creditor who is engaged in a foreclosure under this chapter.

(8) "Guarantor" means a person liable for the debt of another, and includes a surety and an accommodation party.

(9) "Interest holder" means a person who owns a legally recognized interest in real or personal property that is subordinate in priority to a security interest foreclosed under this chapter.

(10) "Original notice of foreclosure" means the first notice of foreclosure sent pursuant to s. 52.204 instituting a foreclosure under this chapter.

(11) "Purchase-money obligation" means an obligation incurred in order to pay part or all of the purchase price of

residential real property collateral. An obligation is not a purchase-money obligation if any part of the real property securing it is not residential real property. A purchase-money obligation includes an obligation:

(a) Incurred to the vendor of the real property;

(b) Owed to a third-party lender to pay a loan made to pay part or all of the purchase price of the real property;

(c) Incurred to purchase labor and materials for the construction of substantial improvements on the real property; or

(d) To pay a loan all of the proceeds of which were used to repay in full an obligation of the type described in paragraphs (a)-(c).

(12) "Real property" means any estate or interest in, over, or under land, including minerals, structures, fixtures, and other things that by custom, usage, or law pass with a conveyance of land though not described or mentioned in the contract of sale or instrument of conveyance. The term includes the interest of a landlord or tenant and, unless under the law of the state in which the property is located that interest is personal property, an interest in a common interest community.

(13) "Record" when used as a verb, means to take the actions necessary to perfect an interest in real property under the laws of this state.

(14) "Record" used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "Residential" means:

(a) As applied to an interest holder, an individual who holds a possessory interest, other than a leasehold interest with a duration of 1 year or less, in residential real property in which a security interest exists, and any person that is wholly owned and controlled by such an individual or individuals.

(b) As applied to a debtor, an individual who is obligated, primarily or secondarily, on an obligation secured in whole or in part by residential real property, and any person that is wholly owned and controlled by such an individual or individuals.

(16) "Residential real property" means real property that, when a security instrument is entered into, is used or is intended by its owner to be used primarily for the personal, family, or household purposes of its owner and is improved, or is intended by its owner to be improved, by one to four dwelling units.

(17) "Secured creditor" means a creditor that has the right to foreclose a security interest in real property under this chapter.

(18) "Security instrument" means a mortgage, deed of trust, security deed, contract for deed, agreement for deed, land sale contract, lease creating a security interest, or other contract or conveyance that creates or provides for an interest in real property to secure payment or performance of an obligation, whether by acquisition or retention of a lien, a lessor's interest under a lease, or title to the real property.

A security instrument may also create a security interest in personal property. If a security instrument makes a default under any other agreement a default under the security instrument, the security instrument includes the other agreement. The term includes any modification or amendment of a security instrument, and includes a lien on real property created by a record to secure an obligation owed by an owner of the real property to an association in a common interest community or under covenants running with the real property.

(19) "Security interest" means an interest in real or personal property that secures payment or performance of an obligation.

(20) "Sign" means:

(a) Execute or adopt a tangible symbol with the present intent to authenticate a record; or

(b) Attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

(21) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(22) "Time of foreclosure" means the time that title to real property collateral passes to the person acquiring it by virtue of foreclosure under this chapter.

52.103 Application.—

(1) Except as otherwise provided in subsection (2), this chapter authorizes the nonjudicial foreclosure of every form of

security interest in real property located in this state and related personal property, regardless of when the security interest was entered into, if the original notice of foreclosure is given after July 1, 2010, and if the debtor has agreed in substance in the security instrument or in a separate written document that the security interest may be foreclosed using a nonjudicial process.

(2) This chapter may not be used to foreclose:

(a) A lien created by statute or operation of law, except a lien of an owners' association on property in a common interest community;

(b) A security interest in property in a common interest community if under the law of this state that interest is personal property; or

(c) A security interest in rents or proceeds of real property.

(3) This chapter does not preclude or govern foreclosure or other enforcement of security interests in real property by judicial or other action permitted by any other laws of this state.

(a) A secured creditor may not take action in pursuance of foreclosure under this chapter if a judicial proceeding is pending in this state to foreclose the security interest or to enforce the secured obligation against a person primarily liable for the obligation.

(b) A secured creditor may not commence or pursue foreclosure under this chapter if a judicial proceeding is

pending in this state to challenge the existence, validity, or enforceability of the security interest to be foreclosed.

(c) Except as provided in s. 52.208(2), foreclosure under this chapter may proceed even if a judicial proceeding is pending or a judicial order has been obtained for appointment or supervision of a receiver of the collateral, possession of the collateral, enforcement of an assignment of rents or other proceeds of the collateral, or collection or sequestration of rents or other proceeds of the collateral or to enforce the secured obligation against a guarantor.

(4) If a security instrument covers both real property and personal property, the secured creditor may proceed under this chapter as to both the real property and personal property to the extent permitted by chapter 679.

52.104 Variation by agreement.—

(1) Except as otherwise provided in subsections (2)-(4), the parties to a security instrument may not vary by agreement the effect of a provision of this chapter.

(2) The time within which a person must respond to a notice sent by a secured creditor may be extended by agreement.

(3) The parties to a security instrument may vary the effect of any provision of this chapter that by its terms permits the parties to do so.

(4) The parties by agreement may determine the standards by which performance of obligations under this chapter is to be measured if those standards are not manifestly unreasonable.

(5) If every debtor under a security instrument is not a residential debtor, an agreement by a guarantor waiving the

right to receive notices under this chapter with respect to the foreclosure of the property of a debtor who is not a guarantor is enforceable unless a waiver is unenforceable under other applicable law.

52.105 Supplemental principles of law and equity applicable.—Unless displaced by a particular provision of this chapter, the principles of law and equity affecting security interests in real property supplement this chapter.

52.106 Notice and knowledge.—For purposes of this section:

(1) The following definitions apply:

(a) "Address" means a physical or an electronic address, or both, as the security instrument requires.

(b) "Address for notice" means:

1. With respect to a notice given by a secured creditor:

a. For a recipient that has given to the secured creditor a security instrument or other document in connection with a security instrument, the address, if any, specified in the security instrument or document.

b. For a recipient not described in sub-subparagraph a. that is identifiable from examination of the public records of the county or counties in which the collateral is located, or, if personal property is being foreclosed together with real property, the Uniform Commercial Code financing statement filings, the address, if any, specified in the recorded or filed document.

c. For a recipient not described in sub-subparagraph a. or sub-subparagraph b. that the secured creditor knows is a tenant, subtenant, or leasehold assignee of all or part of the real

property collateral, the most recent address made known to the secured creditor by that person or, if none, the address of the real property collateral, including the designation of any office, apartment, or other unit that the secured creditor knows is possessed by the recipient, with the notice directed to the recipient's name, if known, or otherwise "To Tenant occupying property at" the physical address or description of the real property collateral.

d. For a recipient not described in sub-subparagraphs a.-c., the physical address of the real property collateral.

2. With respect to notices given by persons other than a secured creditor, the most recent address given in a document provided by the recipient to the person giving notice.

(c) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(d) "Electronic notice" means an electronic record signed by the person sending the notice.

(e) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(f) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with intent to authenticate the record.

(g) "Recipient" means a person to whom a notice is sent.

(h) "Written notice" means a written record signed by the person giving the notice.

(2) A person knows a fact if:

(a) The person has actual knowledge of the fact;

(b) The person has received a notice or notification of the fact; or

(c) From all the facts and circumstances known to the person at the time in question the person has reason to know the fact.

(3) Notice is sent or given, or a recipient is notified, subject to the limitations of subsection (4):

(a) By hand delivering a written notice to the recipient or to an individual authorized to receive service of civil process under applicable Florida law who is found at the recipient's address for notice;

(b) By depositing written notice, properly addressed to the recipient's address for notice, with cost of delivery paid:

1. With the United States Postal Service, registered or certified mail, return receipt requested;

2. With the United States Postal Service by regular mail; or

3. With a commercially reasonable carrier other than the United States Postal Service; or

(c) Subject to subsection (7), by initiating operations that in the ordinary course will cause the notice to come into existence at the recipient's address for notice in the recipient's information processing system in a form capable of being processed by the recipient.

(4) If the recipient is an individual and the security interest covers the recipient's primary residence, use of the

methods of notice specified in subsection (3) is limited as follows:

(a) If the notice is a notice of default pursuant to s. 52.202 or a notice of foreclosure pursuant to s. 52.203, both of the methods of giving notice specified in subparagraphs (3)(b)2. and 3. must be used.

(b) If the notice is not a notice of default pursuant to s. 52.202 or a notice of foreclosure pursuant to s. 52.203, a method of giving notice specified in paragraph (3)(a) or paragraph (3)(b) must be used.

(5) If a person giving a notice pursuant to this chapter and the recipient have agreed to limit the methods of giving notice otherwise permitted by subsections (3) and (4), that limitation is enforceable to the extent that it is consistent with subsection (4) and is otherwise permitted by law.

(6) A person may not give an electronic notice unless the recipient uses, designates by agreement, or otherwise has designated or holds out an information processing system or address within that system as a place for the receipt of communications of that kind. An electronic notice is not sent if the sender or its information processing system inhibits the ability of the recipient to print or store the record.

(7) If, at the time of giving a required notice, a person knows that the recipient's address for notice is incorrect or that notices cannot be delivered to the recipient at that address, the person that sent the notice shall make a reasonable effort to determine a correct address for the recipient and send the notice to the address so determined. Compliance with the

provisions of chapter 49 satisfies the requirement to make reasonable effort to locate the party entitled to notice.

(8) If, after giving a notice, a person acquires knowledge that the address of the recipient to which the notice was directed is incorrect or that notices cannot be delivered to the recipient at that address, the person that sent the notice shall promptly make a reasonable effort to determine a correct address for the recipient and send another copy of the notice to the address so determined, if any. The first notice, if timely sent and properly directed to the recipient's address for notice, complies with the time requirements of this chapter.

(9) A person may use methods of giving notice in addition to, but not in place of, the methods required by subsections (3) and (4).

(10) A notice is sufficient even if it includes information not required by law or contains minor errors that are not seriously misleading.

(11) Receipt of a notice within the time in which it would have been received if properly sent has the effect of a proper giving of notice.

(12) If the recipient is an individual, a notice is received when it comes to the recipient' s attention or is delivered to and available at the recipient's address for notice. If the recipient is not an individual, a notice is received when it is brought to the attention of the individual conducting the transaction, or in any event when it would have been brought to that individual's attention if the recipient had exercised due diligence. An organization exercises due diligence

if it maintains reasonable routines for communicating significant information with the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of the individual's regular duties or unless the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(13) Subject to subsection (12), a person that has sent a notice may revoke it by a subsequent notice unless the recipient has materially changed its position in reliance on the notice before receiving the revocation.

52.107 Transaction creating security interest.—A transaction that is intended to create a security interest does so irrespective of the caption of the documents.

52.108 Time of foreclosure.—The time of foreclosure is the time the affidavit required by:

(1) Section 52.312 is recorded, in the case of a foreclosure by auction.

(2) Section 52.405 is recorded, in the case of a foreclosure by negotiated sale.

(3) Section 52.505 is recorded, in the case of a foreclosure by appraisal.

Section 2. Part II of chapter 52, Florida Statutes, consisting of sections 52.201, 52.202, 52.203, 52.204, 52.205, 52.206, 52.207, 52.208, and 52.209, is created to read:

PART II

PROCEDURES BEFORE FORECLOSURE

52.201 Right to foreclose.—

(1) A secured creditor has a right to foreclose under this chapter if:

(a) All conditions that, by law and the terms of the security instrument, are prerequisites to foreclosure have been satisfied.

(b) All notices to the debtor required by the security instrument and by this chapter as prerequisites to foreclosure have been given.

(c) All periods for cure available to the debtor by the terms of the security instrument and law as prerequisites to foreclosure have elapsed and no cure has been made.

(2) A foreclosing creditor may pursue foreclosure exclusively by auction, by negotiated sale, or by appraisal, or may simultaneously pursue, together with foreclosure by auction, either foreclosure by negotiated sale or by appraisal, but not both. If the creditor pursues two methods of foreclosure simultaneously, the notice of foreclosure must state both methods.

52.202 Notice of default and right to cure.—

(1) Subject to subsection (2) and paragraph (6)(a), a notice of default must be given to each debtor and each interest holder whose interest gives right of possession of the real property collateral, and the cure period provided by this section must expire without cure being made, before the original notice of foreclosure may be given.

(2) Except as provided in the security instrument, notice of default need not be given and no cure period is applicable if the default cannot be cured.

(3) A notice of default must contain:

(a) The facts establishing that a default has occurred.

(b) The amount to be paid or other performance required to cure the default, including the daily rate of accrual for amounts accruing over time, and the time within which cure must be made.

(c) The name, address, and telephone number of an individual who is or represents the secured creditor and who can be contacted for further information concerning the default.

(d) A statement that foreclosure may be initiated if the default is not cured in a timely manner.

(4) Within 30 days after notice of default is given to the last person entitled to such notice, any person may:

(a) Cure the default if the default is curable by the payment of money; or

(b) Commence to cure the default if the default cannot be cured by the payment of money, diligently proceed to cure the default, and complete the cure of the default within 90 days after the notice of default was given.

(5) If no person is proceeding diligently to cure a default that cannot be cured by the payment of money after 30 days from the date the notice of default was sent to the last person entitled to such notice, the secured creditor may immediately terminate the period allowed for cure by

accelerating payment of the principal amount owing on the secured obligation or giving an original notice of foreclosure.

(6) If none of the real property to be foreclosed is residential real property:

(a) If a default cannot be cured by the payment of money and a notice of default was given by the secured creditor within 1 year before the date of the present default on account of a default of the same kind, a notice of default is not required and a right to cure does not exist except as agreed by the parties.

(b) The periods specified in subsection (4) to cure a default may be reduced as the parties agree in the security instrument.

(7) A notice of default may be given notwithstanding that a notice of default has previously been given on account of a different default and is still pending.

(8) The right to cure a default provided in this section does not impair or limit any other right to notice of default or to cure a default provided to any person by the security instrument. The period to cure provided in this section and any period to cure provided in the security instrument run concurrently unless the security instrument provides otherwise.

(9) Unless precluded from doing so by law other than this chapter, a secured creditor shall cooperate with any debtor or interest holder that attempts to cure a default by promptly providing upon request reasonable information concerning the amount or other performance due and expenses necessary for cure.

(10) If a default is cured within a period allowed by this section, or after the expiration of that period but before acceleration of the principal amount owing on the secured obligation or the giving of an original notice of foreclosure, an acceleration by the secured creditor of the principal amount owing on the secured obligation on account of that default is ineffective.

(11) During a period allowed for cure of a default under this section, a secured creditor may enforce any remedy other than foreclosure provided for by the security instrument and enforceable under the laws of this state other than this chapter if enforcement does not unreasonably interfere with the ability of a debtor to cure a default under this section.

52.203 Notice of foreclosure; manner of giving.—

(1) If a secured creditor has a right to foreclose under s. 52.201, the secured creditor may commence foreclosure by giving notice of foreclosure. The notice must comply with subsections (2) and (3) and s. 52.204 and is a prerequisite to foreclosure.

(2) A foreclosing creditor shall record a copy of the notice of foreclosure in the public records of each county in which the real property collateral is located. A recorded notice of foreclosure is notice of its existence and contents to any person acquiring an interest in the real property collateral after the notice of foreclosure is recorded. In the absence of recording of the notice of foreclosure, any purported foreclosure under this chapter is void.

(3) Except as otherwise provided in subsection (4), a foreclosing creditor shall give a notice of foreclosure to the following persons no later than 5 days after recording the original notice of foreclosure pursuant to subsection (2) if such persons can be identified as of the time of recording of the notice of foreclosure:

(a) A person that the foreclosing creditor knows to be a debtor.

(b) A person specified by the debtor in the security instrument to receive notice on the debtor's behalf.

(c) A person that is shown by the public records of each county in which any part of the real property collateral is located to be an interest holder in the real property collateral.

(d) If the foreclosing creditor holds and intends to foreclose on a security interest in personal property, a person who is entitled to notice with respect to the disposition of the personal property collateral under chapter 679.

(e) A person who the foreclosing creditor knows is an interest holder in the real property collateral.

(f) A person that has recorded in the public records of a county in which any part of the real property collateral is located a request for notice of foreclosure satisfying the requirements of s. 52.205.

(g) If the public records of the county in which the real property being foreclosed is located show that the real property may be obligated to a common interest community, a person who is an officer, director, or registered agent of such common

interest community.

(4) After the time of recording of the notice of foreclosure, if the foreclosing creditor obtains actual knowledge that a person holds an interest in the collateral that is subordinate in priority to the security instrument, the foreclosing creditor must give a notice of foreclosure to that person no later than 5 days after obtaining such knowledge.

(5) A foreclosing creditor may give a special notice of foreclosure to any person described in subsection (3) or subsection (4) to avoid the termination of that person's interest in the collateral by the foreclosure. The special notice shall give the information required by s. 52.204, but state that the recipient's interest in the collateral will not be terminated by the foreclosure.

(6) A foreclosing creditor, within 10 days before or after recording a notice of foreclosure, shall affix a copy of the notice of foreclosure at a conspicuous place on the real property collateral.

(7) An original notice of foreclosure is ineffective if given after the limitation period for foreclosure of a security interest in real property by judicial proceeding has expired.

52.204 Notice of foreclosure: content.—

(1) The heading of a notice of foreclosure must be conspicuous and must read as follows:

"NOTICE OF FORECLOSURE. YOU ARE HEREBY NOTIFIED THAT YOU MAY LOSE YOUR RIGHTS TO CERTAIN PROPERTY. READ THIS NOTICE IMMEDIATELY AND CAREFULLY."

(2) A notice of foreclosure must contain:

(a) The date of the notice, the name of the owner of the collateral as identified in the security instrument, a legally sufficient description and, at the secured creditor's option, the street address, if any, stated in the security instrument of the real property collateral or portion thereof being foreclosed, and a description of any personal property collateral to be included in the foreclosure.

(b) Information concerning the recording of the security instrument, including the recording date, and the official records book and page number or the official recording number for the security instrument.

(c) A statement that a default exists under the security instrument, and the facts establishing the default.

(d) A statement that the foreclosing creditor is initiating foreclosure.

(e) A statement that the foreclosing creditor has accelerated or, by virtue of the notice, is accelerating the due date of the principal amount owing on the secured obligation or a statement that the foreclosing creditor elects not to accelerate the due date.

(f) A statement that the collateral may be redeemed from the security interest by payment in full or performance of the secured obligation in full before foreclosure and the amount to be paid or other action necessary to redeem, including a per diem amount that will allow calculation of the total balance owed as of future dates and any further amount the foreclosing creditor anticipates expending to protect the collateral.

(g) A statement of the method or methods of foreclosure the foreclosing creditor elects to use and the earliest date on which foreclosure will occur if no redemption is made.

(h) A statement that the foreclosure will terminate the rights in the collateral of the person receiving the notice of foreclosure.

(i) If applicable, an explanation of a debtor's right to avoid a deficiency claim by compliance with s. 52.605.

(j) If the foreclosure is by negotiated sale or by appraisal, an explanation of the right of the debtor and holders of subordinate interests to object to the foreclosure as provided by s. 52.206.

(k) If applicable, a statement that, within 15 days after the date the notice of foreclosure is given, a debtor or an interest holder having a possessory interest in the real property collateral may request a meeting with a representative of the foreclosing creditor to object to the foreclosure as provided by s. 52.206.

(l) The name, address, and telephone number of an individual who is the foreclosing creditor or a representative of the foreclosing creditor and who can be contacted for further information concerning the foreclosure.

(m) A statement that any person receiving a notice of foreclosure may file an action in court objecting to the foreclosure, which action must be filed within 20 days after receipt of the original notice of foreclosure unless the debtor has been granted a homestead exemption pursuant to s. 196.031 for the property being foreclosed, in which case the complaint

must be filed no later than 45 days after receipt of the original notice of foreclosure.

52.205 Request for notice of foreclosure.—

(1) Any person may record in the public records of any county or counties a request for notice of foreclosure of a security instrument that has been recorded in such county or counties. The request must state:

(a) The date of the security interest, the date of its recording, and the official records book and page, or official recording number of the security instrument's recording.

(b) The names of the parties to the security instrument.

(c) A legally sufficient description of the real property collateral affected by the security instrument.

(d) The name and address of the person requesting notice of foreclosure.

(e) The legal interest, if any, held by the person recording the request for notice.

(2) A person that records a request under subsection (1) prior to the secured party's commencing foreclosure as provided in s. 52.203(1) is entitled to be given notice of foreclosure under s. 52.203(1). Recording a request does not affect the title to the real property collateral and does not constitute constructive notice to any person with an interest in the real property collateral held or claimed by the person requesting notice. A person that records a request for notice under this section may subsequently record an amendment supplementing or correcting information in the request or record a withdrawing of the request.

(3) A foreclosing creditor is liable for a penalty of $500 to a person that is not given timely notice of foreclosure if that person has recorded a request for notice of foreclosure meeting the standards of this section. If a recorded request for notice states that the person recording the request has an interest in the real property collateral and the person is not given timely notice of foreclosure, the person's interest in the collateral, if any, is preserved from termination by the foreclosure.

52.206 Meeting to object to foreclosure.—

(1) A debtor may request a meeting to object to a foreclosure. The request must be made by a notice received by the foreclosing creditor within 30 days after the notice of foreclosure is given to that debtor. If the foreclosing creditor receives a request for a meeting, the foreclosing creditor or a responsible representative of the foreclosing creditor shall schedule and attend a meeting with the person requesting it at a mutually agreeable time. The representative may be an employee, agent, servicer, or attorney of the foreclosing creditor and must have authority to terminate the foreclosure if the representative determines that there is no legal basis for foreclosure. The meeting may be held in person or by telephone, video conferencing, or other reasonable means, at the election of the foreclosing creditor. If the meeting is held in person, it must be held at a location reasonably convenient to a parcel of the real property collateral unless the person requesting the meeting and the representative mutually agree on a different location. If the foreclosing creditor receives requests from

more than one person, the creditor or representative may attempt to arrange a consolidated meeting, and the persons requesting meetings must cooperate reasonably with the foreclosing creditor's effort to do so.

(2) A meeting conducted pursuant to this section is informal and the rules of evidence do not apply. The parties may be represented by legal counsel. The foreclosing creditor or representative must have access to records that provide evidence of the grounds for foreclosure. If the debtor desires to negotiate a forbearance or modification on the underlying obligation, the debtor must provide financial statements and other documents sufficient to permit the foreclosing creditor to determine the existence, if any, for grounds to negotiate alternate terms or obligations. The creditor or representative shall consider the objections to foreclosure stated by the person requesting the meeting. Within 10 days after the meeting, the creditor or representative attending the meeting shall give to each person who requested the meeting a written statement indicating whether the foreclosure will be discontinued or will proceed and the reasons for the determination. The objections to foreclosure stated by the person requesting the meeting and the reasons stated by the creditor or representative do not preclude any person from raising those or other grounds for objecting to or supporting foreclosure in any subsequent judicial proceeding. A statement or representation made by a person at the meeting may not be introduced as evidence in any judicial proceeding. Each party must bear its own expenses in connection with the meeting.

(3) The foreclosing creditor and the representative do not incur any liability for making a determination that is adverse to the person who requested the meeting.

52.207 Period of limitation for foreclosure.—The time of foreclosure may not be less than 90 days nor more than 1 year after an original notice of foreclosure is recorded under s. 52.203 and not less than 30 days after any subsequent notice of foreclosure. The 1-year period of limitation may be extended by agreement of the foreclosing creditor and all persons to whom notice of foreclosure was required to be given pursuant to s. 52.203(3), other than persons excluded from foreclosure by notice issued under s. 52.203(5), s. 52.406(1)(b), or s. 52.506(1)(b). The 1-year and 30-day periods of limitation are tolled during the period that any court order temporarily enjoining or staying the foreclosure is in effect and during any stay under the United States Bankruptcy Code, 11 U.S.C. ss. 101 et seq.

52.208 Judicial supervision of foreclosure.—

(1) Before the time of foreclosure, any person required to be notified of the foreclosure pursuant to s. 52.203(3) may commence a proceeding in a court of competent jurisdiction for any violation of this chapter or of other law or principle of equity in the conduct of the foreclosure. The court may issue any order within the authority of the court in a foreclosure of a mortgage by judicial action, including injunction and postponement of the foreclosure.

(2) Any person required to be notified of the foreclosure pursuant to s. 52.203(3) may file an action in the circuit court

demanding that the foreclosure proceed through the court process. The complaint must include a notice of demand of judicial foreclosure and must be filed no later than 20 days after receipt of the original notice of foreclosure unless filed by a debtor who has been granted and has continuously maintained a homestead exemption pursuant to s. 196.031 for the property being foreclosed, in which case the complaint must be filed by such debtor no later than 45 days after receipt of the original notice of foreclosure. The complaint must state a bona fide defense to the foreclosure and must include a certification by all plaintiffs under oath that the complaint is not being filed principally for the purpose of delay. Unless waived pursuant to s. 57.082 or as permitted under subsection (3), the complaint must be accompanied by the appropriate filing fee and any other required fees. Service of process on the foreclosing creditor may be perfected by serving the foreclosing creditor at the address listed on the notice of foreclosure sent to the debtor as required by s. 52.203(3). Unless dismissed by the court, the civil action takes precedence over foreclosure under this chapter and the creditor must cease further action under this chapter.

(3)(a) A debtor who has been granted and has continuously maintained a homestead exemption pursuant to s. 196.031 for the property being foreclosed may, in lieu of paying the filing and other fees associated with commencing a civil action, file a complaint pursuant to this chapter without paying filing fees if such debtor is the only plaintiff in the lawsuit and if the complaint is accompanied by a sworn affidavit confirming that:

1. Payment of the required fees would place an undue hardship on the debtor receiving and maintaining a homestead exemption.

2. The debtor receiving and maintaining a homestead exemption has a bona fide defense to the foreclosure proceeding.

3. The filing is not principally for the purpose of delay.

(b) If the debtor filing the complaint under paragraph (a) is represented by an attorney, the attorney shall also verify under oath, to the best of his or her knowledge, that the affidavit required of the debtor receiving and maintaining a homestead exemption under paragraph (a) is true and correct.

(c) Within 45 days after a debtor's filing an action in circuit court under this subsection, the foreclosing creditor shall pay the required filing and other fees to the clerk of the circuit court. Failure to do so shall cause the complaint to be dismissed without prejudice.

(d) In addition, the debtor's attorney shall provide to the debtor a written statement that electing to proceed in court rather than under this chapter could result in a deficiency judgment, a more negative impact upon credit ratings, and eviction immediately upon entry of a judgment of foreclosure. This statement must be acknowledged by the debtor in writing. Failure by the debtor's attorney to comply with this paragraph is negligence per se.

(4) The court may, at any time, examine the pleadings, affidavits, and the parties and shall dismiss the case upon a finding that the case was filed principally for the purpose of delay. If the court dismisses the action, the foreclosure under

this chapter shall resume from the point at which it previously stopped, treating the case filing as an abatement of the foreclosure under this chapter, and all costs shall be awarded in favor of the foreclosing creditor. In addition, if the court finds that the affidavits required under paragraphs (3)(a) and (b) are false or were filed without reasonable basis, the debtor and his attorney shall be jointly and severally liable for the foreclosing creditor's reasonable costs and attorney's fees.

52.209 Redemption.—A person who has the right to redeem collateral from a security interest under principles of law and equity may not redeem after the time of foreclosure. Unless precluded from doing so by law other than this chapter, a foreclosing creditor shall cooperate with any person who attempts to redeem the collateral from the security interest before the time of foreclosure by promptly providing upon request reasonable information concerning the amount due or performance required to redeem.

Section 3. Part III of chapter 52, Florida Statutes, consisting of sections 52.301, 52.302, 52.303, 52.304, 52.305, 52.306, 52.307, 52.308, 52.309, 52.310, 52.311, and 52.312, is created to read:

PART III

FORECLOSURE BY AUCTION

52.301 Foreclosure by auction.—A secured creditor may elect to foreclose by auction. A secured creditor that elects to foreclose by auction shall comply with the requirements of this part and parts I, II, and VI.

52.302 Evidence of title; other information.—

(1) If a secured creditor elects to foreclose by auction, the foreclosing creditor shall obtain evidence of title and make a copy thereof available upon request to any prospective bidder at the foreclosure. The evidence of title must have an effective date no earlier than the time of recording of the original notice of foreclosure and must be issued no later than 30 days after the time of such recording. Unless the evidence of title is an attorney's opinion, the evidence of title must state that the issuer is willing to provide evidence of title to the real property collateral to a person who acquires title by virtue of the foreclosure, and the exceptions and exclusions from coverage to which the evidence of title issued to that person will be subject.

(2) The foreclosing creditor may, but is not required to, make reports and information concerning the collateral other than evidence of title available to prospective bidders at the foreclosure.

(3) The foreclosing creditor is not liable to any person because of error in any information disclosed to prospective bidders unless the information was prepared by the foreclosing creditor and the foreclosing creditor had actual knowledge of the error at the time the information was disclosed.

52.303 Advertisement of sale.—

(1) After giving notice as required by ss. 52.203 and 52.204, a foreclosing creditor shall, at the foreclosing creditor's option, advertise foreclosure sale under this part either:

(a) In a manner that complies with the publication requirements provided by s. 45.031; or

(b) By placing an advertisement in a newspaper having general circulation in each county where any part of the real property collateral is located. The advertisement must be published at least once per week for 3 consecutive weeks, with the last publication not less than 7 nor more than 30 days before the advertised date of sale.

(2) No later than 21 days before the advertised date of sale, the foreclosing creditor shall give a copy of the advertisement required by subsection (1) to the persons to whom notice of foreclosure was required to be given pursuant to s. 52.203. The advertisement may be sent with the notice of foreclosure or may be sent separately in the manner prescribed for notices under s. 52.106. The foreclosing creditor may, but is not required to, enter the real property collateral and post on it a copy of the advertisement or a sign containing information about the sale.

(3) An advertisement required by subsection (1) must state:

(a) The date, time, and location by street address and, if applicable, by floor and office number, of the foreclosure sale.

(b) That the sale will be made to the highest qualified bidder.

(c) The amount or percentage of the bid that will be required of the successful bidder at the completion of the sale as a deposit, and the form in which the deposit may be made if payment other than by cash or certified check will be accepted.

(d) A legally sufficient description of the real property to be sold, and the street address, if any, or the location if there is no street address, of the real property.

(e) A brief description of any improvements on the real property and any personal property collateral to be sold.

(f) The name, address, and telephone number of an individual who is the foreclosing creditor or a representative of the foreclosing creditor, who can provide information concerning the collateral and the foreclosure if the foreclosing creditor is not an individual.

(g) That a copy of the evidence of title, any available reports concerning the collateral, which may be listed specifically, and additional information are available from the person identified pursuant to paragraph (f).

(h) Whether access to the collateral for the purpose of inspection before foreclosure is available to prospective bidders and, if so, how to obtain access.

(4) An advertisement required by subsection (1) may also state any other information concerning the collateral or the foreclosure that the foreclosing creditor elects to include.

52.304 Access to collateral.—If a foreclosing creditor has authority to grant access to the real property collateral, the creditor shall reasonably accommodate a person who contacts the creditor, expresses an interest in bidding at the foreclosure sale, and requests an opportunity to inspect the collateral.

52.305 Location and time of sale.—An auction sale under this part must be conducted:

(1) At a date and time permitted for a sale under judicial foreclosure of a security interest in real property in this state.

(2) In a county where some of the real property collateral is located.

(3) At any location where a sale under judicial foreclosure of a security interest in real property may be held in this state.

52.306 Foreclosure of two or more parcels.—

(1) Collateral consisting of two or more parcels of real property may be foreclosed by auction separately or in combination. If the security instrument does not specify the manner of sale of two or more parcels, the auction may be conducted:

(a) By separate sale of each of the parcels; or

(b) At the time notice of foreclosure is recorded, if two or more parcels are contiguous, are being used in a unitary manner, are part of a unitary plan of development, or are operated under integrated management:

1. By combining the parcels in a single auction; or

2. By conditionally offering the parcels both in combination and separately, and accepting the higher of the two aggregate bids.

(2) If the entire real property collateral is not made the subject of a single auction, the foreclosing creditor shall discontinue sales of parcels or combinations of parcels when the total amount of bids received is sufficient to pay the secured obligation and the expenses of foreclosure.

52.307 Postponement of sale.—

(1) An individual conducting an auction under this part may postpone the auction for any cause the foreclosing creditor considers appropriate. Announcement of the postponement, and the time and location of the rescheduled sale, must be given orally at the place previously scheduled for the sale and within a reasonable time after the scheduled time for commencement of the sale. No other advertisement or notice of the postponed time and place of sale is required. A postponement may not be for a period of more than 30 days. Subsequent postponements of the sale may be made in the same manner.

(2) If an auction cannot be held at the time stated in the notice of sale by reason of stay under the United States Bankruptcy Code, 11 U.S.C. ss. 101 et seq., or a stay order issued by any court of competent jurisdiction, the foreclosing creditor may reschedule the auction to occur at a time when the stay is no longer in effect. The rescheduled sale must be advertised, and a copy of the advertisement must be sent to the persons entitled thereto, as provided by s. 52.302.

52.308 Conduct of sale.—

(1) An auction sale under this part must be conducted by a person designated by the foreclosing creditor.

(2) The person conducting an auction, before commencing the auction:

(a) Must make available to prospective purchasers copies of the evidence of title.

(b) May verify that persons intending to bid have money in an amount and form necessary to make the deposit stated in the

advertisement, but may not disclose the amount that any bidder is prepared to deposit.

(3) The auction must be conducted, at the foreclosing creditor's option:

(a) By the creditor or the creditor's representative following the procedures for sale prescribed by s. 45.031; or

(b) In the following manner:

1. Any person, including a debtor and the foreclosing creditor, may bid at the auction. The individual conducting the auction may bid on behalf of the foreclosing creditor or any other person by whom he or she is authorized, but may not bid for his or her own account. The foreclosing creditor may bid by credit up to any amount up to the balance owing on the secured obligation, including the expenses of foreclosure.

2. A fixed bid of a person not attending the auction may be submitted by a writing received at least 24 hours before the scheduled time of the auction by the person designated in the advertisement of sale to provide information about the property. The bid must be accompanied by a deposit satisfying the requirements of s. 52.310. The bid must be read aloud by the person conducting the auction before the auction is opened to oral bids.

3. Sale must be made to the person bidding the highest amount who complies with this section.

4. The auction is completed by the announcement of the person conducting the auction that the property is sold.

52.309 Deposit by successful bidder.—Immediately after the sale is complete, the successful bidder, if other than the

foreclosing creditor, at an auction under this part must pay a deposit to the person conducting the sale. The deposit must be at least 10 percent of the amount of the bid or such lower amount as the advertisement of sale stated would be accepted. The deposit must be paid in cash, by certified check, or in such other form of payment as was stated to be acceptable in the advertisement of sale or is acceptable to the person conducting the sale.

52.310 Payment of remainder of bid.—

(1) The successful bidder at an auction under this part shall pay the remainder of the bid to the person conducting the sale within 7 days after notice is given under s. 52.106(8) of the date of the auction.

(2) If payment of the remainder of the bid is not timely made, the foreclosing creditor may cancel the sale and reschedule the auction as provided in s. 52.307(2) or may terminate the foreclosure under s. 52.701. In either event the deposit of the successful bidder may be forfeited and distributed in the same manner as the proceeds of a sale, but no person has any other remedy against the defaulting bidder.

52.311 Foreclosure amount; distribution of proceeds.—The highest amount bid at a sale is the foreclosure amount. The foreclosure must be applied by the foreclosing creditor as provided in s. 52.601 within 30 days after the time of the foreclosure. After receiving but before applying the proceeds of sale, the secured creditor may, but is not required to, invest them in a reasonable manner.

52.312 Deed to successful bidder; affidavit.—

(1) Upon payment by the successful bidder of the full balance of the bid, the foreclosing creditor shall:

(a) Record and deliver a statutory warranty deed, a bill of sale with respect to personal property if applicable, and such other documents as may be necessary to record the deed, conveying the collateral to or as directed by the successful bidder.

(b) Execute and record in the public records of each county in which the security instrument being foreclosed was recorded an affidavit containing the following:

1. Identification of the security instrument foreclosed, including the official records book and page number, or official document number at which it was recorded, if any.

2. Identification the debtor.

3. A sufficient description of the collateral and identification of the official records book and page number, or official document number at which the notice of foreclosure was recorded.

4. Identification of persons to whom notice of foreclosure was given and the official records book and page number, or official document number at which documents reflecting their interests in the collateral were recorded, if any.

5. A statement as to which, if any, of the persons identified pursuant to subparagraph 4. were given special notice of foreclosure preserving their interests from termination by the foreclosure.

6. A statement that the foreclosing creditor has complied with all provisions of this chapter for a foreclosure by auction.

7. Identification of the person acquiring title to the collateral by virtue of the foreclosure, and a statement that title has passed to that person.

(2) When recorded, the deed and bill of sale, if any, transfer title to the collateral to or as directed by the successful bidder as provided in s. 52.602.

Section 4. Part IV of chapter 52, Florida Statutes, consisting of sections 52.401, 52.402, 52.403, 52.404, 52.405, and 52.406, is created to read:

PART IV

FORECLOSURE BY NEGOTIATED SALE

52.401 Foreclosure by negotiated sale.—A secured creditor may elect to foreclose by negotiated sale. A secured creditor that elects to foreclose by negotiated sale shall comply with the requirements of this part and parts I, II, and VI.

52.402 Advertisement and contract of sale.—

(1) The foreclosing creditor may advertise the collateral for sale to prospective purchasers by whatever methods the foreclosing creditor considers appropriate and may list the collateral for sale with brokers. The foreclosing creditor may, but is not required to, enter the real property collateral and post on it a sign containing information about the sale.

(2) The foreclosing creditor may enter into a conditional contract of sale with a prospective purchaser or, if the collateral is sold in parcels, with more than one purchaser. The

contract shall state the gross amount, before expenses of sale, that the purchaser will pay for the collateral. The foreclosing creditor's obligation to sell under the contract is subject to the following conditions:

(a) That no objection to the foreclosure amount is made under s. 52.404.

(b) That no redemption of the collateral from the security interest is made before the time of foreclosure.

52.403 Notice of proposed negotiated sale.—If a foreclosing creditor enters into a conditional contract of sale as provided in s. 52.402, the foreclosing creditor shall give notice of the proposed sale at least 30 days before the date of the proposed sale to the persons specified in s. 52.203. The notice of proposed sale must state:

(1) The date on or after which the foreclosing creditor proposes to sell the collateral.

(2) The foreclosure amount, net of all expenses of foreclosure and sale, that the foreclosing creditor offers to credit against the secured debt and distribute to other persons entitled thereto, which amount may be greater or less than the selling price stated in the contract.

(3) That if the sale is completed, title to the collateral will be transferred to the purchaser under the contract as of the time of foreclosure and the stated foreclosure amount will be applied as provided in s. 52.601.

(4) That the person receiving the notice may inspect a copy of the contract of sale by communicating with an individual

who is or represents the foreclosing creditor and whose name, address, and telephone number are given in the notice.

(5) That if a debtor or any other party whose interest in the collateral is subordinate in priority to the foreclosing creditor's security interest objects to the sale, the debtor or interest holder may give the foreclosing creditor a notice so stating, and if the notice is received by the foreclosing creditor no later than 7 days before the date of the proposed sale, the foreclosing creditor must discontinue the foreclosure by negotiated sale unless the foreclosing creditor elects to preserve that person's interest from termination by the foreclosure or discharges the person's interest.

52.404 Completion of sale.—

(1) A foreclosing creditor may complete the sale in accordance with the contract of sale, subsection (2), and ss. 52.405 and 52.406 unless the creditor receives a notice objecting to the proposed foreclosure by negotiated sale 7 or more days before the proposed date of sale from a person who holds an interest in the real property collateral that is subordinate in priority to the foreclosing creditor's security interest.

(2) Upon compliance by the purchaser with a contract for sale under this part, on or after the proposed date of sale, the foreclosing creditor shall deliver to the purchaser or a nominee designated by the purchaser a statutory warranty deed, a bill of sale if applicable, and other documents necessary to consummate the sale or that the parties agreed the foreclosing creditor

would supply. The foreclosing creditor shall also execute an affidavit containing the following:

(a) Identification of the security instrument foreclosed, including the official records book and page number or official document number at which it was recorded, if any.

(b) Identification of the debtor.

(c) A sufficient description of the collateral and identification of the official records book and page number, or official document number at which the notice of foreclosure was recorded.

(d) Identification of persons to whom notice of foreclosure was given and the official records book and page number, or official document number at which documents reflecting their interests in the collateral are recorded, if any.

(e) A statement as to which, if any, of the persons identified pursuant to paragraph (d) were given notice under s. 52.203(5) or s. 52.406(1)(a) preserving their interests from termination by the foreclosure.

(f) A statement that the foreclosing creditor has complied with all provisions of this chapter for a foreclosure by negotiated sale.

(g) Identification of the person acquiring title to the collateral by virtue of the foreclosure, and a statement that title has passed to that person.

52.405 Recording of affidavit and deed; application of foreclosure amount.—On or after the date of delivery of the deed, the affidavit, deed, and bill of sale, if any, required

under s. 52.404 must be recorded in public records of the county or counties where the collateral is located. When the affidavit, deed, and bill of sale, if any, are recorded, the deed and bill of sale transfer title to the collateral to the contract purchaser or a nominee designated by the contract purchaser as provided in s. 52.602. The foreclosure amount stated in the notice of proposed negotiated sale pursuant to s. 52.403(2) must be applied as provided in s. 52.601 within 30 days after the time of foreclosure.

52.406 Notice of objection to sale.—

(1) If, 7 or more days before the proposed date of sale under this part, a foreclosing creditor receives notice of objection to the sale from any person who holds an interest in the real property collateral subordinate in priority to the foreclosing creditor's security interest, the foreclosing creditor must:

(a) Discontinue the foreclosure pursuant to s. 52.701, in which case the notice of objection has no further effect;

(b) Give notice, before the time of foreclosure, to the person who made the objection that the person's interest in the collateral will be preserved from termination by the foreclosure. If the foreclosing creditor gives such notice:

1. The objection of the person to whom such notice is given may be disregarded by the foreclosing creditor;

2. The foreclosure by negotiated sale may be completed;

3. The affidavit recorded under s. 52.405 must identify that interest in the collateral of the person objecting as not being terminated by the foreclosure; and

4. That person is entitled to none of the foreclosure amount; or

(c) If the interest of the person who made the objection is capable of being discharged for a liquidated sum of money, tender that sum, or a lesser sum acceptable to the person whose interest is being discharged, to the person and thereby discharge the interest.

(2) If the foreclosing creditor makes a tender as provided in paragraph (1)(c) and keeps the tender in effect, the person to whom the tender is made must provide the foreclosing creditor with a suitable document in recordable form evidencing that the person's interest has been discharged.

(3) After expiration of the time for objection specified in s. 52.404(1), a person to whom notice of foreclosure under s. 52.203 and notice of proposed sale under s. 52.403 were sent may not assert that the foreclosure amount was inadequate.

Section 5. Part V of chapter 52, Florida Statutes, consisting of sections 52.501, 52.502, 52.503, 52.504, 52.505, and 52.506, is created to read:

PART V

FORECLOSURE BY APPRAISAL

52.501 Foreclosure by appraisal.—A secured creditor may elect to foreclose by appraisal. A secured creditor that elects to foreclose by appraisal shall comply with the requirements of this part and parts I, II, and VI.

52.502 Appraisal.—

(1) The foreclosing creditor shall obtain a written appraisal of the collateral. The debtor and other persons in

possession of the real property collateral must provide reasonable access to the real property to the appraiser. The appraisal report shall state the appraiser's conclusion as to the fair market value of the collateral as of a date not more than 60 days before the date of foreclosure stated in the notice of foreclosure.

(2) The appraisal must be made by an independent appraiser certified by the Appraisal Institute who is not an employee or affiliate of the foreclosing creditor.

52.503 Notice of appraisal.—The foreclosing creditor shall give notice of the appraisal at least 30 days before the proposed date of the foreclosure to the persons specified in s. 52.203. The notice of appraisal shall be accompanied by a copy of the appraisal report and shall state:

(1) The date on or after which the foreclosing creditor proposes to foreclose by appraisal.

(2) The foreclosure amount, net of all expenses of foreclosure, that the foreclosing creditor offers to credit against the secured obligation and to distribute to other persons entitled thereto, which amount may be greater or less than the appraised value of the collateral.

(3) That if the foreclosure by appraisal is completed, title to the collateral will vest in the foreclosing creditor or its nominee as of the time of foreclosure, and that the stated foreclosure amount will be applied as provided in s. 52.601.

(4) That the person receiving the notice may obtain further information concerning the foreclosure and the appraisal by communicating with an individual who is or represents the

foreclosing creditor and whose name, address, and telephone number are given in the notice.

(5) That if a debtor or interest holder whose interest in the collateral is subordinate in priority to the foreclosing creditor's security interest objects to the foreclosure by appraisal, the debtor or interest holder may give the foreclosing creditor a notice so stating, and if the notice is received by the foreclosing creditor no later than 7 days before the date of the proposed sale, the foreclosing creditor must discontinue the foreclosure by appraisal unless the foreclosing creditor elects to preserve that person's interest from termination by the foreclosure or discharges the person's interest.

52.504 Completion of foreclosure by appraisal.—

(1) A foreclosing creditor may complete the foreclosure as provided in subsection (2) and ss. 52.505 and 52.506 unless the creditor receives a notice objecting to the proposed foreclosure by negotiated sale 7 or more days before the proposed date of sale from a person who holds an interest in the real property collateral that is subordinate in priority to the foreclosing creditor's security interest.

(2) On or after the proposed date of sale, the foreclosing creditor shall record a statutory warranty deed in the public records and shall also execute an affidavit containing the following:

(a) Identification of the security instrument foreclosed, including the official records book and page number, or official document number at which it was recorded, if any.

(b) Identification of the debtor.

(c) A sufficient description of the collateral and identification of the official records book and page number, or official document number at which the notice of foreclosure was recorded.

(d) Identification of persons to whom notice of foreclosure was given and the official records book and page number, or official document number at which documents reflecting their interests in the collateral are recorded, if any.

(e) A statement as to which, if any, of the persons identified pursuant to paragraph (d) were given notice under s. 52.203(5) or s. 52.506(1)(a) preserving their interests from termination by the foreclosure.

(f) A statement that the foreclosing creditor has complied with all provisions of this chapter for a foreclosure by appraisal.

(g) Identification of the person acquiring title to the collateral by virtue of the foreclosure, and a statement that title has passed to that person.

52.505 Recording of affidavit; application of foreclosure amount.—On or after the proposed date of foreclosure, the affidavit required by s. 52.504 must be recorded in the public records of the county or counties in which the collateral is located. When recorded, the affidavit transfers title to the collateral to the foreclosing creditor or its nominee as provided in s. 52.602. The foreclosure amount stated in the notice of appraisal pursuant to s. 52.503(2) must be applied as

provided in s. 52.601 within 30 days after the time of foreclosure.

52.506 Notice of objection to foreclosure.—

(1) If, 7 or more days before the proposed date of foreclosure under this part, a foreclosing creditor receives notice of objection to the foreclosure from any person who holds an interest in the real property collateral subordinate in priority to the foreclosing creditor's security interest, the foreclosing creditor must:

(a) Discontinue the foreclosure pursuant to s. 52.701, in which case the notice of objection has no further effect;

(b) Give notice, before the time of foreclosure, to the person who made the objection that the person's interest in the collateral will be preserved from termination by the foreclosure. If the foreclosing creditor gives such notice:

1. The objection of the person to whom such notice is given may be disregarded by the foreclosing creditor;

2. The foreclosure by appraisal may be completed;

3. The affidavit recorded under s. 52.505 must identify that interest in the collateral of the person objecting as not being terminated by the foreclosure; and

4. That person is entitled to none of the foreclosure amount; or

(c) If the interest of the person who made the objection is capable of being discharged for a liquidated sum of money, tender that sum to the person and thereby discharge the interest.

(2) If the foreclosing creditor makes a tender as provided in subsection (1)(c) and keeps the tender in effect, the person to whom the tender is made must provide the foreclosing creditor with a suitable document in recordable form evidencing that the person's interest has been discharged.

(3) After expiration of the time for objection specified in s. 52.504(1), a person to whom notice of foreclosure under s. 52.203 and notice of appraisal under s. 52.503 were sent may not assert that the foreclosure amount was inadequate.

Section 6. Part VI of chapter 52, Florida Statutes, consisting of sections 52.601, 52.602, 52.603, 52.604, 52.605, 52.606, and 52.607, is created to read:

PART VI

RIGHTS AFTER FORECLOSURE

52.601 Application of proceeds of foreclosure.—

(1) The foreclosing creditor shall apply the proceeds of foreclosure and any investment earnings thereon in the following order:

(a) To pay or reimburse the expenses of foreclosure in the case of a foreclosure by auction.

(b) To pay the obligation secured by the foreclosed security instrument.

(c) To pay, in the order of their priority, the amounts of all liens and other interests of record terminated by the foreclosure.

(d) To the interest holder who owned the collateral at the time of foreclosure.

(2) If the foreclosing creditor, in applying the proceeds of the sale, acts in good faith and without actual knowledge of the invalidity or lack of priority of the claim of a person to whom distribution is made, the foreclosing creditor is not liable for an erroneous distribution. The foreclosing creditor may maintain an action in the nature of interpleader, in a court of competent jurisdiction sitting in a county in which some part of the real estate collateral is located, for an order directing the order of distribution of the proceeds of the sale.

52.602 Title transferred by foreclosure.—A foreclosure under this chapter transfers the debtor's title to the collateral to the successful bidder under part III, the contract purchaser under part IV, or the foreclosing creditor under part V, subject only to interests in the collateral having priority over the security interest foreclosed and the interests of persons entitled to notice under s. 52.202(3) who were not given notice of the foreclosure or whose interests were preserved from foreclosure by notice issued under s. 52.203(5), s. 52.406(1)(b), or s. 52.506(1)(b). The interests of all of other persons in the collateral are terminated.

52.603 Action for damages or to set aside foreclosure.—

(1) Subject to subsection (3), after the time of foreclosure an aggrieved person may commence a proceeding in a court of competent jurisdiction seeking the following relief:

(a) Damages against a foreclosing creditor for any violation of this chapter or an applicable law or principle of equity in the conduct of the foreclosure; or

(b) That the foreclosure be set aside to correct a violation of this chapter or to satisfy an applicable law or principle of equity.

(2) Recording of the deed and affidavit pursuant to s. 52.312, the deed and affidavit pursuant to s. 52.405, or the affidavit pursuant to s. 52.505 conclusively establishes compliance with all applicable notice and procedural requirements of this chapter in favor of good faith purchasers for value of the collateral. If the title derived from foreclosure is not held by a good faith purchaser for value, a person attacking the foreclosure on grounds of noncompliance with the notice or procedural requirements of this chapter has the burden of production and persuasion.

(3) An action may not be commenced:

(a) For damages for violation of this chapter, more than 3 years after the time of foreclosure; or

(b) For an order to set aside a foreclosure conducted under this chapter, more than 1 year after the time of foreclosure.

52.604 Possession after foreclosure.—A person that acquires an interest in real property by foreclosure under this chapter may obtain a writ of possession from the clerk of the court of the county in which any part of the collateral is located, or commence an action for ejectment under chapter 66 or for unlawful detainer under chapter 82 to gain possession of the real property against any person whose interest in the real property was terminated by the foreclosure.

52.605 Judgment for deficiency.—

(1) Except as provided in subsection (2), after the time of foreclosure, the foreclosing creditor and any other person whose security interest in the collateral was terminated by a foreclosure under this chapter is entitled to pursue in court a money judgment against any person liable for a deficiency.

(2) A debtor is not liable to a foreclosing creditor for a deficiency after a foreclosure under this chapter unless the debtor is found by the court not to have acted in good faith.

(3) For purposes of this section, the term "acted in good faith" means the debtor:

(a) Peaceably vacated the real estate collateral and relinquished any personal property collateral within 10 days after the time of foreclosure and the giving of a notice demanding possession by the person entitled to possession by virtue of the foreclosure.

(b) Did not commit significant affirmative waste upon the collateral and leave such waste uncured at the time possession was relinquished to the person entitled to possession by virtue of the foreclosure.

(c) Did not significantly contaminate the collateral with hazardous materials and leave the contamination uncured at the time possession was relinquished to the person entitled to possession by virtue of the foreclosure.

(d) Did not commit fraud against the foreclosing creditor.

(e) Did not engage in criminal activity on the secured real estate collateral that significantly reduced its value at the time possession was relinquished to the person entitled to possession by virtue of the foreclosure.

(f) Did not permit significant uncured damage to be done to the collateral by other persons or natural causes as a result of the debtor's failure to take reasonable precautions against the damage.

(g) Provided reasonable access to the collateral for inspection by the foreclosing creditor and prospective purchasers after the initial notice of foreclosure was sent.

(4) The burden of proof as to the absence of good faith on the part of a debtor is on the person seeking a deficiency judgment against the debtor. The absence of good faith by one debtor does not make any other debtor liable for a deficiency.

(5) If liability of a debtor for a deficiency is barred by paragraph (2), liability of a guarantor of the debtor's obligation is also barred.

(6) This section does not prohibit recovery of a deficiency by a person other than the foreclosing creditor.

52.606 Determining amount of deficiency.—

(1) Subject to subsection (2), the deficiency to which a foreclosing creditor is entitled after a foreclosure under this chapter is the balance remaining, if any, after subtracting the foreclosure amount as determined under s. 52.311, s. 52.403, or s. 52.503, as applicable, from the balance owing on the secured obligation, including principal, interest, legally recoverable fees and charges and, in the case of a foreclosure by auction, the expenses of foreclosure.

(2) In an action for a deficiency brought by the foreclosing creditor following a foreclosure by auction, a person against whom the action is filed may petition a court of

competent jurisdiction for a determination of the fair market value of the collateral at the time of foreclosure. After a hearing at which all interested parties may present evidence of fair market value, the court shall determine the fair market value of the collateral as of the time of foreclosure. The determination must be made by the court without a jury. If the court determines that 90 percent of the fair market value of the collateral was greater than the bid accepted at the foreclosure sale, 90 percent of the fair market value must be substituted for the foreclosure amount in making the calculations required by subsection (1) with respect to all parties against whom a judgment for a deficiency is entered.

52.607 Effect of good faith by debtor.—If a debtor acted in good faith in the foreclosure as provided in s. 52.605(3), the debtor shall not be considered to have been in default under the note or security instrument and the foreclosing creditor shall use its best efforts thereafter to report to credit bureaus the fact that the debtor, having acted in good faith, is deemed not to be in default under Florida Law. This section does not invalidate any foreclosure pursuant to this chapter or any judgment in a case related to this chapter. This section does not affect the title or insurability of title to real property or personal property.

Section 7. Part VII of chapter 52, Florida Statutes, consisting of section 52.701, is created to read:

PART VII

DISCONTINUATION OF FORECLOSURE

52.701 Discontinuation of foreclosure.—

(1) A foreclosing creditor may elect to discontinue foreclosure at any time before:

(a) The completion of the auction in the case of a foreclosure by auction; or

(b) The time of foreclosure, in the case of a foreclosure by negotiated sale or by appraisal.

(2) To discontinue foreclosure, the foreclosing creditor shall give notice to the persons to whom notice of foreclosure was required to be given under s. 52.203(2), advising them that the foreclosure has been discontinued and whether the foreclosing creditor will:

(a) Pursue another foreclosure by the same method;

(b) Continue to foreclose by another method under this chapter pursuant to a notice of foreclosure previously given;

(c) Commence foreclosure by a different method authorized by this chapter pursuant to a new notice of foreclosure;

(d) Commence foreclosure by judicial proceeding; or

(e) Abandon the foreclosure.

(3) If a foreclosing creditor chooses to discontinue foreclosure under this chapter and pursue foreclosure by judicial proceeding:

(a) A deficiency judgment may not be obtained through such judicial proceeding against any debtor receiving an original notice of foreclosure pursuant to this chapter.

(b) Upon commencing a judicial proceeding, the limitations on liability provided in s. 718.116(1)(b) and s. 720.3085(2)(c) shall not apply. In all other aspects of foreclosure pursuant to this chapter, such limitations on liability shall be applicable

to the same extent as if the foreclosure had been filed pursuant to s. 45.031 or chapter 702.

(4) If a notice sent by a foreclosing creditor under this section includes all elements required for a notice of foreclosure under ss. 52.203 and 52.204, no additional notice of foreclosure is necessary to pursue a further foreclosure under this chapter.

Section 8. Part VIII of chapter 52, Florida Statutes, consisting of sections 52.801, 52.802, and 52.803, is created to read:

PART VIII

MISCELLANEOUS

52.801 Uniformity of application and construction.—In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact its provisions.

52.802 Relation to Electronic Signatures in Global and National Commerce Act.—This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., except that nothing in this chapter modifies, limits, or supersedes 15 U.S.C. s. 7001(c) or authorizes electronic delivery of any of the notices described in 15 U.S.C. s. 7003(b).

52.803 Calculation of documentary stamp taxes.—For the purposes of this chapter, the documentary stamp taxes required under chapter 201 shall be assessed based on the following values:

(1) For foreclosure by auction, the foreclosure amount

defined in s. 52.311;

(2) For foreclosure by negotiated sale, the gross amount of the sale described in s. 52.402(2); or

(3) For foreclosure by appraisal, the fair market value determined by the appraisal as described in s. 52.502.

Section 9. Section 702.01, Florida Statutes, is amended to read:

702.01 Equity.—All mortgages foreclosed though judicial process shall be foreclosed in equity. In a judicial mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the court without a jury. This section does not require a foreclosure to be pursued through judicial process or prohibit a foreclosure through nonjudicial process.

Section 10. This act shall take effect July 1, 2010.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 1553 Basic Rights
SPONSOR(S): Rader
TIED BILLS: **IDEN./SIM. BILLS:** SJR 84

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Criminal & Civil Justice Policy Council		Billmeier LMB	Havlicak
2)	Rules & Calendar Council			
3)				
4)				
5)				

SUMMARY ANALYSIS

The Florida Constitution provides that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. A provision such as this one is commonly referred to as an "alien land law." Many states adopted such provisions in late 19th and early part of the 20th centuries to bar certain nationalities of immigrants from acquiring land in those states. The first alien land law provision was adopted as part of the Florida Constitution in 1868. The current provision was adopted in 1968.

The joint resolution proposes amending the Florida Constitution to delete provisions authorizing the Legislature to regulate or prohibit the ownership, inheritance, disposition, and possession of real property by aliens ineligible for citizenship.

The joint resolution appears to have a fiscal impact on state government. The Department of State, Division of Elections, estimates a non-recurring cost of approximately $16,853.04 for FY 2010-11. The cost is a result of publishing required notices in newspapers.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters, it would become effective on January 4, 2011.

The joint resolution requires a three-fifths vote of the membership for passage.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Basic Rights

Article I, s. 2 of the Florida Constitution, which sets forth Florida's constitutional guaranty of property rights, provides:

> Basic Rights.--All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; **except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law.** No person shall be deprived of any right because of race, religion, national origin, or physical disability.

(emphasis added).

This constitutional provision has its genesis in the Florida Constitution of 1868, which provided:

> Foreigners who are or who may hereafter become *bona fide* residents of the State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens.[1]

In 1926, the Constitution was amended:

> Foreigners who are eligible to become citizens of the United States under the provisions of the laws and treaties of the United States shall have the same rights as to the ownership, inheritance and disposition of property in the State as citizens of the State, **but the Legislature shall have power to limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida by foreigners who are not eligible to become citizens of the United States under the provisions of the laws and treaties of the United States.**[2]

[1] See Article 1, Section 17, Fla. Const. (1868).
[2] See Article 1, Section 18, Fla. Const. (Amendment approved June 25, 1925).

(emphasis added).

The current provision pertaining to the Legislature's ability to regulate or prohibit an alien's right to own, inherit, dispose, and possess real property has been in the Florida Constitution since 1968.[3] There is no Florida case law construing this provision. It does not appear that the Legislature has ever enacted laws implementing this provision.[4] Additionally, there are only two current statutes that pertain to an alien's real property rights. Section 198.04, F.S., provides for a tax to be imposed upon the real property of an alien that is located in this state upon the death of the alien. Section 732.1101, F.S., simply provides that aliens shall have the same rights of inheritance as citizens.

The alien land law was created to ban Japanese farmers from leasing or owning property.[5] Over the course of the 1940's, the exclusion of particular Asian nationalities from U.S. citizenship gradually was eliminated, until federal naturalization law was made entirely race- and nationality-neutral in the Immigration and Nationality Act of 1952.[6]

The only persons ineligible for citizenship under current federal law are ineligible on an individual basis and not on a national or racial basis. To be eligible for naturalization[7] an immigrant must:

- Be a legal permanent resident of the United States for five years;[8]
- Demonstrate knowledge of the English language and of the history, principles and form of government of the United States;[9]
- Be of "good moral character;"[10] and
- Not be a deserter from the U.S. military.[11]

Because an applicant for naturalization must be a legal permanent resident, eligibility for naturalization also relates back to initial eligibility for admission into the United States. Federal law provides that an alien is inadmissible if he or she:

- Is infected with a communicable disease designated by the Secretary of Health and Human Services as being of public health significance;

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[3] The Florida Constitution does not define the term "alien." Only one Florida Statute, s. 327.02(1), F.S., defines the term "alien" by providing that an alien is "a person who is not a citizen of the United States." The Federal Code defines an alien as any person not a citizen or national of the United States. See 8 U.S.C.A. s. 1101(a)(3).

[4] In 2007, the staff of the Florida Senate Committee on Judiciary reviewed Florida Statutes adopted since 1847 and found no statute regulating or prohibiting the ownership of property by aliens ineligible for citizenship. See Professional Staff Analysis and Economic Impact Statement of SJR 166 prepared by the staff of the Florida Senate Committee on Judiciary, dated March 21, 2007.

[5] See Florida Constitutional Amendments and You at the Collins Center for Public Policy website, https://www.communicationsmgr.com/projects/1373/property-rights-ineligible-aliens.asp (accessed April 8, 2010).

[6] Public Law 82-414, chapter 477, 66 Stat. 163 (June 27, 1952).

[7] In law, **naturalization** refers to an act whereby a person acquires a citizenship different from that person's citizenship at birth. Naturalization is most commonly associated with economic migrants or refugees who have immigrated to a country and resided there as aliens, and who have voluntarily and actively chosen to become citizens of that country after meeting specific requirements. However, naturalization that is at least passive, and often not voluntary, can take place upon annexation or border adjustments between countries. Unless resolved by denaturalization or renunciation of citizenship, naturalization can lead to multiple citizenship. See Blacks Law Dictionary (2006 edition).

[8] *See* 8 U.S.C. s. 1427(a).

[9] *See* 8 U.S.C. s. 1423(a). These requirements do not apply to applicants for naturalization who are unable to comply due to physical or developmental disability or mental impairment. *See* 8 U.S.C. s. 1423(b)(1). Requirements with respect to knowledge of the English language do not apply to applicants for naturalization who are over 50 years old and a permanent legal resident for at least 20 years or over 55 and a permanent legal resident for at least 15 years. *See* 8 U.S.C. s. 1423(b)(2).

[10] *Id.*

[11] *See* 8 U.S.C. s. 1425.

- Fails to present documentation of having received vaccination against vaccine-preventable diseases;
- Has a physical or mental disorder and behavior or a history of behavior associated with that disorder that is a threat to his or her own or others' property, safety or welfare;
- Is a drug user or addict;
- Has been convicted of a crime of moral turpitude or of any federal, state, or foreign crime relating to trafficking in controlled substances;
- Has been convicted of two or more crimes of any kind, other than purely political offenses, the aggregate sentences for which were five years or more;
- Is reasonably believed by the Attorney General or a consular officer to have been involved in drug trafficking or is the spouse or child of such a person and has profited from those activities within five years;
- Seeks entry to engage in or profit from any unlawful commercialized vice, including but not limited to prostitution, or has engaged in or profited from such activities in the past 10 years;
- Has ever asserted diplomatic immunity to escape criminal prosecution in the U.S.;
- Has engaged in severe violations of religious freedom as an official of a foreign government;
- Is reasonably believed to have trafficked in persons or benefited from traffic in persons;
- Is reasonably believed to be involved in money laundering;
- Is reasonably believed to be seeking entry to engage in sabotage, espionage, or attempts to overthrow the U.S. government by force;
- Has engaged in or are reasonably expected to engage in or incite, terrorist activity; or
- Is a representative or member of a foreign terrorist organization.[12]

As such, the Legislature could arguably regulate or prohibit an alien who has unlawfully entered the country or who falls in any of the above categories from acquiring or disposing of real property in Florida under the alien land law provision of the state constitution.

Others have argued that alien land laws cannot be sustained because such laws were initially enacted to prohibit persons of particular races from owning property.[13] A discussion from the Collins Center for Public Policy also set forth the argument:

> Using this argument, that the law is racially discriminatory and based on old definitions of "ineligible aliens," they distance the amendment from the current political debate on how to stem illegal immigration. One has nothing to do with the other, they say, because immigrants are no longer barred from citizenship based on their race. "Ineligible aliens," they argue, have no legal relationship to people regarded as "illegal immigrants," who enter the country illegally.[14]

The Florida Legislature has never enacted laws to implement the alien land law provision so no court has ruled on whether such laws are permissible under the federal constitution's equal protection provision. A law enacted pursuant to this provision would be subject to an equal protection challenge if a court were to find the provision was based on race.

In 2007, the Legislature passed SJR 166 to attempt to remove the alien land law provision. The voters rejected the proposal.[15]

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[12] *See* 8 U.S.C. s. 1182(a).

[13] See generally Gabriel J. Chin, Citizenship and Exclusion: Wyoming's Anti-Japanese Alien Land Law in Context, Wyoming Law Review, 2001.

[14] See Florida Constitutional Amendments and You at the Collins Center for Public Policy website, https://www.communicationsmgr.com/projects/1373/property-rights-ineligible-aliens.asp (accessed April 8, 2010).

[15] See Florida Department of State website report at http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=69 (accessed April 8, 2010). The proposal had 3,564,090 votes for and 3,871,704 votes against.

Effect of Bill

The joint resolution proposes to remove the alien land law provision from Article 1, section 2, of the Florida Constitution. It does not appear to render any statutes void since it does not appear that any provisions of the Florida Statutes currently in effect were enacted pursuant to this constitutional provision.

The joint resolution does not contain a specific effective date. Therefore, if adopted by 60% of the electors voting on the measure, it would take effect the first Tuesday after the first Monday in January following the election at which it was approved.[16]

B. SECTION DIRECTORY:

The joint resolution is not divided into sections.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The joint resolution appears to have a fiscal impact on state government. The Department of State, Division of Elections, estimates a non-recurring cost of approximately $16,853.04 for FY 2010-11. The cost is a result of publishing required notices in newspapers.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because Article 7, Section 18 of the Florida Constitution applies only to general laws.

2. Other:

[16] Article 11, Section 5, of the Florida Constitution.

A potential equal protection issue relating to laws that might be enacted pursuant to Florida's alien land law provision was discussed in section 1 of this analysis.

Armstrong v. Harris, 773 So.2d 7 (Fla. 2000), requires that ballot summaries must accurately explain proposed constitutional amendments submitted by the Legislature. The ballot summary contained in this proposed joint resolution reads:

> This amendment to the State Constitution eliminates authority granted to the Legislature by a constitutional amendment adopted in 1926 which allowed the Legislature to regulate or eliminate the real property rights of individuals **based on race** or national origin. The Florida Constitution will now state that all natural persons, female and male alike, are equal before the law and have an inalienable right to acquire, possess, and protect property, without exception.
>
> (emphasis added).

It could be argued that the current language in the Constitution does not grant the Legislature the authority to restrict or eliminate property rights of aliens based on race. In response, it could be argued that the history of alien land laws supports the position that they were race-based. If a court were to find the use of "race" to be misleading, it could find the ballot summary inaccurate and remove the amendment from the Constitution if it ultimately is adopted.

The ballot summary appears to accurately state the result if the amendment is adopted.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

House Joint Resolution

A joint resolution proposing an amendment to Section 2 of Article I of the State Constitution, relating to basic rights.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 2 of Article I of the State Constitution is agreed to and shall be submitted to the electors of this state for approval or rejection at the next general election or at an earlier special election specifically authorized by law for that purpose:

ARTICLE I

DECLARATION OF RIGHTS

SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property~~; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law~~. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION 2

DECLARATION OF RIGHTS.—This amendment to the State Constitution eliminates authority granted to the Legislature by a constitutional amendment adopted in 1926 which allowed the Legislature to regulate or eliminate the real property rights of individuals based on race or national origin. The Florida Constitution will now state that all natural persons, female and male alike, are equal before the law and have an inalienable right to acquire, possess, and protect property, without exception.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7125 PCB FTC 10-05 Criminal Penalties for Violations of Tax Statutes
SPONSOR(S): Finance & Tax Council; Fresen
TIED BILLS: **IDEN./SIM. BILLS:** SB 1978

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Finance & Tax Council	14 Y, 0 N	Wilson	Langston
1)	Criminal & Civil Justice Policy Council		Billmeier LMB	Havlicak RH
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

Chapter 212, F.S., provides that businesses are required to collect and remit sales tax to the Department of Revenue (Department). The failure of a business to register with the Department or collect and remit sales tax, after written notification from the Department, may result in civil and criminal penalties. Persons that provide false or fraudulent tax returns, with the willful intent to evade the payment of taxes, are also subject to similar penalties. Some of the penalty provisions in current law are unclear.

This bill clarifies the criminal penalties for violations of the tax statutes related to dealers who intentionally fail to register or collect and remit taxes and fees or persons who fraudulently file returns with the intent to evade the payment of taxes and fees. The bill provides for misdemeanor penalties for first offenses and for offenses that involve smaller amounts of money. Felony penalties are provided for offenders who commit multiple violations and for offenses that involve larger amounts of money. The bill moves provisions related to failure to file a registration to a different section of statute to clarify current law and provides that a willful failure to register is third degree felony.

This bill has not been analyzed by the 2010 Revenue Impact Estimating Conference. However, staff estimates the bill to have a positive but indeterminate impact on revenues due to stricter provisions that will enable increased enforcement and encourage higher levels of voluntary compliance with Florida's tax code.

The Criminal Justice Impact Conference has not considered the prison bed impact of this bill. However, to the extent that this bill creates or enhances felony offenses, there could be a prison bed impact. Additionally, to the extent that this bill creates or enhances misdemeanor offenses, there could be a jail bed impact on local governments.

The bill takes effect upon becoming a law.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Businesses Must Register with the Department of Revenue

Current Law

Any person engaging in or conducting business in Florida must register with the Department of Revenue (Department), pursuant to s. 212.18, F.S. Section 212.18(3)(a), F.S., requires persons desiring to conduct business to file an application for a certificate of registration for each place of business. The Department must grant a certificate if the appropriate information is supplied. See s. 212.18(3)(b), F.S. A person must obtain the certificate prior to engaging in business. Id. A person who engages in business without a certificate commits a first degree misdemeanor[1] and is subject to an additional $100 registration fee. Id.

Section 212.12(2)(d), F.S., provides penalties for failing to register after being notified by the Department of the failure to register. Section 212.12(2)(d), F.S., provides, in relevant part:

> Any person... who, after the department's delivery of a written notice to the person's last known address specifically alerting the person of the requirement to register the person's business as a dealer, intentionally fails to register the business... shall, in addition to the other penalties provided by law, be liable for a specific penalty of 100 percent of any unreported or any uncollected tax or fee and, upon conviction, for fine and punishment as provided in s. 775.082, s. 775.083, or s. 775.084. Delivery of written notice may be made by certified mail, or by the use of such other method as is documented as being necessary and reasonable under the circumstances. The civil and criminal penalties imposed herein for failure to comply with a written notice alerting the person of the requirement to register the person's business as a dealer or to collect tax on specific transactions shall not apply if the person timely files a written challenge to such notice in accordance with procedures established by the department by rule or the notice fails to clearly advise that failure to comply with or timely challenge the notice will result in the imposition of the civil and criminal penalties imposed herein.

This provision cites statutes related to criminal punishment but does not provide a level of offense. It is unclear how such a case would be prosecuted.

[1] First degree misdemeanors are punishable by up to 1 year in jail and a $1,000 fine. See ss. 775.082 and 775.083, F.S.

Effect of the Bill

The bill removes provisions related to penalties for failing to register from s. 212.12(2)(d), F.S., and places them in the section related to registration, s. 212.18, F.S. The bill provides that a person who willfully fails to register after the Department provides notice of the duty to register commits a third degree felony.[2] This addresses the confusion caused by current law's failure to create the level of offense for failure to register a business. Notice can be given by registered mail to the person's last known address, personal service, or both. The bill defines "willful" as "a voluntary and intentional violation of a known legal duty."

The bill removes the provision that permits a business to challenge the Department's notice that it is required to register with the Department. Businesses are already provided a mechanism to challenge the Department's notice that the business must register under s. 213.21, F.S.

Penalties for Failure to Collect a Tax After Notice from the Department

Current Law

Current law provides penalties for failure to collect a tax after notice from the Department that collection is required. Section 212.12(2)(d), F.S., provides, in relevant part:

> Any person... who, after the department's delivery of a written notice to the person's last known address specifically alerting the person of the requirement to collect tax on specific transactions, intentionally fails to collect such tax, shall, in addition to the other penalties provided by law, be liable for a specific penalty of 100 percent of any unreported or any uncollected tax or fee and, upon conviction, for fine and punishment as provided in s. 775.082, s. 775.083, or s. 775.084. Delivery of written notice may be made by certified mail, or by the use of such other method as is documented as being necessary and reasonable under the circumstances. The civil and criminal penalties imposed herein for failure to comply with a written notice alerting the person of the requirement... to collect tax on specific transactions shall not apply if the person timely files a written challenge to such notice in accordance with procedures established by the department by rule or the notice fails to clearly advise that failure to comply with or timely challenge the notice will result in the imposition of the civil and criminal penalties imposed herein.
>
> 1. If the total amount of unreported or uncollected taxes or fees is less than $300, the first offense resulting in conviction is a misdemeanor of the second degree, the second offense resulting in conviction is a misdemeanor of the first degree, **and the third and all subsequent offenses resulting in conviction is a misdemeanor of the first degree, and the third and all subsequent offenses resulting in conviction are felonies of the third degree.**
> 2. If the total amount of unreported or uncollected taxes or fees is $300 or more but less than $20,000, the offense is a felony of the third degree.
> 3. If the total amount of unreported or uncollected taxes or fees is $20,000 or more but less than $100,000, the offense is a felony of the second degree.
> 4. If the total amount of unreported or uncollected taxes or fees is $100,000 or more, the offense is a felony of the first degree. (emphasis added).

[2] Third degree felonies are punishable by up to five years in prison and a $5,000 fine. See ss. 775.082, 775.083, F.S.

Current law is unclear whether misdemeanor or felony offenses apply for a third or subsequent conviction. It is also unclear which level of offense applies to various criminal acts.

Effect of the Bill

The bill strikes the unclear penalty provisions in s. 212.12(2)(d), F.S. Under the bill, a dealer who willfully fails to collect a tax or fee after the Department provides notice is liable for a penalty of 100% of the uncollected tax or fee.[3] The Department is required to provide notice by personal service, sending notice by registered mail, or both. In addition, a dealer who willfully[4] fails to collect taxes or fees is subject to the following penalties:

- For uncollected taxes or fees less than $300 – The first offense is a second degree misdemeanor,[5] the second offense is a first degree misdemeanor, and the third and all subsequent offenses are third degree felonies.
- For uncollected taxes and fees between $300 and $20,000 – The offense is a third degree felony.
- For uncollected taxes and fees between $20,000 and $100,000 – The offense is a second degree felony.[6]
- For uncollected taxes and fees of $100,000 or more – The offense is a first degree felony.[7]

The bill removes the provision that permits a business to challenge the Department's notice that it is required to collect a specified tax. Businesses are already provided a mechanism to challenge the Department's notice that the business must register under s. 213.21, F.S.

Penalties for Filing a False or Fraudulent Return

Current Law

Section 212.12(2)(d), F.S., provides that any person who provides a false or fraudulent return, with the willful intent to evade the payment of any tax or fee, is subject to an additional penalty of 100% of any unreported tax or fee and is subject to a fine and punishment as follows:

1. If the total amount of unreported or uncollected taxes or fees is less than $300, the first offense resulting in conviction is a misdemeanor of the second degree, the second offense resulting in conviction is a misdemeanor of the first degree, **and the third and all subsequent offenses resulting in conviction is a misdemeanor of the first degree, and the third and all subsequent offenses resulting in conviction are felonies of the third degree.**

2. If the total amount of unreported or uncollected taxes or fees is $300 or more but less than $20,000, the offense is a felony of the third degree.

3. If the total amount of unreported or uncollected taxes or fees is $20,000 or more but less than $100,000, the offense is a felony of the second degree.

4. If the total amount of unreported or uncollected taxes or fees is $100,000 or more, the offense is a felony of the first degree. (emphasis added).

Current law is unclear whether misdemeanor or felony offenses apply for a third or subsequent conviction.

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[3] This does not change current law but the bill moves the provision to a different statutory subsection.
[4] The bill defines "willful" as "a voluntary and intentional violation of a known legal duty."
[5] Second degree misdemeanors are punishable by up to 60 days in jail and a $500 fine. See ss. 775.082, 775.083, F.S.
[6] Second degree felonies are punishable by up to 15 years in prison and a $10,000 fine. See ss. 775.082, 775.083, F.S.
[7] First degree felonies are punishable by up to 30 years in prison and a $10,000 fine. See ss. 775.082, 775.083, F.S.

Effect of the Bill

The bill strikes the unclear penalty provisions in s. 212.12(2)(d), F.S. Under the bill, a person who makes a false or fraudulent return with a willful intent to evade payment of any tax or fee is liable for a penalty of 100% of the uncollected tax or fee.[8] In addition, the person is subject to the following penalties:

- For false or fraudulent returns with a willful intent to evade taxes and fees totaling less than $300 – The first offense is a second degree misdemeanor, the second offense is a first degree misdemeanor, and the third and all subsequent offenses are third degree felonies.
- For uncollected taxes and fees between $300 and $20,000 – The offense is a third degree felony.
- For uncollected taxes and fees between $20,000 and $100,000 – The offense is a second degree felony.
- For uncollected taxes and fees of $100,000 or more – The offense is a first degree felony.

B. SECTION DIRECTORY:

Section 1: Amends s. 212.07, F.S, relating to sales, storage, use tax; tax added to purchase price; dealer not to absorb; liability of purchasers who cannot prove payment of the tax; penalties; general exemptions.

Section 2: Amends s. 212.12, F.S., relating to dealer's credit for collecting tax; penalties for noncompliance; powers of Department of Revenue in dealing with delinquents; brackets applicable to taxable transactions; records required.

Section 3: Amends s. 212.18, F.S., relating to administration of law; registration of dealers; rules.

Section 4: This bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See FISCAL COMMENTS.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See FISCAL COMMENTS.

2. Expenditures:

   See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

[8] This does not change current law but the bill moves the provision to a different statutory subsection.

D. FISCAL COMMENTS:

This bill has not been analyzed by the 2010 Revenue Impact Estimating Conference. However, staff estimates the bill to have a positive but indeterminate impact on revenues due to stricter provisions that will enable increased enforcement and encourage higher levels of voluntary compliance with Florida's tax code.

The Criminal Justice Impact Conference has not yet met to consider the prison bed impact of this bill. However, to the extent that this bill creates or enhances felony offenses, there could be a prison bed impact. Additionally, to the extent that this bill creates or enhances misdemeanor offenses, there could be a jail bed impact on local governments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other

None.

B. RULE-MAKING AUTHORITY:

The bill removes a requirement that the Department establish rules relating to certain notices.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

A bill to be entitled

An act relating to criminal penalties for violations of tax statutes; amending s. 212.07, F.S.; conforming a cross-reference to changes made by the act; imposing an additional monetary penalty on a dealer for willfully failing to collect certain taxes or fees after notice of a duty to collect the taxes or fees by the Department of Revenue; specifying a schedule of criminal penalties relating to amounts not collected; defining the term "willful"; requiring the department to send written notice of the duty to register by certain specified means; amending s. 212.12, F.S.; revising provisions imposing an additional monetary penalty on persons making false or fraudulent returns with a willful intent to evade payment of taxes or fees; specifying a schedule of criminal penalties relating to amounts not paid; deleting provisions relating to criminal penalties for failing to register as a dealer or to collect tax after notice from the Department of Revenue; amending s. 212.18, F.S.; revising requirements for registration of dealers; revising penalties for failing or refusing to register as a dealer; providing a criminal penalty for willfully failing to register as a dealer after notice by the Department of Revenue; defining the term "willful"; requiring the department to send written notice of the duty to register by certain specified means; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (1) and (3) of section 212.07, Florida Statutes, are amended to read:

212.07 Sales, storage, use tax; tax added to purchase price; dealer not to absorb; liability of purchasers who cannot prove payment of the tax; penalties; general exemptions.—

(1)(a) The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.

(b) A resale must be in strict compliance with s. 212.18 and the rules and regulations, and any dealer who makes a sale for resale which is not in strict compliance with s. 212.18 and the rules and regulations shall himself or herself be liable for and pay the tax. Any dealer who makes a sale for resale shall document the exempt nature of the transaction, as established by rules promulgated by the department, by retaining a copy of the purchaser's resale certificate. In lieu of maintaining a copy of the certificate, a dealer may document, prior to the time of sale, an authorization number provided telephonically or electronically by the department, or by such other means established by rule of the department. The dealer may rely on a resale certificate issued pursuant to s. 212.18(3)(d) ~~(c)~~, valid at the time of receipt from the purchaser, without seeking annual verification of the resale certificate if the dealer makes recurring sales to a purchaser in the normal course of business on a continual basis. For purposes of this paragraph, "recurring sales to a purchaser in the normal course of

business" refers to a sale in which the dealer extends credit to the purchaser and records the debt as an account receivable, or in which the dealer sells to a purchaser who has an established cash or C.O.D. account, similar to an open credit account. For purposes of this paragraph, purchases are made from a selling dealer on a continual basis if the selling dealer makes, in the normal course of business, sales to the purchaser no less frequently than once in every 12-month period. A dealer may, through the informal protest provided for in s. 213.21 and the rules of the Department of Revenue, provide the department with evidence of the exempt status of a sale. Consumer certificates of exemption executed by those exempt entities that were registered with the department at the time of sale, resale certificates provided by purchasers who were active dealers at the time of sale, and verification by the department of a purchaser's active dealer status at the time of sale in lieu of a resale certificate shall be accepted by the department when submitted during the protest period, but may not be accepted in any proceeding under chapter 120 or any circuit court action instituted under chapter 72.

(c) Unless the purchaser of tangible personal property that is incorporated into tangible personal property manufactured, produced, compounded, processed, or fabricated for one's own use and subject to the tax imposed under s. 212.06(1)(b) or is purchased for export under s. 212.06(5)(a)1. extends a certificate in compliance with the rules of the department, the dealer shall himself or herself be liable for and pay the tax.

(3)(a) A ~~Any~~ dealer who fails, neglects, or refuses to collect the tax or fees imposed under this chapter ~~herein provided~~, ~~either~~ by himself or herself or through the dealer's agents or employees, ~~is,~~ in addition to ~~the penalty of~~ being liable for and paying the tax ~~himself or herself~~, commits ~~guilty of~~ a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A dealer who willfully fails to collect a tax or fee after the department provides notice of the duty to collect the tax or fee is liable for a specific penalty of 100 percent of the uncollected tax or fee. This penalty is in addition to any other penalty that may be imposed by law. A dealer who willfully fails to collect taxes or fees totaling:

1. Less than $300:

a. For a first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

b. For a second offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

c. For a third or subsequent offense, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. An amount equal to $300 or more, but less than $20,000, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. An amount equal to $20,000 or more, but less than $100,000, commits a felony of the second degree, punishable as

provided in s. 775.082, s. 775.083, or s. 775.084.

4. An amount equal to $100,000 or more, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) As used in this subsection, the term "willful" means a voluntary and intentional violation of a known legal duty.

(d) The department shall give written notice of the duty to collect taxes or fees to the dealer by personal service, by sending notice to the dealer's last known address by registered mail, or by both personal service and mail.

Section 2. Paragraph (d) of subsection (2) of section 212.12, Florida Statutes, is amended to read:

212.12 Dealer's credit for collecting tax; penalties for noncompliance; powers of Department of Revenue in dealing with delinquents; brackets applicable to taxable transactions; records required.—

(2)

(d) A ~~Any~~ person who makes a false or fraudulent return with a willful intent to evade payment of any tax or fee imposed under this chapter is~~; any person who, after the department's delivery of a written notice to the person's last known address specifically alerting the person of the requirement to register the person's business as a dealer, intentionally fails to register the business; and any person who, after the department's delivery of a written notice to the person's last known address specifically alerting the person of the requirement to collect tax on specific transactions, intentionally fails to collect such tax, shall, in addition to~~

~~the other penalties provided by law, be~~ liable for a specific penalty of 100 percent of any unreported ~~or any uncollected~~ tax or fee. This penalty is in addition to any other penalty provided by law. A person who makes a false or fraudulent return with a willful intent to evade payment of taxes or fees totaling:

1. Less than $300:

a. For a first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

b. For a second offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

c. For a third or subsequent offense, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. An amount equal to $300 or more, but less than $20,000, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. An amount equal to $20,000 or more, but less than $100,000, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

4. An amount equal to $100,000 or more, commits a felony of the first degree, punishable ~~and, upon conviction, for fine and punishment~~ as provided in s. 775.082, s. 775.083, or s. 775.084. ~~Delivery of written notice may be made by certified mail, or by the use of such other method as is documented as being necessary and reasonable under the circumstances. The~~

~~civil and criminal penalties imposed herein for failure to comply with a written notice alerting the person of the requirement to register the person's business as a dealer or to collect tax on specific transactions shall not apply if the person timely files a written challenge to such notice in accordance with procedures established by the department by rule or the notice fails to clearly advise that failure to comply with or timely challenge the notice will result in the imposition of the civil and criminal penalties imposed herein.~~

~~1. If the total amount of unreported or uncollected taxes or fees is less than $300, the first offense resulting in conviction is a misdemeanor of the second degree, the second offense resulting in conviction is a misdemeanor of the first degree, and the third and all subsequent offenses resulting in conviction is a misdemeanor of the first degree, and the third and all subsequent offenses resulting in conviction are felonies of the third degree.~~

~~2. If the total amount of unreported or uncollected taxes or fees is $300 or more but less than $20,000, the offense is a felony of the third degree.~~

~~3. If the total amount of unreported or uncollected taxes or fees is $20,000 or more but less than $100,000, the offense is a felony of the second degree.~~

~~4. If the total amount of unreported or uncollected taxes or fees is $100,000 or more, the offense is a felony of the first degree.~~

Section 3. Subsection (3) of section 212.18, Florida Statutes, is amended to read:

212.18 Administration of law; registration of dealers; rules.—

(3)(a) Every person desiring to engage in or conduct business in this state as a dealer~~, as defined in this chapter,~~ or to lease, rent, or let or grant licenses in living quarters or sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, or tourist or trailer camps that are subject to tax under s. 212.03, or to lease, rent, or let or grant licenses in real property~~, as defined in this chapter,~~ and every person who sells or receives anything of value by way of admissions, must file with the department an application for a certificate of registration for each place of business. The application must include~~, showing~~ the names of the persons who have interests in the ~~such~~ business and their residences, the address of the business, and ~~such~~ other data reasonably required by ~~as~~ the department ~~may reasonably require~~. However, owners and operators of vending machines or newspaper rack machines are required to obtain only one certificate of registration for each county in which such machines are located. The department, by rule, may authorize a dealer that uses independent sellers to sell its merchandise to remit tax on the retail sales price charged to the ultimate consumer in lieu of having the independent seller register as a dealer and remit the tax. The department may appoint the county tax collector as the department's agent to accept applications for registrations. The application must be made to the department before the person, firm, copartnership, or corporation may engage in such business, and it must be accompanied by a registration fee of $5. However,

a registration fee is not required to accompany an application to engage in or conduct business to make mail order sales. The department may waive the registration fee for applications submitted through the department's Internet registration process.

(b) The department, upon receipt of such application, shall ~~will~~ grant to the applicant a separate certificate of registration for each place of business, which certificate may be canceled by the department or its designated assistants for any failure by the certificateholder to comply with any of the provisions of this chapter. The certificate is not assignable and is valid only for the person, firm, copartnership, or corporation to which issued. The certificate must be placed in a conspicuous place in the business or businesses for which it is issued and must be displayed at all times. Except as provided in this subsection, a ~~no~~ person may not ~~shall~~ engage in business as a dealer or in leasing, renting, or letting of or granting licenses in living quarters or sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, tourist or trailer camps, or real property or ~~as hereinbefore defined, nor shall any person~~ sell or receive anything of value by way of admissions, without a valid ~~first having obtained such a~~ certificate. A ~~or after such certificate has been canceled; no~~ person may not ~~shall~~ receive a ~~any~~ license from any authority within the state to engage in any such business without a valid ~~first having obtained such a~~ certificate ~~or after such certificate has been canceled~~. A person may not engage ~~The engaging~~ in the business of selling or leasing tangible personal

property or services or as a dealer; engage~~, as defined in this chapter, or the engaging~~ in leasing, renting, or letting of or granting licenses in living quarters or sleeping or housekeeping accommodations in hotels, apartment houses, roominghouses, or tourist or trailer camps that are taxable under this chapter, or real property~~;~~ or engage ~~the engaging~~ in the business of selling or receiving anything of value by way of admissions, without a valid ~~such~~ certificate ~~first being obtained or after such certificate has been canceled by the department, is prohibited~~.

(c)1. A ~~The failure or refusal of any~~ person who engages in acts requiring a certificate of registration under this subsection and who fails or refuses to register, commits~~, firm, copartnership, or corporation to so qualify when required hereunder is~~ a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Such acts are~~, or~~ subject to injunctive proceedings as provided by law. A person who engages in acts requiring a certificate of registration and who fails or refuses to register is also subject ~~Such failure or refusal also subjects the offender~~ to a $100 initial registration fee in lieu of the $5 registration fee required by ~~authorized in~~ paragraph (a). However, the department may waive the increase in the registration fee if it finds ~~is determined by the department~~ that the failure to register was due to reasonable cause and not to willful negligence, willful neglect, or fraud.

2. A person who willfully fails to register after the department provides notice of the duty to register as a dealer

commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

a. As used in this subsection, the term "willful" means a voluntary and intentional violation of a known legal duty.

b. The department shall give written notice of the duty to register to the person by personal service, by sending notice by registered mail to the person's last known address, or by both personal service and mail.

(d) ~~(c)~~ In addition to the certificate of registration, the department shall provide to each newly registered dealer an initial resale certificate that will be valid for the remainder of the period of issuance. The department shall provide each active dealer with an annual resale certificate. For purposes of this section, "active dealer" means a person who is currently registered with the department and who is required to file at least once during each applicable reporting period.

(e) ~~(d)~~ The department may revoke a ~~any~~ dealer's certificate of registration if ~~when~~ the dealer fails to comply with this chapter. Prior to revocation of a dealer's certificate of registration, the department must schedule an informal conference at which the dealer may present evidence regarding the department's intended revocation or enter into a compliance agreement with the department. The department must notify the dealer of its intended action and the time, place, and date of the scheduled informal conference by written notification sent by United States mail to the dealer's last known address of record furnished by the dealer on a form prescribed by the department. The dealer is required to attend the informal

conference and present evidence refuting the department's intended revocation or enter into a compliance agreement with the department which resolves the dealer's failure to comply with this chapter. The department shall issue an administrative complaint under s. 120.60 if the dealer fails to attend the department's informal conference, fails to enter into a compliance agreement with the department resolving the dealer's noncompliance with this chapter, or fails to comply with the executed compliance agreement.

(f) ~~(e)~~ As used in this paragraph, the term "exhibitor" means a person who enters into an agreement authorizing the display of tangible personal property or services at a convention or a trade show. The following provisions apply to the registration of exhibitors as dealers under this chapter:

1. An exhibitor whose agreement prohibits the sale of tangible personal property or services subject to the tax imposed in this chapter is not required to register as a dealer.

2. An exhibitor whose agreement provides for the sale at wholesale only of tangible personal property or services subject to the tax imposed in this chapter must obtain a resale certificate from the purchasing dealer but is not required to register as a dealer.

3. An exhibitor whose agreement authorizes the retail sale of tangible personal property or services subject to the tax imposed in this chapter must register as a dealer and collect the tax imposed under this chapter on such sales.

4. Any exhibitor who makes a mail order sale pursuant to s. 212.0596 must register as a dealer.

Any person who conducts a convention or a trade show must make their exhibitor's agreements available to the department for inspection and copying.

Section 4. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7181 PCB PSDS 10-02 Department of Juvenile Justice
SPONSOR(S): Public Safety & Domestic Security Policy Committee; Ambler
TIED BILLS: **IDEN./SIM. BILLS:** SB 1072

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Public Safety & Domestic Security Policy Committee	13 Y, 0 N	Cunningham	Cunningham
1)	Criminal & Civil Justice Policy Council		Cunningham	Havlicak
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

This bill makes various changes to ch. 985, F.S., relating to juvenile justice, as well as changes to the "Children and Families in Need of Services" (CINS/FINS) statute and the "Comprehensive Child and Adolescent Mental Health Services Act." Specifically, the bill:

- Amends the definition of "child or adolescent at risk of emotional disturbance" to include the additional risk factor of "being 9 years of age or younger at the time of referral for a delinquent act." This change will expand the pool of persons eligible to receive treatment services through the child and adolescent mental health system of care.
- Provides changes to the "child in need of services" and "families in need of services" definitions to allow youth 9 years of age or younger who have been referred to the Department of Juvenile Justice (Department) to be served by the CINS/FINS network.
- Permits a child who has been taken into custody for a misdemeanor domestic violence charge to be placed in a shelter prior to a court hearing.
- Encourages specified entities to establish prearrest/postarrest diversion programs and provides that youth 9 years of age or younger should be given the opportunity to participate in such programs.
- Requires juvenile probation officers to make a referral to the appropriate CINS/FINS shelter if a child taken into custody for a domestic violence offense is ineligible for secure detention.
- Requires the Department to independently validate the detention risk assessment instrument and adds two child advocates to the committee responsible for developing the instrument.
- Authorizes the court to commit a child who has been adjudicated delinquent to the Department for placement in a mother-infant program.
- Requires the Department to submit an annual Comprehensive Accountability Report to the Governor and Legislature detailing the effectiveness of Department programs.
- Includes legislative intent language specifying that the court is in the best position to weigh all facts and circumstances to determine whether or not to commit a juvenile to the Department and to determine the most appropriate restrictiveness level for a juvenile committed to the Department.

The bill takes effect upon becoming a law and does not appear to have a fiscal impact.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Child and Adolescent Mental Health System of Care – Eligibility

Chapter 394, F.S., entitled the "Comprehensive Child and Adolescent Mental Health Services Act," requires the Department of Children and Families (DCF) to establish a child and adolescent mental health system of care that that provides array of services to meet the individualized service and treatment needs of children[1] and adolescents[2] who are members of specified target populations. Currently, only individuals who fall within the following categories are eligible to be served through the child and adolescent mental health system of care:

- Children and adolescents who are experiencing an acute mental or emotional crisis.
- Children and adolescents who have a serious emotional disturbance or mental illness.
- Children and adolescents who have an emotional disturbance.
- Children and adolescents who are at risk of emotional disturbance.[3]

Section 394.492(4), F.S., currently defines a "child or adolescent at risk of emotional disturbance" as a person under 18 years of age who has an increased likelihood of becoming emotionally disturbed because of risk factors that include, but are not limited to:

- Being homeless.
- Having a family history of mental illness.
- Being physically or sexually abused or neglected.
- Abusing alcohol or other substances.
- Being infected with human immunodeficiency virus (HIV).
- Having a chronic and serious physical illness.
- Having been exposed to domestic violence.
- Having multiple out-of-home placements.

Effect of the Bill

The bill amends the definition of "child or adolescent at risk of emotional disturbance" to include the additional risk factor of "being 9 years of age or younger at the time of referral for a delinquent act." This change will expand the pool of persons eligible to receive treatment services through the child and adolescent mental health system of care.

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[1] Section 394.492, F.S., defines the term "child" as "a person from birth until the person's 13th birthday."
[2] Section 394.492, F.S., defines the term "adolescent" as "a person who is at least 13 years of age but under 18 years of age."
[3] Each of these groups is defined in s. 394.492, F.S.

Children and Families in Need of Services - Definitions

The Department of Juvenile Justice's (Department) CINS/FINS network provides services and treatment to children and families in need of services that are designed to preserve the integrity and unity of the family.[4] Such services and treatment include, but are not limited to, parent training, runaway center services, intensive crisis counseling, and placement in a staff-secure shelter. To be eligible for such services and treatment, a child or family must first meet the definition of a "child in need of services" or a "family in need of services."

Section 984.03(9), F.S., currently defines the term "child in need of services" as:

> A child for whom there is no pending investigation into an allegation or suspicion of abuse, neglect, or abandonment; no pending referral alleging the child is delinquent; or no current supervision by the Department of Juvenile Justice or the Department of Children and Family Services for an adjudication of dependency or delinquency. The child must also be found by the court:
>
> - To have persistently run away from the child's parents or legal custodians despite reasonable efforts of the child, the parents or legal custodians, and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts shall include voluntary participation by the child's parents or legal custodians and the child in family mediation, services, and treatment offered by the Department of Juvenile Justice or the Department of Children and Family Services;
>
> - To be habitually truant from school, while subject to compulsory school attendance, despite reasonable efforts to remedy the situation pursuant to ss. 1003.26 and 1003.27 and through voluntary participation by the child's parents or legal custodians and by the child in family mediation, services, and treatment offered by the Department of Juvenile Justice or the Department of Children and Family Services; or
>
> - To have persistently disobeyed the reasonable and lawful demands of the child's parents or legal custodians, and to be beyond their control despite efforts by the child's parents or legal custodians and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts may include such things as good faith participation in family or individual counseling.

Section 984.03(25), F.S., currently defines the term "family in need of services" as:

> A family that has a child who is running away; who is persistently disobeying reasonable and lawful demands of the parent or legal custodian and is beyond the control of the parent or legal custodian; or who is habitually truant from school or engaging in other serious behaviors that place the child at risk of future abuse, neglect, or abandonment or at risk of entering the juvenile justice system. The child must be referred to a law enforcement agency, the Department of Juvenile Justice, or an agency contracted to provide services to children in need of services. A family is not eligible to receive services if, at the time of the referral, there is an open investigation into an allegation of abuse, neglect, or abandonment or if the child is currently under supervision by the Department of Juvenile Justice or the Department of Children and Family Services due to an adjudication of dependency or delinquency.

The above definitions currently exclude children who have a pending referral to the Department from being served by the CINS/FINS network. The Department reports that 498 children age 9 or younger were referred to the Department during FY 08-09. As such, these youth were excluded from being served through the CINS/FINS network.

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[4] *See* ch. 984, F.S.

Effect of the Bill
The bill amends the definitions of "child in need of services" and "family in need of services" in s. 984.03, F.S., to include youth who are 9 years of age or younger who have a delinquency referral. As a result, these youth will be able to receive CINS/FINS services even though they have an active referral to the Department.

The bill makes the same changes to the definitions of "child in need of services" and "family in need of services" in the delinquency statute, s. 985.03(7), F.S.

Shelter Placement
Section 984.13, F.S., provides that a child may be taken into custody:

- By a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from his or her parents, guardian, or other legal custodian;

- By a law enforcement officer when the officer has reasonable grounds to believe that the child is absent from school without authorization or is suspended or expelled and is not in the presence of his or her parent or legal guardian, for the purpose of delivering the child without unreasonable delay to the appropriate school system site;

- Pursuant to an order of the circuit court based upon sworn testimony before or after a petition seeking an adjudication that a child is a child in need of services is filed; or

- By a law enforcement officer when the child voluntarily agrees to or requests services pursuant to this chapter or placement in a shelter.

Section 984.14, F.S., provides that unless ordered by the court or upon voluntary consent by the child and the child's parent, legal guardian, or custodian, a child taken into custody shall not be placed in a shelter[5] prior to a court hearing unless a determination has been made that the provision of appropriate and available services will not eliminate the need for placement and that such placement is required:

- To provide an opportunity for the child and family to agree upon conditions for the child's return home, when immediate placement in the home would result in a substantial likelihood that the child and family would not reach an agreement; or

- Because a parent, custodian, or guardian is unavailable to take immediate custody of the child.

Effect of the Bill
The bill amends s. 984.14, F.S., to add that a child may also be placed into custody prior to a court hearing if the child is taken into custody for a misdemeanor domestic violence charge and is ineligible to be placed in secure detention.[6] The Department reports that there were 7,263 children with misdemeanor domestic violence-related offenses referred to the Department in FY 08-09. The bill allows these children to be placed in a shelter prior to a court hearing rather than being placed back into the home where the domestic violence allegedly occurred.

[5] Section 984.03(39), F.S., defines the term "shelter" as "a place for the temporary care of a child who is alleged to be or who has been found to be dependent, a child from a family in need of services, or a child in need of services, pending court disposition before or after adjudication or after execution of a court order. "Shelter" may include a facility which provides 24-hour continual supervision for the temporary care of a child who is placed pursuant to s. 984.14."
[6] Section 984.03(18), F.S., defines the term "secure detention" as "temporary custody of the child while the child is under the physical restriction of a detention center or facility pending adjudication, disposition, or placement."

Legislative Intent
Section 985.02, F.S., sets forth the Legislature's intent for the juvenile justice system. The bill creates two new subsections under s. 985.02, F.S., entitled "children nine years of age or younger" and "restorative justice." The new subsections provide the following:

- Children 9 Years of Age or Younger
  - The Legislature finds that very young children need age-appropriate services in order to prevent and reduce future acts of delinquency. Children who are 9 years of age or younger should be diverted into prearrest or postarrest programs, civil citations programs, or child-in-need-of-services and families-in-need-of-services programs, or other programs as appropriate. If, upon findings from the needs assessment, the child is found to be in need of mental health services or substance abuse treatment services, the department shall cooperate with the parent or legal guardian and the Department of Children and Family Services, as appropriate, to identify the most appropriate services and supports and available funding sources to meet the needs of the child.[7]

- Restorative Justice
  - It is the intent of the Legislature that the juvenile justice system advance the principles of restorative justice. The department should focus on repairing the harm to victims of delinquent behavior, ensuring the youth understands the impact of their delinquent behavior on the victim and the community, and restoring the loss to the victim.
  - Offender accountability is one of he basic principles of restorative justice. The premise of this principle is that the juvenile justice system must respond to delinquent behavior in such a way that the offender is made aware of and takes responsibility for repaying or restoring loss, damage, or injury perpetrated upon the victim and the community. This goal is achieved when the offender understands the consequences of delinquent behaviors in terms of harm to others; and when the offender makes amends for the harm, loss or damage through restitution, community services or other appropriate payment.

Pre-Arrest and Post-Arrest Diversion Programs
Section 985.125, F.S., allows a law enforcement agency or a school district, in cooperation with the state attorney, to create a prearrest or postarrest diversion program for children who have committed or been alleged to have committed a delinquent act. Diversion is a process designed to keep a youth from entering the juvenile justice system through the legal process. Diversion programs include community arbitration, Juvenile Alternative Services Program (JASP), teen court, civil citation, boy scouts and girl scouts, boys and girls clubs, mentoring programs, and alternative schools.

Effect of the Bill
The bill adds counties, municipalities, and the DJJ to the list of entities that may establish prearrest and postarrest diversion programs. It also specifies that youth 9 years of age or younger should be given the opportunity to participate in a prearrest or postarrest diversion program.

Intake
Section 985.14, F.S., requires the Department to develop an intake system whereby a child brought into intake is assigned a juvenile probation officer. The purpose of the intake process is to assess the child's needs and risks and to determine the most appropriate treatment plan and setting for the child's programmatic needs and risks. The intake process is performed by the Department through a case

[7] The Department reports that it communicates with DCF regularly about youth who are served by both agencies. According to a FY 07-8 analysis of youth IDs, DCF had contact with approximately 30 percent of the youth age 9 and younger who were referred to the Department for a delinquent act.

management system, and a child's assigned juvenile probation officer serves as the primary case manager.[8]

Currently, s. 985.145(1)(d), F.S., requires a child's juvenile probation officer to ensure that a risk assessment instrument that establishes the child's eligibility for detention has been completed and that the appropriate recommendation was made to the court.

Effect of the Bill
The bill amends s. 985.145(1)(d), F.S., to add that juvenile probation officers must make a referral to the appropriate CINS/FINS shelter if a child is ineligible for secure detention due to a misdemeanor charge of domestic violence when the child lives with a family with a history of domestic violence or has been a victim of abuse or neglect.

Detention – Initial Assessment
Section 985.24, F.S., provides criteria used in determining if a child alleged to have committed a delinquent act qualifies for detention. Subsection (2) of the statute specifies that a child alleged to have committed a delinquent act may not be placed in detention for any of the following reasons:

- To allow a parent to avoid his or her legal responsibilities;
- To permit more convenient administrative access to the child;
- To facilitate further interrogation or investigation; or
- Due to a lack of appropriate facilities.

Effect of the Bill
The bill amends s. 985.24(2), F.S., by adding the following reason to the above list:

- Due to a misdemeanor charge of domestic violence when the child lives with a family with a history of domestic violence or has been a victim of abuse or neglect, and the decision to place in secure detention is mitigated by the history of trauma faced by the child, unless the youth would otherwise score for secure detention based on prior history.

The bill also provides that children 9 years of age or younger not be placed into secure detention unless the child is charged with a capital felony, life felony, or a first degree felony.

Risk Assessment Instrument
Section 985.245, F.S., requires a detention risk assessment instrument to be developed by the Department in agreement with representatives appointed by the following associations:

- Conference of Circuit Judges of Florida
- Prosecuting Attorneys Association
- Public Defenders Association
- Florida Sheriff's Association
- Florida Association of Chiefs of Police

Effect of the Bill
The bill amends s. 985.245, F.S., to provide that the risk assessment instrument be developed by the Department in agreement with a committee composed of two representatives from each of the above-listed associations, as well as two representatives from child advocacy organizations appointed by the Secretary of the Department.

Additionally, the bill amends s. 985.245, F.S., to require that the risk assessment instrument be independently validated. The bill requires the Department to review the population, policies and procedures impacting the use of detention every seven years to determine the necessity of revalidating

[8] *See* ss. 985.14 and 985.145, F.S.

the instrument, and specifies that validation is assessing the effectiveness of the instrument's ability to measure the risk of new offending and failure to appear for court proceedings.

Continued Detention

Section 985.255, F.S., provides criteria the court may use in determining whether to continue to detain a child prior to a detention hearing. Section 985.255(1)(d), F.S. provides the court may continue to detain a child if the child is charged with domestic violence. Additionally, subsection (2) of the statute provides that a child who is charged with committing an offense of domestic violence and who does not meet detention criteria may be held in secure detention if the court makes specific findings.

Effect of the Bill

The bill amends s. 985.255(1)(d), F.S., to provide the court may consider only whether the child is charged with *felony* domestic violence when determining whether to continue to detain a child prior to a detention hearing. The bill also amends subsection (2) of the statute to specify that a child who is charged with committing a *felony* offense of domestic violence and who does not meet detention criteria may be held in secure detention if the court makes specific findings.

Juvenile Justice Circuit Boards

Section 985.664, F.S., authorizes the creation of a juvenile justice circuit board in each of the 20 judicial circuits and a juvenile justice county council in each of the 67 counties. The purpose of each juvenile justice circuit board and each juvenile justice county council is to provide advice and direction to the Department in the development and implementation of juvenile justice programs and to work collaboratively with the Department in seeking program improvements and policy changes to address the emerging and changing needs of Florida's youth who are at risk of delinquency.[9]

Generally, membership of the circuit board may not exceed 18 members.[10] However, s. 985.664(8), F.S., permits a juvenile justice circuit board to revise its bylaws to increase the number of members by no more than three in order to adequately reflect the diversity of the population and community organizations or agencies in the circuit.

Effect of the Bill

The bill amends s. 985.664(8), F.S., to expand the number of additional members that may be added to the juvenile justice circuit boards to adequately reflect the community diversity from 3 to 5.

Commitment – Mother-Infant Programs

Section 985.441, F.S., authorizes a court that has jurisdiction of an adjudicated delinquent child to commit the child to:

- A licensed child-caring agency willing to receive the child
- The Department at a restrictiveness level defined in s. 985.03, F.S.
- The Department for placement in a program/facility for serious or habitual juvenile offenders
- The Department for placement in a program or facility for juvenile sexual offenders

The Department currently operates a 20-bed mother-infant program in Miami-Dade county that serves pregnant and postpartum females ages 14-19. The goal of the program is to return the women back to their communities with skills necessary to lead productive lives and successfully parent their children. At this time, there is no statutory provision allowing a court to commit a child who has been adjudicated delinquent to a mother-infant program.

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[9] s. 985.664(1), F.S.

[10] s. 985.664(7), F.S. In certain instances, the circuit board may exceed 18 members. *See* s. 985.664(8) and (9), F.S.

Effect of the Bill
The bill amends s. 985.441, F.S., to authorize the court to commit a child to the Department for placement in a mother-infant program designed to serve the needs of juvenile mothers or expectant juvenile mothers who are committed as delinquents. The bill requires the Department's mother-infant program to be licensed as a childcare facility under s. 402.308, F.S., and requires the program to provide the services and support necessary to enable the committed juvenile mothers to provide for the needs of the infants who, upon agreement of the mother, may accompany them in the program. The bill also requires the Department to adopt rules to govern the program.

Comprehensive Accountability Report
Legislative Intent
Section 985.632(1), F.S., provides that it is the intent of the Legislature that the Department:

- Ensure that information be provided to decisionmakers in a timely manner so that resources are allocated to programs of the department which achieve desired performance levels.
- Provide information about the cost of such programs and their differential effectiveness so that the quality of such programs can be compared and improvements made continually.
- Provide information to aid in developing related policy issues and concerns.
- Provide information to the public about the effectiveness of such programs in meeting established goals and objectives.
- Provide a basis for a system of accountability so that each client is afforded the best programs to meet his or her needs.
- Improve service delivery to clients.
- Modify or eliminate activities that are not effective.

Effect of the Bill
The bill adds to the above list that it is the intent of the Legislature that the Department collect and analyze available statistical data for the purpose of ongoing evaluation of all programs.

The bill also deletes the definition of the term "program effectiveness" and creates the following definitions in s. 985.632(2), F.S.:

- "Program" means any facility, service, or program for youth that is operated by the department or by a provider under contract with the department.
- "Program group" means a collection of programs with sufficient similarity of functions, services, and youth to permit appropriate comparison among programs within the group.

Comprehensive Accountability Report
Currently, s. 985.632(3), F.S., requires the Department to annually collect and report cost data for every program operated or contracted by the Department. The cost data must conform to a format approved by the Department and the Legislature and shall be reported and collected for state-operated and contracted programs so that comparisons can be made among programs. The statute also requires the Department to ensure that there is accurate cost accounting for state-operated services including market-equivalent rent and other shared cost. Further, the Department must submit an annual cost report to the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of each house of the Legislature, the appropriate substantive and fiscal committees of each house of the Legislature, and the Governor, no later than December 1 of each year.

Effect of the Bill
The bill deletes s. 985.632(3), F.S., in its entirety and replaces it with language requiring the Department to:

- Use a standard methodology for annually measuring, evaluating, and reporting program outputs and youth outcomes for each program and program group.
- Submit a Comprehensive Accountability Report to the appropriate substantive and fiscal committees of the Legislature and the Governor no later than January 15 of each year.

- Notify the Office of Program Policy Analysis and Government Accountability (OPPAGA) and contract service providers of substantive changes to the methodology.

The bill specifies that the standard methodology must:

- Incorporate, whenever possible, performance-based budgeting measures.
- Include common terminology and operational definitions for measuring the performance of system and program administration, program outputs, and youth outcomes.
- Specify program outputs for each program and for each program group within the juvenile justice continuum.
- Specify desired youth outcomes and methods by which to measure youth outcomes for each program and program group.

Cost-Effectiveness Model

Section 985.632(4), F.S., currently requires the Department to develop a cost-effectiveness model and apply it to each commitment program. The statute also requires the Department to rank commitment programs based on the cost-effectiveness model and submit a report to specified entities. The Department is also required to develop a work plan to refine the cost-effectiveness model so that the model is consistent with the performance based program budgeting measures approved by the legislature to the extent the Department deems appropriate.

Effect of the Bill

The bill makes several amendments to s. 985.632(4), F.S. The amendments:

- Require the Department to include the results of the cost-effectiveness model in the Comprehensive Accountability Report.
- Remove the language requiring the Department to rank commitment programs based on the cost-effectiveness model.
- Replaces the language requiring the Department to develop a work plan to refine the cost-effectiveness model with language requiring the Department to notify OPPAGA and contract service providers of substantive changes to the cost-effectiveness model.

Quality Assurance

Section 985.632(5), F.S., requires the Department to establish a comprehensive quality assurance system for each program operated by the Department or operated by a provider under contract with the Department. The statute also requires the Department to submit an annual report relating to quality assurance to specified entities. The annual report must include specified information about each program component.

Effect of the Bill

The bill removes the requirement that the Department submit the annual quality assurance report and instead requires the Department to include quality assurance information in the Comprehensive Accountability Report.

Obsolete Reporting Requirement

The bill removes an obsolete requirement that the Department submit a proposal to the Legislature by November 1, 2001 concerning funding incentives and disincentives for the Department and for providers under contract with the Department.

Legislative Intent

The bill provides the following legislative intent language:

- The Legislature finds that the court is in the best position to weigh all facts and circumstances to determine whether or not to commit a juvenile to the department and to determine the most appropriate restrictiveness level for a juvenile committed to the department.

B. SECTION DIRECTORY:

Section 1. Amends s. 394.492, F.S., relating to definitions.

Section 2. Amends s. 984.03, F.S., relating to definitions.

Section 3. Amends s. 984.14, F.S., relating to shelter placement; hearing.

Section 4. Amends s. 985.02, F.S., relating to legislative intent for juvenile justice system.

Section 5. Amends s. 985.03, F.S., relating to definitions.

Section 6. Amends s. 985.125, F.S., relating to prearrest or postarrest diversion programs.

Section 7. Amends s. 985.145, F.S., relating to responsibilities of juvenile probation officer during intake; screenings and assessments.

Section 8. Amends s. 985.24, F.S., relating to use of detention; prohibitions.

Section 9. Amends s. 985.245, F.S., relating to risk assessment instrument.

Section 10. Amends s. 985.255, F.S., relating to detention criteria; detention hearing.

Section 11. Amends s. 985.441, F.S., relating to commitment.

Section 12. Amends s. 985.45, F.S., relating to liability and remuneration for work.

Section 13. Amends s. 985.632, F.S., relating to quality assurance and cost-effectiveness.

Section 14. Amends s. 985.664, F.S., relating to juvenile justice circuit boards and juvenile county councils.

Section 15. Provides legislative intent language.

Section 16. This bill takes effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The Department of Juvenile Justice reports that this bill will not have a fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the Department to adopt rules pursuant to ch. 120, F.S., to govern operation of mother-infant programs.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 16, 2010, the Public Safety & Domestic Security Policy Committee adopted an amendment to the bill. The amendment creates a new section of the bill providing the following legislative intent language:

> The Legislature finds that the court is in the best position to weigh all facts and circumstances to determine whether or not to commit a juvenile to the department and to determine the most appropriate restrictiveness level for a juvenile committed to the department.

The bill was reported favorably as amended. This analysis reflects the amended bill.

A bill to be entitled

An act relating to juvenile justice; amending s. 394.492, F.S.; including children 9 years of age or younger at the time of referral for a delinquent act within the definition of those children who are eligible to receive comprehensive mental health services; amending s. 984.03, F.S.; expanding the meaning of the terms "child in need of services" and "family in need of services" to include a child 9 years of age or younger at the time of referral to the Department of Juvenile Justice; amending s. 984.14, F.S.; providing for a youth taken into custody for a misdemeanor domestic violence charge who is ineligible to be held in secure detention to be placed in a shelter; amending s. 985.02, F.S.; providing additional legislative findings and intent concerning very young children and restorative justice; amending s. 985.03, F.S.; expanding the meaning of the terms "child in need of services" and "family in need of services" to include a child 9 years of age or younger at the time of referral to the Department of Juvenile Justice; amending s. 985.125, F.S.; encouraging law enforcement agencies, school districts, counties, municipalities, and the Department of Juvenile Justice to establish prearrest or postarrest diversion programs for youth who are 9 years of age or younger; amending s. 985.145, F.S.; requiring a juvenile probation officer to refer a child to the appropriate shelter if the completed risk assessment instrument shows that the child is ineligible for secure detention; amending s. 985.24,

F.S.; prohibiting a child alleged to have committed a delinquent act or violation of law from being placed into secure, nonsecure, or home detention care because of a misdemeanor charge of domestic violence if the child lives in a family that has a history of domestic violence or if the child is a victim of abuse or neglect; prohibiting a child 9 years of age or younger from being placed into secure detention care unless the child is charged with a capital felony, life felony, or felony of the first degree; amending s. 985.245, F.S.; revising membership on the statewide risk assessment instrument committee; requiring independent validation of the risk assessment instrument; amending s. 985.255, F.S.; providing that a child may be retained in home detention care under certain circumstances; providing that a child who is charged with committing a felony offense of domestic violence and who does not meet detention criteria may nevertheless be held in secure detention if the court makes certain specific written findings; amending s. 985.441, F.S.; providing that a court may commit a female child adjudicated as delinquent to the department for placement in a mother-infant program designed to serve the needs of the juvenile mothers or expectant juvenile mothers who are committed as delinquents; requiring the department to adopt rules to govern the operation of the mother-infant program; amending s. 985.45, F.S.; specifying that a child working under certain circumstances is a state employee for workers' compensation purposes; amending s. 985.632, F.S.;

revising provisions relating to quality assurance and cost-effectiveness of department programs; amending s. 985.664, F.S.; increasing the number of members by which a juvenile justice circuit board may be increased to reflect the diversity of the population and community organizations or agencies in the circuit; providing legislative findings concerning the determination of whether to commit a juvenile to the Department of Juvenile Justice and to determine the most appropriate restrictiveness level for such a juvenile; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (i) is added to subsection (4) of section 394.492, Florida Statutes, to read:

394.492 Definitions.—As used in ss. 394.490-394.497, the term:

(4) "Child or adolescent at risk of emotional disturbance" means a person under 18 years of age who has an increased likelihood of becoming emotionally disturbed because of risk factors that include, but are not limited to:

(i) Being 9 years of age or younger at the time of referral for a delinquent act.

Section 2. Subsections (9) and (25) of section 984.03, Florida Statutes, are amended to read:

984.03 Definitions.—When used in this chapter, the term:

(9) "Child in need of services" means a child for whom

there is no pending investigation into an allegation or suspicion of abuse, neglect, or abandonment; no pending referral alleging the child is delinquent, except when a child 9 years of age or younger is being referred to the department; or no current supervision by the department ~~of Juvenile Justice~~ or the Department of Children and Family Services for an adjudication of dependency or delinquency. The child must also, pursuant to this chapter, be found by the court:

(a) To have persistently run away from the child's parents or legal custodians despite reasonable efforts of the child, the parents or legal custodians, and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts shall include voluntary participation by the child's parents or legal custodians and the child in family mediation, services, and treatment offered by the department ~~of Juvenile Justice~~ or the Department of Children and Family Services;

(b) To be habitually truant from school, while subject to compulsory school attendance, despite reasonable efforts to remedy the situation pursuant to ss. 1003.26 and 1003.27 and through voluntary participation by the child's parents or legal custodians and by the child in family mediation, services, and treatment offered by the department ~~of Juvenile Justice~~ or the Department of Children and Family Services; ~~or~~

(c) To have persistently disobeyed the reasonable and lawful demands of the child's parents or legal custodians, and to be beyond their control despite efforts by the child's parents or legal custodians and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts

may include such things as good faith participation in family or individual counseling; or

(d) To be 9 years of age or younger and have been referred to the department for a delinquent act.

(25) "Family in need of services" means a family that has a child who is running away; who is persistently disobeying reasonable and lawful demands of the parent or legal custodian and is beyond the control of the parent or legal custodian; ~~or~~ who is habitually truant from school or engaging in other serious behaviors that place the child at risk of future abuse, neglect, or abandonment or at risk of entering the juvenile justice system; or who is 9 years of age or younger and being referred to the department for a delinquent act. The child must be referred to a law enforcement agency, the department ~~of Juvenile Justice~~, or an agency contracted to provide services to children in need of services. A family is not eligible to receive services if, at the time of the referral, there is an open investigation into an allegation of abuse, neglect, or abandonment or if the child is currently under supervision by the department ~~of Juvenile Justice~~ or the Department of Children and Family Services due to an adjudication of dependency or delinquency.

Section 3. Subsection (1) of section 984.14, Florida Statutes, is amended to read:

984.14 Shelter placement; hearing.—

(1) Unless ordered by the court pursuant to the provisions of this chapter, or upon voluntary consent to placement by the child and the child's parent, legal guardian, or custodian, a

child taken into custody shall not be placed in a shelter prior to a court hearing unless the child is taken into custody for a misdemeanor domestic violence charge and is ineligible to be held in secure detention or a determination has been made that the provision of appropriate and available services will not eliminate the need for placement and that such placement is required:

(a) To provide an opportunity for the child and family to agree upon conditions for the child's return home, when immediate placement in the home would result in a substantial likelihood that the child and family would not reach an agreement; or

(b) Because a parent, custodian, or guardian is unavailable to take immediate custody of the child.

Section 4. Subsections (9) and (10) are added to section 985.02, Florida Statutes, to read:

985.02 Legislative intent for the juvenile justice system.—

(9) CHILDREN 9 YEARS OF AGE OR YOUNGER.—The Legislature finds that very young children need age-appropriate services in order to prevent and reduce future acts of delinquency. Children who are 9 years of age or younger should be diverted into prearrest or postarrest programs, civil citation programs, or children-in-need-of-services and families-in-need-of-services programs, or other programs as appropriate. If, upon findings from the needs assessment, the child is found to be in need of mental health services or substance abuse treatment services, the department shall cooperate with the parent or legal guardian

and the Department of Children and Family Services, as appropriate, to identify the most appropriate services and supports and available funding sources to meet the needs of the child.

(10) RESTORATIVE JUSTICE.—

(a) It is the intent of the Legislature that the juvenile justice system advance the principles of restorative justice. The department should focus on repairing the harm to victims of delinquent behavior by ensuring that the child understands the impact of his or her delinquent behavior on the victim and the community and that the child restore the losses of his or her victim.

(b) Offender accountability is one of the basic principles of restorative justice. The premise of this principle is that the juvenile justice system must respond to delinquent behavior in such a way that the offender is made aware of and takes responsibility for repaying or restoring loss, damage, or injury perpetrated upon the victim and the community. This goal is achieved when the offender understands the consequences of delinquent behavior in terms of harm to others and when the offender makes amends for the harm, loss, or damage through restitution, community service, or other appropriate repayment.

Section 5. Subsections (7) and (23) of section 985.03, Florida Statutes, are amended to read:

985.03 Definitions.—As used in this chapter, the term:

(7) "Child in need of services" means a child for whom there is no pending investigation into an allegation or suspicion of abuse, neglect, or abandonment; no pending referral

alleging the child is delinquent, except when a child 9 years of age or younger is being referred to the department; or no current supervision by the department or the Department of Children and Family Services for an adjudication of dependency or delinquency. The child must also, under this chapter, be found by the court:

(a) To have persistently run away from the child's parents or legal custodians despite reasonable efforts of the child, the parents or legal custodians, and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts shall include voluntary participation by the child's parents or legal custodians and the child in family mediation, services, and treatment offered by the department or the Department of Children and Family Services;

(b) To be habitually truant from school, while subject to compulsory school attendance, despite reasonable efforts to remedy the situation under ss. 1003.26 and 1003.27 and through voluntary participation by the child's parents or legal custodians and by the child in family mediation, services, and treatment offered by the department ~~of Juvenile Justice~~ or the Department of Children and Family Services; ~~or~~

(c) To have persistently disobeyed the reasonable and lawful demands of the child's parents or legal custodians, and to be beyond their control despite efforts by the child's parents or legal custodians and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts may include such things as good faith participation in family or individual counseling; or

(d) To be 9 years of age or younger and have been referred to the department for a delinquent act.

(23) "Family in need of services" means a family that has a child for whom there is no pending investigation into an allegation of abuse, neglect, or abandonment or no current supervision by the department or the Department of Children and Family Services for an adjudication of dependency or delinquency. The child must also have been referred to a law enforcement agency or the department for:

(a) Running away from parents or legal custodians;

(b) Persistently disobeying reasonable and lawful demands of parents or legal custodians, and being beyond their control; ~~or~~

(c) Habitual truancy from school; or

(d) Being a child 9 years of age or younger and being referred for a delinquent act.

Section 6. Subsection (1) of section 985.125, Florida Statutes, is amended to read:

985.125 Prearrest or postarrest diversion programs.—

(1) A law enforcement agency, ~~or~~ school district, county, municipality, or the department, in cooperation with the state attorney, is encouraged to ~~may~~ establish a prearrest or postarrest diversion program. Youth 9 years of age or younger should be given the opportunity to participate in a prearrest or postarrest diversion program.

Section 7. Paragraph (d) of subsection (1) of section 985.145, Florida Statutes, is amended to read:

985.145 Responsibilities of juvenile probation officer

during intake; screenings and assessments.—

(1) The juvenile probation officer shall serve as the primary case manager for the purpose of managing, coordinating, and monitoring the services provided to the child. Each program administrator within the Department of Children and Family Services shall cooperate with the primary case manager in carrying out the duties and responsibilities described in this section. In addition to duties specified in other sections and through departmental rules, the assigned juvenile probation officer shall be responsible for the following:

(d) Completing risk assessment instrument.—The juvenile probation officer shall ensure that a risk assessment instrument establishing the child's eligibility for detention has been accurately completed and that the appropriate recommendation was made to the court. <u>If upon completion of the risk assessment instrument the child is ineligible for secure detention based on the criteria in s. 985.24(2)(e), the juvenile probation officer shall make a referral to the appropriate shelter for a child in need of services or a family in need of services.</u>

Section 8. Section 985.24, Florida Statutes, is amended to read:

985.24 Use of detention; prohibitions.—

(1) All determinations and court orders regarding the use of secure, nonsecure, or home detention shall be based primarily upon findings that the child:

(a) Presents a substantial risk of not appearing at a subsequent hearing;

(b) Presents a substantial risk of inflicting bodily harm

on others as evidenced by recent behavior;

(c) Presents a history of committing a property offense prior to adjudication, disposition, or placement;

(d) Has committed contempt of court by:

1. Intentionally disrupting the administration of the court;

2. Intentionally disobeying a court order; or

3. Engaging in a punishable act or speech in the court's presence which shows disrespect for the authority and dignity of the court; or

(e) Requests protection from imminent bodily harm.

(2) A child alleged to have committed a delinquent act or violation of law may not be placed into secure, nonsecure, or home detention care for any of the following reasons:

(a) To allow a parent to avoid his or her legal responsibility.

(b) To permit more convenient administrative access to the child.

(c) To facilitate further interrogation or investigation.

(d) Due to a lack of more appropriate facilities.

(e) Due to a misdemeanor charge of domestic violence when the child lives in a family with a history of domestic violence as defined in s. 741.28 or is a victim of abuse or neglect as defined in s. 39.01, and the decision to place the child in secure detention is mitigated by the history of trauma faced by the child, unless the child would otherwise be subject to secure detention based on prior history.

(3) A child alleged to be dependent under chapter 39 may

not, under any circumstances, be placed into secure detention care.

(4) A child 9 years of age or younger may not be placed in secure detention care unless the child is charged with a capital felony, life felony, or felony of the first degree.

(5) ~~(4)~~ The department shall continue to identify alternatives to secure detention care and shall develop such alternatives and annually submit them to the Legislature for authorization and appropriation.

Section 9. Subsection (2) of section 985.245, Florida Statutes, is amended to read:

985.245 Risk assessment instrument.—

(2)(a) The risk assessment instrument for detention care placement determinations and court orders shall be developed by the department in agreement with a committee composed of two representatives appointed by ~~the following associations:~~ the Conference of Circuit Judges of Florida, the Prosecuting Attorneys Association, the Public Defenders Association, the Florida Sheriffs Association, and the Florida Association of Chiefs of Police. Each association shall appoint two individuals, one representing an urban area and one representing a rural area. In addition, the committee shall include two representatives from child advocacy organizations appointed by the secretary of the department. The parties involved shall evaluate and revise the risk assessment instrument as is considered necessary using the method for revision as agreed by the parties.

(b) The risk assessment instrument shall take into

consideration, but need not be limited to, prior history of failure to appear, prior offenses, offenses committed pending adjudication, any unlawful possession of a firearm, theft of a motor vehicle or possession of a stolen motor vehicle, and probation status at the time the child is taken into custody. The risk assessment instrument shall also take into consideration appropriate aggravating and mitigating circumstances, and shall be designed to target a narrower population of children than s. 985.255. The risk assessment instrument shall also include any information concerning the child's history of abuse and neglect. The risk assessment shall indicate whether detention care is warranted, and, if detention care is warranted, whether the child should be placed into secure~~, nonsecure,~~ or home detention care.

(c) The risk assessment instrument shall be independently validated. The department shall review the population, policies, and procedures that have an impact on the use of detention every 7 years to determine the necessity of revalidating the risk assessment instrument. Validation of the instrument means assessing the effectiveness of the instrument's ability to measure the risk of committing new offenses and failure to appear for court proceedings.

Section 10. Section 985.255, Florida Statutes, is amended to read:

985.255 Detention criteria; detention hearing.—

(1) Subject to s. 985.25(1), a child taken into custody and placed into ~~nonsecure or~~ home detention care or detained in secure detention care prior to a detention hearing may continue

to be detained by the court if:

(a) The child is alleged to be an escapee from a residential commitment program; or an absconder from a nonresidential commitment program, a probation program, or conditional release supervision; or is alleged to have escaped while being lawfully transported to or from a residential commitment program.

(b) The child is wanted in another jurisdiction for an offense which, if committed by an adult, would be a felony.

(c) The child is charged with a delinquent act or violation of law and requests in writing through legal counsel to be detained for protection from an imminent physical threat to his or her personal safety.

(d) The child is charged with committing a felony ~~an~~ offense of domestic violence as defined in s. 741.28 and is detained as provided in subsection (2).

(e) The child is charged with possession or discharging a firearm on school property in violation of s. 790.115.

(f) The child is charged with a capital felony, a life felony, a felony of the first degree, a felony of the second degree that does not involve a violation of chapter 893, or a felony of the third degree that is also a crime of violence, including any such offense involving the use or possession of a firearm.

(g) The child is charged with any second degree or third degree felony involving a violation of chapter 893 or any third degree felony that is not also a crime of violence, and the child:

1. Has a record of failure to appear at court hearings after being properly notified in accordance with the Rules of Juvenile Procedure;

2. Has a record of law violations prior to court hearings;

3. Has already been detained or has been released and is awaiting final disposition of the case;

4. Has a record of violent conduct resulting in physical injury to others; or

5. Is found to have been in possession of a firearm.

(h) The child is alleged to have violated the conditions of the child's probation or conditional release supervision. However, a child detained under this paragraph may be held only in a consequence unit as provided in s. 985.439. If a consequence unit is not available, the child shall be placed on home detention with electronic monitoring.

(i) The child is detained on a judicial order for failure to appear and has previously willfully failed to appear, after proper notice, for an adjudicatory hearing on the same case regardless of the results of the risk assessment instrument. A child may be held in secure detention for up to 72 hours in advance of the next scheduled court hearing pursuant to this paragraph. The child's failure to keep the clerk of court and defense counsel informed of a current and valid mailing address where the child will receive notice to appear at court proceedings does not provide an adequate ground for excusal of the child's nonappearance at the hearings.

(j) The child is detained on a judicial order for failure to appear and has previously willfully failed to appear, after

proper notice, at two or more court hearings of any nature on the same case regardless of the results of the risk assessment instrument. A child may be held in secure detention for up to 72 hours in advance of the next scheduled court hearing pursuant to this paragraph. The child's failure to keep the clerk of court and defense counsel informed of a current and valid mailing address where the child will receive notice to appear at court proceedings does not provide an adequate ground for excusal of the child's nonappearance at the hearings.

(2) A child who is charged with committing a felony ~~an~~ offense of domestic violence as defined in s. 741.28 and who does not meet detention criteria may be held in secure detention if the court makes specific written findings that:

(a) Respite care for the child is not available.

(b) It is necessary to place the child in secure detention in order to protect the victim from injury.

The child may not be held in secure detention under this subsection for more than 48 hours unless ordered by the court. After 48 hours, the court shall hold a hearing if the state attorney or victim requests that secure detention be continued. The child may continue to be held in detention care if the court makes a specific, written finding that detention care is necessary to protect the victim from injury. However, the child may not be held in detention care beyond the time limits set forth in this section or s. 985.26.

(3)(a) A child who meets any of the criteria in subsection (1) and who is ordered to be detained under that subsection

shall be given a hearing within 24 hours after being taken into custody. The purpose of the detention hearing is to determine the existence of probable cause that the child has committed the delinquent act or violation of law that he or she is charged with and the need for continued detention. Unless a child is detained under paragraph (1)(d) or paragraph (1)(e), the court shall use the results of the risk assessment performed by the juvenile probation officer and, based on the criteria in subsection (1), shall determine the need for continued detention. A child placed into secure, nonsecure, or home detention care may continue to be so detained by the court.

(b) If the court orders a placement more restrictive than indicated by the results of the risk assessment instrument, the court shall state, in writing, clear and convincing reasons for such placement.

(c) Except as provided in s. 790.22(8) or in s. 985.27, when a child is placed into secure or nonsecure detention care, or into a respite home or other placement pursuant to a court order following a hearing, the court order must include specific instructions that direct the release of the child from such placement no later than 5 p.m. on the last day of the detention period specified in s. 985.26 or s. 985.27, whichever is applicable, unless the requirements of such applicable provision have been met or an order of continuance has been granted under s. 985.26(4).

Section 11. Paragraph (e) is added to subsection (1) of section 985.441, Florida Statutes, to read:

985.441 Commitment.—

(1) The court that has jurisdiction of an adjudicated delinquent child may, by an order stating the facts upon which a determination of a sanction and rehabilitative program was made at the disposition hearing:

(e) Commit a female child to the department for placement in a mother-infant program designed to serve the needs of the juvenile mothers or expectant juvenile mothers who are committed as delinquents. The department's mother-infant program shall be licensed as a child care facility in accordance with s. 402.308 and shall provide the services and support necessary to enable the committed juvenile mothers to provide for the needs of the infants who, upon agreement of the mother, may accompany them in the program. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 to govern the operation of such program.

Section 12. Subsection (1) of section 985.45, Florida Statutes, is amended to read:

985.45 Liability and remuneration for work.—

(1) Whenever a child is required by the court to participate in any work program under this part or whenever a child volunteers to work in a specified state, county, municipal, or community service organization supervised work program or to work for the victim, either as an alternative to monetary restitution or as a part of the rehabilitative or probation program, the child is an employee of the state for the purposes of chapter 440 ~~liability~~.

Section 13. Section 985.632, Florida Statutes, is amended to read:

985.632 Quality assurance and cost-effectiveness.—

(1) INTENT.—It is the intent of the Legislature that the department:

(a) Ensure that information be provided to decisionmakers in a timely manner so that resources are allocated to programs that ~~of the department which~~ achieve desired performance levels.

(b) Collect and analyze available statistical data for the purpose of ongoing evaluation of all programs.

(c) ~~(b)~~ Provide information about the cost of such programs and their differential effectiveness so that program ~~the~~ quality ~~of such programs~~ can be compared and improvements made continually.

(d) ~~(c)~~ Provide information to aid in developing related policy issues and concerns.

(e) ~~(d)~~ Provide information to the public about the effectiveness of such programs in meeting established goals and objectives.

(f) ~~(e)~~ Provide a basis for a system of accountability so that each youth ~~client~~ is afforded the best programs to meet his or her needs.

(g) ~~(f)~~ Improve service delivery to youth ~~clients~~.

(h) ~~(g)~~ Modify or eliminate activities that are not effective.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Program" means any facility, service, or program for youth that is operated by the department or by a provider under contract with the department.

(b) "Program component" means an aggregation of generally related objectives which, because of their special character,

related workload, and interrelated output, can logically be considered an entity for purposes of organization, management, accounting, reporting, and budgeting.

~~(c) "Program effectiveness" means the ability of the program to achieve desired client outcomes, goals, and objectives.~~

(c) "Program group" means a collection of programs with sufficient similarity of functions, services, and youth to permit appropriate comparison among programs within the group.

(d) ~~(a)~~ "Youth" ~~"Client"~~ means any person who is being provided treatment or services by the department or by a provider under contract with the department.

(3) COMPREHENSIVE ACCOUNTABILITY REPORT.—The department shall use a standard methodology for annually measuring, evaluating, and reporting program outputs and youth outcomes for each program and program group. The department shall submit a report to the appropriate substantive and fiscal committees of the Legislature and the Governor no later than January 15 of each year. The department shall notify the Office of Program Policy Analysis and Government Accountability and contract service providers of substantive changes to the methodology. The standard methodology must:

(a) Incorporate, whenever possible, performance-based budgeting measures.

(b) Include common terminology and operational definitions for measuring the performance of system and program administration, program outputs, and youth outcomes.

(c) Specify program outputs for each program and for each

program group within the juvenile justice continuum.

(d) Specify desired youth outcomes and methods by which to measure youth outcomes for each program and program group.

~~(3) The department shall annually collect and report cost data for every program operated or contracted by the department. The cost data shall conform to a format approved by the department and the Legislature. Uniform cost data shall be reported and collected for state-operated and contracted programs so that comparisons can be made among programs. The department shall ensure that there is accurate cost accounting for state-operated services including market-equivalent rent and other shared cost. The cost of the educational program provided to a residential facility shall be reported and included in the cost of a program. The department shall submit an annual cost report to the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of each house of the Legislature, the appropriate substantive and fiscal committees of each house of the Legislature, and the Governor, no later than December 1 of each year. Cost-benefit analysis for educational programs will be developed and implemented in collaboration with and in cooperation with the Department of Education, local providers, and local school districts. Cost data for the report shall include data collected by the Department of Education for the purposes of preparing the annual report required by s. 1003.52(19).~~

(4)~~(a)~~ COST-EFFECTIVENESS MODEL.—The department ~~of Juvenile Justice, in consultation with the Office of Economic and Demographic Research, and contract service providers,~~ shall

~~develop a cost-effectiveness model and~~ apply the cost-effectiveness model to each commitment program and include the results in the Comprehensive Accountability Report. ~~Program recidivism rates shall be a component of the model.~~

(a) The cost-effectiveness model shall compare program costs to expected and actual youth recidivism rates ~~client outcomes and program outputs~~. It is the intent of the Legislature that continual development efforts take place to improve the validity and reliability of the cost-effectiveness model ~~and to integrate the standard methodology developed under s. 985.401(4) for interpreting program outcome evaluations~~.

~~(b) The department shall rank commitment programs based on the cost-effectiveness model and shall submit a report to the appropriate substantive and fiscal committees of each house of the Legislature by December 31 of each year.~~

(b) ~~(c)~~ Based on ~~reports of the department on client outcomes and program outputs and on~~ the department's most recent cost-effectiveness rankings, the department may terminate a commitment program ~~operated by the department or a provider~~ if the program has failed to achieve a minimum threshold of cost-effectiveness ~~program effectiveness~~. This paragraph does not preclude the department from terminating a contract as provided under this section or as otherwise provided by law or contract, and does not limit the department's authority to enter into or terminate a contract.

(c) ~~(d)~~ The department shall notify the Office of Program Policy Analysis and Government Accountability and contract service providers of substantive changes to the cost-

effectiveness model ~~In collaboration with the Office of Economic and Demographic Research, and contract service providers, the department shall develop a work plan to refine the cost-effectiveness model so that the model is consistent with the performance-based program budgeting measures approved by the Legislature to the extent the department deems appropriate. The department shall notify the Office of Program Policy Analysis and Government Accountability of any meetings to refine the model~~.

(d) ~~(e)~~ Contingent upon specific appropriation, the department, in consultation with the Office of Economic and Demographic Research, and contract service providers, shall:

1. Construct a profile of each commitment program that uses the results of the quality assurance report required by this section, the cost-effectiveness report required in this subsection, and other reports available to the department.

2. Target, for a more comprehensive evaluation, any commitment program that has achieved consistently high, low, or disparate ratings in the reports required under subparagraph 1.

3. Identify the essential factors that contribute to the high, low, or disparate program ratings.

4. Use the results of these evaluations in developing or refining juvenile justice programs or program models, youth ~~client~~ outcomes and program outputs, provider contracts, quality assurance standards, and the cost-effectiveness model.

(5) QUALITY ASSURANCE.—The department shall:

(a) Establish a comprehensive quality assurance system for each program operated by the department or operated by a

provider under contract with the department. Each contract entered into by the department must provide for quality assurance and include the results in the Comprehensive Accountability Report.

(b) Provide operational definitions of and criteria for quality assurance for each specific program component.

(c) Establish quality assurance goals and objectives for each specific program component.

(d) Establish the information and specific data elements required for the quality assurance program.

(e) Develop a quality assurance manual of specific, standardized terminology and procedures to be followed by each program.

(f) Evaluate each program operated by the department or a provider under a contract with the department and establish minimum thresholds for each program component. If a provider fails to meet the established minimum thresholds, such failure shall cause the department to cancel the provider's contract unless the provider achieves compliance with minimum thresholds within 6 months or unless there are documented extenuating circumstances. In addition, the department may not contract with the same provider for the canceled service for a period of 12 months. If a department-operated program fails to meet the established minimum thresholds, the department must take necessary and sufficient steps to ensure and document program changes to achieve compliance with the established minimum thresholds. If the department-operated program fails to achieve compliance with the established minimum thresholds within 6

months and if there are no documented extenuating circumstances, the department must notify the Executive Office of the Governor and the Legislature of the corrective action taken. Appropriate corrective action may include, but is not limited to:

1. Contracting out for the services provided in the program;

2. Initiating appropriate disciplinary action against all employees whose conduct or performance is deemed to have materially contributed to the program's failure to meet established minimum thresholds;

3. Redesigning the program; or

4. Realigning the program.

~~The department shall submit an annual report to the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of each house of the Legislature, the appropriate substantive and fiscal committees of each house of the Legislature, and the Governor, no later than February 1 of each year. The annual report must contain, at a minimum, for each specific program component: a comprehensive description of the population served by the program; a specific description of the services provided by the program; cost; a comparison of expenditures to federal and state funding; immediate and long-range concerns; and recommendations to maintain, expand, improve, modify, or eliminate each program component so that changes in services lead to enhancement in program quality. The department shall ensure the reliability and validity of the information contained in the report.~~

~~(6) The department shall collect and analyze available statistical data for the purpose of ongoing evaluation of all programs. The department shall provide the Legislature with necessary information and reports to enable the Legislature to make informed decisions regarding the effectiveness of, and any needed changes in, services, programs, policies, and laws.~~

~~(7) No later than November 1, 2001, the department shall submit a proposal to the Legislature concerning funding incentives and disincentives for the department and for providers under contract with the department. The recommendations for funding incentives and disincentives shall be based upon both quality assurance performance and cost-effectiveness performance. The proposal should strive to achieve consistency in incentives and disincentives for both department-operated and contractor-provided programs. The department may include recommendations for the use of liquidated damages in the proposal; however, the department is not presently authorized to contract for liquidated damages in non-hardware-secure facilities until January 1, 2002.~~

Section 14. Subsection (8) of section 985.664, Florida Statutes, is amended to read:

985.664 Juvenile justice circuit boards and juvenile justice county councils.—

(8) At any time after the adoption of initial bylaws pursuant to subsection (12), a juvenile justice circuit board may revise the bylaws to increase the number of members by not more than <u>five</u> ~~three~~ in order to adequately reflect the diversity of the population and community organizations or

agencies in the circuit.

Section 15. The Legislature finds that a court is in the best position to weigh all facts and circumstances to determine whether to commit a juvenile before it to the Department of Juvenile Justice and to determine the most appropriate restrictiveness level when such a juvenile is committed to the department.

Section 16. This act shall take effect upon becoming a law.